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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

BLUFF CITY LUMBER COMPANY *v.* BANK OF CLARKSVILLE.
(Two cases).

Opinion delivered May 2, 1910.

1. CORPORATION—POWER TO FORM PARTNERSHIP.—Where a corporation formed a partnership with individuals and entered into contracts in furtherance of the object of its creation, it will be liable to third persons who contracted with the firm. (Page 5.)
2. PARTNERSHIP—NOTICE OF DISSOLUTION.—The retiring members of a dissolved partnership continue liable to creditors who deal with the remaining members upon the faith of the firm's continued existence and without notice of its dissolution. (Page 6.)
3. DEEDS—RECORD AS NOTICE.—The record of a deed is constructive notice only of that for which it is required, but not, for example, of the dissolution of a partnership. (Page 6.)

Appeal from Johnson Circuit Court; *Hugh Basham,* Judge; reversed in part.

Austin & Danaher, Cravens & Covington and *R. W. McFarlane,* for appellants.

The admission of the fact of partnership by one of the alleged partners is not receivable in evidence against any of the others to prove the partnership. 29 Ark. 526. That relation can only exist by virtue of a contract between the parties. 49 Ill. 439; 41 Ore. 617. A corporation cannot become a partner with an individual. 141 Mich. 604; 133 Fed. 462; 66 C. C. A. 336. One holding himself out as a partner does not thereby render himself liable except to those who have extended credit on the strength of it. 80 Ark. 96; 32 Ark. 733; 29 Ark. 512;

60 Ill. 484. The true test of partnership is the intention of the parties. 63 Ark. 525.

Patterson & Ragon, J. T. Bullock and *Sellers & Sellers*, for appellees.

If appellants agreed to become partners, as to third parties they are liable as such. 2 Ark. 346; 5 Ark. 61; 28 Ark. 59; 29 Ark. 512; 32 Ark. 733. When a partnership is once shown to exist, it is presumed to continue until notice is given of its dissolution. 74 Ark. 437; 20 Ark. 171. Since the instructions copied are not shown to be all that were given, the question as to whether the jury were properly instructed is not before the court. 28 Ark. 549; 46 Ark. 207. The bill of exceptions must be filed with the clerk within the time allowed. 66 Ark. 312; 72 Ark. 264.

BATTLE, J. The Bank of Clarksville brought an action against Clarksville Lumber Company, alleging that it was a corporation organized under the laws of Arkansas, and that the defendant was a partnership composed of Bluff City Lumber Company, a corporation, J. F. Rutherford, D. T. Reynolds and others, and from 1906 until September, 1909, was engaged in buying and selling lumber and building material in the town of Clarksville, in this State; that soon after defendant began business, as alleged above, it opened an account with the plaintiff, and from time to time borrowed sums of money from it until the 5th day of October, 1907, when it executed its two promissory notes to plaintiff for the sum of $500 each, due and payable, respectively, the 5th and 30th days of January, 1908, and bearing ten per centum per annum interest from maturity until paid. The prayer of the complaint was for $1,000 and interest.

To this complaint Rutherford and Bluff City Lumber Company separately answered, and denied the foregoing allegations.

E. O. Strong and Dwight Strong, partners doing business under the firm name and style of E. O. Strong & Son, brought an action against the same parties, and made the same allegations as to the Clarksville Lumber Company as contained in the complaint of the Bank of Clarksville, and alleged that they became indebted to them in the sum of $964.43 as principal, for lumber material purchased at various times, as evi-

denced by two notes for $250 each, dated 8th day of November, 1907, payable, respectively, the 5th and 20th days of January, 1908, by a note for $248.62, dated November 8, 1907, and due February 5, 1908, by a note for $215.81, dated April 20, 1908, and due sixty days after date, all of which notes bear ten per cent. per annum interest from date until paid. The prayer of this complaint was for $946.43 and interest.

The defendants, J. F. Rutherford and Bluff City Lumber Company, answered and denied the allegations of the complaint of E. O. Strong & Son.

It being conceded by the parties in these actions that the only issue therein was whether or not the defendants were liable as partners, the actions were tried together, by consent, upon that issue in a trial by a jury, with directions to them to find for or against the defendants in each case, which was done, and a verdict was returned in one case in favor of Bank of Clarksville and J. F. Rutherford and against Bluff City Lumber Company, and a judgment was accordingly rendered, and a verdict was returned in the other case in favor of E. O. Strong & Son and against Rutherford and Bluff City Lumber Company, and a judgment was rendered upon the verdict. The Bluff City Lumber Company appealed from the judgment against it in both cases, and Rutherford from the judgment against him in the latter.

Was the evidence adduced in the trial of the two actions sufficient to sustain the verdicts of the jury?

The Bluff City Lumber Company was a corporation engaged in the sale of lumber. J. B. York, Robert York, M. F. Rutherford and J. F. Rutherford were its principal stockholders. Some time in 1905 or 1906 D. F. Reynolds undertook to establish a lumber yard and a business in lumber at Clarksville, in this State. Reynolds had little money, and needed help. He endeavored to enlist J. F. Rutherford, one of the Yorks, and one Samstag, another stockholder of the Bluff City Lumber Company. Reynolds contributed $1,000 to the enterprise. That much of an interest was acquired—he was the owner. The negotiation for the promotion of a company seems to have drifted from the stockholders to the corporation itself. In a short time the company was in progress. It had assumed the name of its locality—Clarksville Lumber Company. Reynolds

was representing Bluff City Lumber Company as maintaining the business. On the faith of such representation debts were contracted, the debts sued on in these cases being a part of them. The Bluff City Lumber Company apparently accepted the proposition to enter into the proposed partnership by taking joint control with Reynolds of the business; receiving at its principal place of business at Pine Bluff, Arkansas, from the Clarksville Lumber Company daily reports of its business and "a trial balance" at the end of each month, and furnishing the new company with all necessary stationery, such as letter heads, envelopes, books, etc. There is no evidence that Reynolds ever parted with his interest in the business. On the 5th day of April, 1907, the Bluff City Lumber Company disposed of its interest by executing the following instrument of writing:

"This agreement entered into at Pine Bluff, Arkansas, the 5th day of April, 1907, by and between the Bluff City Lumber Company, a corporation, party of the first part, and D. T. Reynolds, E. T. Reynolds and A. D. Reynolds, parties of the second part.

"Witnesseth That, whereas, the Clarksville Lumber Company is now indebted to the party of the first part in the sum of fourteen thousand nine hundred and fourteen dollars and ninety-six cents, as is evidenced by their twenty-five promissory notes as follows: * * * All of said notes bearing interest from date until paid at the rate of eight per cent. per annum. That, whereas, the party of the first part has this day agreed to sell to the parties of the second part the entire business known and now conducted under the firm name of Clarksville Lumber Company, at Clarksville, Johnson County, Arkansas, in consideration of the payment of the above indebtedness upon the following terms, * * * with interest thereon at the rate of eight per cent. per annum from the respective dates of said notes until paid.

"Now, therefore, the said party of the first part does hereby agree, upon the payment of the named amounts, to execute a bill of sale of the said Clarksville Lumber Company, including the stock of lumber on hand, all buildings and machinery, tools, appliances, accounts, choses in action and other evidence of indebtedness. It is, however, understood and agreed that the parties of the second part shall execute to the parties

of the first part a proper deed of trust conveying the above named property and also a farm consisting of one hundred and fourteen acres of land, situated along the east side of the town of Clarksville, as security for the payment of the notes herein named. Upon payment of the amounts herein specified, with interest, said deed of trust is to be satisfied and surrendered.

"It is also understood and agreed that, so far as the profits arising from conducting the business of the said Clarksville Lumber Company are concerned, said business shall be held to belong to the said parties of the second part from this day, and such profits shall be theirs, subject to the payment, however, of the above named notes.

"Bluff City Lumber Company."

How did it acquire the interest in the property it undertook to sell? There is no evidence that it purchased it. The jury might have inferred that he acquired it through a course of partnership dealings. This is supported by the use of the following language in the instrument: "The entire business known and now conducted under the firm name of Clarksville Lumber Company, at Clarksville, Johnson County, Arkansas," thereby impliedly acknowledging that the business was a partnership, and it was a partner. After this sale to the Reynoldses the Clarksville Lumber Company furnished its own stationery, and printed upon its letter heads the names of those composing it, and ceased to furnish the Bluff City Lumber Company with daily reports of its business and monthly balance sheets, although the Reynoldses still remained greatly indebted to it. These facts, although by no means satisfactory, furnish some evidence to sustain the verdict against Bluff City Lumber Company. It was not sufficient, however, to sustain the verdict against Rutherford. He was not connected with the Clarksville Lumber Company except by his relation of stockholder and officer to the Bluff City Lumber Company.

But it is said that it was beyond the power of Bluff City Lumber Company to form a partnership with individuals. The contracts with the appellees, Bank of Clarksville and E. O. Strong & Son, have been performed on their part, and were the transactions of such business for which the Bluff City Lumber Company was created, and was presumably for its benefit, as it enabled it to dispose of a part or much of its goods.

Under such circumstances the corporation is liable for the contracts. *Cleveland Paper Co.* v. *Courier Co.*, 67 Mich. 152, 158; 1 Clark & Marshall on Private Corporations, § 185, sub. d. and cases cited.

It is said that the notes sued on were executed after the partnership was dissolved. But they were renewals of other notes and for an indebtedness created before the dissolution. The creditors had dealings with the old firm, and had no notice of the dissolution before the indebtedness sued for was incurred, and hence were not affected by the dissolution. *Rector* v. *Robins*, 74 Ark. 437.

The court refused to instruct the jury as follows at the request of the defendant:

"XI. You are instructed that when the deed of trust introduced in evidence was executed and filed for record, conveying the property of the Clarksville Lumber Company and the real estate of the defendants, D. T., A. D. and E. T. Reynolds, to secure the indebtedness of the Bluff City Lumber Company, the filing of the said deed of trust was notice of its contents to every one, and the plaintiffs cannot plead ignorance of its contents."

The appellants contend that the trial court erred in refusing to so instruct; but it did not. The record of a deed is only constructive notice of that for which it is required. As it is not required to give notice of the dissolution of partnership, it does not subserve that purpose. Kirby's Dig., § 762.

Judgment in both cases against Bluff City Lumber Company is affirmed; and the judgment against Rutherford is reversed, and the action instituted by E. O. Strong & Son is dismissed as to him.

RACHELS v. STECHER COOPERAGE WORKS.

Opinion delivered May 2, 1910.

1. CORPORATIONS—AUTHORITY TO BUY LAND.—A Missouri corporation, authorized by its charter to carry on the cooperage business and to buy, manufacture and sell staves, and by statute to purchase and

hold such real estate as its purposes may require, is authorized to purchase timber land or land upon which to build and operate its manufacturing plants. (Page 12.)

2. SAME—WHO MAY INQUIRE AS TO AUTHORITY TO BUY LAND.—Where a corporation is authorized to acquire lands, no one but the State can inquire whether any particular real property, or how much, may be necessary to enable it to carry on the business for which it was organized. (Page 12.)

3. FOREIGN CORPORATIONS—AUTHORITY TO SUE.—Kirby's Digest, § 830, providing that no foreign corporation which shall fail to comply with the statute authorizing such corporations to do business in the State "can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether *arising out of contract or tort,*" does not apply to a suit by a foreign corporation to quiet the title to land, where it does not appear that plaintiff's deeds, relied upon by it as color of title, were executed in this State. (Page 13.)

4. PLEADING—LEGAL CONCLUSION.—An answer denying that a certain deed conveyed title or color of title states merely a legal conclusion, and is insufficient. (Page 13.)

5. FOREIGN CORPORATIONS—CONSTRUCTIVE POSSESSION BY PAYING TAXES.—A foreign corporation, owning unimproved and uninclosed land in this State, is entitled to the benefit of Kirby's Digest, § 5057, giving it constructive possession by reason of paying the taxes thereon, notwithstanding it failed to designate an agent within the State upon whom process could be served during the years it was paying the taxes. (Page 14.)

6. LIMITATION OF ACTIONS—ABSCONDING DEBTOR.—A foreign corporation which, while doing business in this State, neglects to designate an agent upon whom process may be served is not an "absconding debtor" within Kirby's Digest, § § 5077, 5088. (Page 14.)

7. APPEAL AND ERROR—PRESUMPTION AS TO CHANCELLOR'S FINDINGS.—The presumption on appeal is that the findings of the chancellor were based upon competent and relevant testimony until the contrary appears. (Page 16.)

8. SAME—HOW MATTERS BROUGHT UP.—Where no objection to the competency of evidence in a deposition appears in the deposition itself, in the decree of the court or by bill of exceptions, a statement showing such objection, inserted in the transcript by the clerk, will not be noticed on appeal. (Page 16.)

9. CLOUD ON TITLE—LACHES.—A suit to remove a cloud upon the title to land will be barred by laches where for more than twelve years the party asking relief has asserted no title to the lands and paid no taxes thereon, during which time the lands have greatly increased in value. (Page 17.)

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

STATEMENT BY THE COURT.

This is a suit by appellee under sections 649 and 650 of Kirby's Digest to quiet title to various tracts of land described in the complaint, consisting of —— acres, and situated in township 7 north, range 5 west, in White County, Arkansas. The appellee exhibits with its complaint the deeds under which it claims, and alleges as follows:

"Its grantors in all of said deeds and conveyances were at the time of the execution and delivery of said deed or deeds to this petitioner the fee simple owner or owners to [of] the lands so conveyed to it; and your petitioner alleges that it at least acquired by said deeds and conveyances set out in this petition, and referred to as exhibits (from A to N, inclusive), a color of title to each and every tract of land hereinbefore and hereinafter described; that no one is in possession of said lands, or any part thereof, claiming title thereto adversely to this petitioner; and if any person or persons other than this petitioner has, or claims to have, any interest or title in and to said lands, or any part or tract thereof, this petitioner has no knowledge of same. This petitioner would further state that it not only has a fee simple title and a *prima facie* title to said lands, but, as aforesaid, has a color of title thereto, and has had such color of title to all of said lands for more than seven years last past; and that it has for more than seven years last past in succession paid the taxes on each and every tract of said lands, claiming to be the owner thereof, and claiming title thereto."

Appellant filed an "intervention," in which he denies that appellee is the owner of any of the land described in its petition. Appellant then proceeds to set up title in himself to certain of the tracts described in appellee's petition. He deraigns title thereto through mesne conveyances from the government, and further avers as follows:

"Fourth. This intervener admits that certain deeds set out in petitioner's petition were executed by the various parties named, describing various tracts of land mentioned in petitioner's petition, but denies that said deeds conveyed title to the said Stecher Cooperage Works, and denies that said deeds conveyed to it any right, title or color of title.

"Fifth. This intervener admits that various parties, companies or corporations have caused tax receipts to be issued,

showing payment of the taxes asessed against said lands, but denies that the Stecher Cooperage Works acquired any right, title or interest in said lands because of said tax receipts, or by any pretended payment of taxes.

"Sixth. The intervener admits that the Stecher Cooperage Works is a Missouri corporation, but denies that as such it has any right to acquire lands in the State of Arkansas; denies that the petitioner, the Stecher Cooperage Works, has a right to plead statutes of limitation or laches, or to in any manner acquire, claim or hold titles to land in the State of Arkansas.

"Wherefore this intervener, J. N. Rachels, would ever pray that the petition of the petitioner, the Stecher Cooperage Works, be dismissed for want of equity, and for such other and further orders as this honorable court may, in its wisdom, find right and equitable."

By amendment to the "intervention" appellant set up that the various tax deeds and other deeds through which appellee claimed were void and a cloud on appellant's title.

Appellee answered the intervention, denying that appellant had title to the lands claimed by him, and setting up that appellee had patent to a certain tract describing it, and as to a certain other tract appellee alleged that it had been in actual adverse possession for more than fourteen years continuously, paying the taxes thereon. As to this tract it pleaded the seven years statute of limitations. The appellee then alleged as follows:

"Petitioner states that said Pierce and the heirs of the said W. T. Jones, from whom the intervener claims a pretended original title to said lands and their grantees, including the intervener herein, have not paid taxes on said land for over twenty-five years last past; that the said H. A. Pierce and W. T. Jones and heirs long since abandoned said lands, and ceased to set up any claim or title thereto, because of the fact that they were practically worthless, and at the time had no market value; that at the time they were induced to make quitclaim deeds to the grantor of the said B. C. Rhodes, they claimed no title to said lands, and quitclaimed same for a trifle upon the representation, and with the distinct understanding, that they had no title thereto, and that said quitclaim deeds were

wanted for the purpose of perfecting the then paramount title to said land. Petitioner states that said lands are now valuable, and worth from $10 to $15 per acre, and it is because of this fact that petitioner's title is being disturbed by the present intervener, and were heretofore disturbed by his grantor, B. C. Rhodes. Petitioner states that the intervener's claim herein ought not to be heard and ought not to be entertained; that in equity and good conscience he is barred by laches, which, in addition to constructive possession of said lands by payment of taxes for more than seven years, petitioner specially pleads."

The cause was heard upon the pleadings, title deeds, records, tax receipts, and depositions of witnesses, and from these the court found the facts to be "that the lands were granted to the State by the United States as swamp lands; that various parties obtained title to these lands from the State; that petitioner obtained deeds to the lands; that the lands were not in petitioner's possession, were wild; that petitioner paid the taxes thereon, on a part from 1894 to 1908; on a part from 1891 to 1908, and on the remainder from 1895 to 1908, inclusive of all cases. That these taxes were paid by petitioner while claiming title to the lands, and under color of title.

Upon these facts, as found by the court, it rendered judgment dismissing the intervention and quieting title in appellee to the lands described in its petition. Appellant seeks by this appeal to reverse that judgment.

Rachels & Robinson, for appellant.

The right of appellee to hold land is controlled by the law of Missouri. 71 Ark. 379; 90 Tex. 533; 149 Mo. 57; 109 U. S. 527; 155 Mo. 95; 13 Pet. 588; 51 Mich. 145; 16 N. W. 314; 68 L. R. A. 815; 25 Mich. 214; 22 N. W. 505; 25 Am. & Eng. R. Cas. 32; 6 Kans. 255; 4 So. 235; 23 Ill. 609; 14 Pet. 122; 43 Am. & Eng. Corp. Cas. 459; 72 Ill. 50. The charter being silent on that point, appellee cannot hold land in Missouri. 2 Idaho 26; 32 Mo. 305; 34 Conn. 541; 7 N. Y. 471; 144 Mo. 588; 21 Pa. 22; 5 Conn. 572; 38 N. W. 43; 64 L. R. A. 399; 4 Mass. 140. If any doubt arises as to its power, that doubt must be solved against the corporation. 45 L. R. A. 680; 43 Mo. 353; 135 N. Y. 404; 10 Mo. 559; 31 Mo. 185; 108 Mo. 559;

16 How. 534; 9 Mo. 507; 130 Mo. 10; 23 How. 435; 64 L. R. A. 376; 24 L. Ed. 1036; 32 L. Ed. 842.

A contract of a corporation that is outside the object of its creation is of no validity. 82 Mo. App. 661; 43 L. Ed. 1007; 42 L. Ed. 198; 41 *Id.* 821; 50 Miss. 403; 73 Mo. 135; 35 L. Ed. 55; 3 Wend. 573; 10 Wis. 230; 37 Cal. 543. Such contracts cannot be made good by laches or ratification. 132 Fed. 721; 35 L. Ed. 67; 139 U. S. 24; 25 L. Ed. 950; 101 U. S. 71; 41 L. Ed. 822; 165 U. S. 538. And the question of its validity may be raised by any interested party. 132 Fed. 721; 174 U. S. 370; 37 Cal. 543; 53 N. Y. 363; 101 Mass. 57; 120 Ill. 447; 11 N. E. 899. The phrase "such land as the purposes of the corporation shall require" signifies such land as will give it the room it requires. 3 Zab. 514; 133 U. S. 21; 66 S. W. 485; 1 Dutch. 316; 43 N. Y. 137; 33 So. 84; 45 Mo. 212; 9 Rich. L. 236. Appellee acquired no title to the land. 60 Ark. 120; 35 S. W. 898; 101 Mo. App. 569; 116 Ill. 375; 197 Mo. 507; 71 Ala. 60; 33 N. E. 166; 103 Ala. 371; 15 So. 944; 41 L. Ed. 817; 100 Va. 438; 77 Ark. 203; 60 Ark. 120; 192 Mo. 413; 55 Ark. 625; 19 A. B R. 361; 124 Mo. App. 349; 8 Gray 206; 6 Biss. 420; 41 Ind. 1; 25 Wend. 648; 37 Mo. 398; 20 O. 283; 97 S. W. 636; 95 S. W. 344; 35 S. W. 898. In a suit to quiet title, complainant must show title. 82 Ark. 294; 80 Ark. 31; 45 So. 480; 77 Ark. 338; 74 Ark. 387; 44 Ark. 436. Delay on the part of the defendant is not available to the plaintiff unless it amounts to an estoppel *in pais*. 89 Ark. 19; 88 Ark. 395; *Id.* 478; 155 U. S. 314; 13 N. J. Eq. 19; 13 App. Cas. 543; 88 Ark. 404; 75 Ark. 194; 81 Ark. 301. The statute of limitations will not run in favor of one who absents himself from the State so that process cannot be served on him. 158 Pa. 521; 7 Am. Dec. 739; 16 *Id.* 290; 19 Am. Rep. 293; 94 N. C. 231; 24 Ark. 556; 47 Ark. 170.

J. H. Harrod and *J. G. & C. B. Thweatt,* for appellee.

Parties cannot avoid or neglect paying taxes for 25 years or more and then, when the land becomes valuable, come in and have their rights recognized and established. 81 Ark. 353; *Id.* 432.

WOOD, J., (after stating the facts). First. It was shown that appellee was a Missouri corporation chartered "to carry on the cooperage business for pecuniary profit or gain, and to

cut, buy, manufacture and sell staves, and to manufacture and sell casks, barrels, kegs and all other articles whatsoever belonging to the cooperage business."

Appellant contends that, such being the express powers granted to appellee, under the laws of Missouri, which must control, appellee was prohibited from holding any lands, and that its acquisition of lands was *ultra vires* and consequently void.

Under the Revised Statutes of Missouri (1899), § 971, corporations may "hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." See also section 851, Kirby's Digest. The power to "manufacture" "staves," "casks," "barrels," "kegs," and all other articles whatsoever belonging to the cooperage business necessarily carries with it the power to acquire the timber out of which such articles are manufactured. As it might be impossible to purchase timber without the land upon which it grows, the power to acquire timber also, in such case, would necessarily include the power to buy the land upon which the timber grows. The power to manufacture also necessarily implies the power to obtain lands upon which to build and operate the manufacturing plants. Powers that are essential to the exercise of the powers expressly granted are necessarily implied from those expressly granted, and are "as much granted as what is expressed." *Thomas* v. *West Jersey Railroad*, 101 U. S. 71. "It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant." *Minturn* v. *Larue*, 23 How. 435; *Carroll* v. *Campbell*, 108 Mo. 559; *State* v. *Lincoln Trust Co.*, 144 Mo. 586; *State* v. *Murphy*, 130 Mo. 10; *Huntington* v. *Savings Bank*, 96 U. S. 388.

Therefore, since the power to acquire land is comprehended in the charter of appellee, it was acting within the scope of the powers conferred upon it in obtaining lands, and the quantity was not limited in its charter. It being determined that the acquisition of land is within the charter powers of appellee, the inquiry whether any particular real property, or how much,

may be necessary to enable appellee to carry on the business for which it was organized is a matter between the State and appellee. "That is a matter which is not subject to investigation, and can not be called in question by appellant in this suit." *Bowman* v. *Trainor,* 93 Ark. 435.

Second. It was shown that appellee had not complied with the statute authorizing foreign corporations to do business in this State (section 825, Kirby's Digest) until August 20, 1907. Appellant contends that appellee, because of this failure to comply with the statute, acquired no color of title by its deeds and no title by its payments of taxes. The result of the failure of appellee to comply with the above statute precludes it from enforcing any demand it may have against any of the citizens of this State growing out of the contract or tort. Section 830, Kirby's Digest. But appellee by its suit to quiet title is not seeking to enforce any demand growing out of the contract with appellant or out of any tort committed by appellant against appellee. The deeds which give appellee color of title are executed contracts conveying to appellee the lands in suit. As we have seen, the taking of these deeds on the part of appellee was not *ultra vires.* For aught shown to the contrary in the evidence, as abstracted by appellant, these deeds may have been delivered to appellee in Missouri. The contracts conveying the lands to appellee may have been consummated by the payment of the purchase money and the delivery of the deeds there. If so, the deeds were valid, even though appellee at the time may have been engaged in business in this State without having complied with the statute. Section 825, Kirby's Digest.

It is not alleged in the intervention of appellant that the deeds under which appellee claims color of title were made in this State, while appellee was doing business here in violation of the statute *supra;* nor is it shown by the proof that these deeds were made in this State. As we said in *White River Lumber Co.* v. *Southwestern Improvement Association,* 55 Ark. 625: "For aught that appears," these deeds "may have been made in a foreign State in the course of a business lawfully done there, and in the absence of a showing the law will not imply facts disclosing the illegality of the contract." Appellant denies that the deeds conveyed to appellee any right, title or color of title. But that allegation is only a legal conclusion, and is far

from stating any facts showing that the deeds were void. We do not mean to hold that the deeds could not give color to appellee, even though it had been shown that they were executed in this State.

Since there is nothing in the law or appellee's charter prohibiting it from obtaining deeds to land in this State, and since appellee is not seeking to enforce any demand against appellant growing out of contract or tort, a majority of the court is of the opinion that appellant, in this suit, can not invoke the provisions of sections 829 and 830, Kirby's Digest, to have the deeds which appellee obtained through other parties declared null and void. But, even if appellant could make such proof, he has not done so. Therefore, conceding that appellee was doing business in this State contrary to the provision of the statute *supra*, at the time the deeds under which it claims color of title were executed, still, as appellant could not show in this suit that these deeds were void, it follows that appellee is entitled to whatever benefits may be derived therefrom as color of title under section 5057 of Kirby's Digest.

Third. That section gives title by limitation to a person who has color of title to uninclosed and unimproved lands and who has paid taxes thereon for seven years in succession, at least three of the payments having been made after the passage of the act March 18, 1899. *Towson* v. *Denson*, 74 Ark. 302. See also *Price* v. *Greer*, 76 Ark. 429; *Wyse* v. *Johnston*, 83 Ark. 520; *Updegraff* v. *Marked Tree Lumber Co.*, 83 Ark. 154.

The chancellor found that appellee had acquired title to the lands in suit by payment of taxes under the above statute. Appellant contends that appellee can not have the benefit of the above statute because it failed to designate an agent upon whom process could be served during the seven years it was paying the taxes, and thereby became subject to the provisions of sections 5077 and 5088 of Kirby's Digest. These statutes refer to absconding debtors and other persons who have fraudulently concealed themselves to prevent the commencement of an action against them. Limitations do not begin in such cases until the residence or whereabouts of the absconder has been discovered, and the commencement of the action is for that reason no longer prevented. But these statutes and the authorities based on such statutes have no application, even by analogy,

to the case at bar. Appellee, although a foreign corporation, and doing business in this State without designating an agent, would still have the right to pay taxes on lands to which it had color of title. There is nothing in section 5057, *supra,* or any other statute prohibiting foreign corporations, although doing business in this State without designating an agent, from paying taxes on lands which they own or to which they have color of title. Even if the failure to designate an agent, in a sense, would be absconding, the act of paying taxes would be notice to the true owner of the foreign corporation's constructive possession. It is, under the statute, a taking of the possession. *Towson* v. *Denson, supra.* It affects the *res,* and starts this special statute of limitations. If, when paid by another before April 10, it is a wrong to the true owner, as contended by appellant, under section 7053, giving the owner till that day to pay his taxes, the wrong can be easily prevented by him, or corrected by proper application to the collector. The true owner whose taxes have been paid by a foreign corporation can not claim that, inasmuch as such foreign corporation is not subject to process here, or is evading the service of process, the statute of limitations under section 5057 *supra* does not begin to run. "Taxes are *glebae ascripti*—serfs of the soil—a charge which follows the land in whosesoever hands it may go." *Coats* v. *Hill,* 41 Ark. 149, 152; *Seldon* v. *Dudley E. Jones Co.,* 89 Ark. 234-38.

If not paid, the proceeding to collect them is not against the owner, but against the land itself. Sections 7084-5, Kirby's Digest. Therefore it is wholly immaterial whether the owner be resident or non-resident, absconding or otherwise. The payment of taxes under the conditions prescribed by section 5057 starts the limitation therein contained against the owner. If the taxes are paid, as prescribed by the statute, seven years in succession at any time when taxes are payable, the party paying acquires the title, whether he makes the payments within one year of each other or not. *Price* v. *Greer,* 89 Ark. 300. Each payment constitutes the equivalent of possession contemplated by the statute, and continues that possession until the next payment in succession, and so on until seven years shall have elapsed from the time of the first payment. *Towson* v. *Denson, supra.* See also *Updegraff* v. *Marked Tree Lumber Co.,* 83 Ark.

154; *Sibly* v. *England,* 90 Ark. 420. There is no allegation in the complaint that the lands were "unimproved and uninclosed." But the chancellor found that the lands that were not in the possession of appellee, were "wild." That finding is sufficient to show that the lands were "uninclosed and unimproved." There was competent evidence to sustain this finding. But appellant contends that it was introduced over his objection, and therefore can not be considered. The presumption is that the findings of the chancellor recited in his decree were based upon competent and relevant testimony until the contrary appears.

There is no objection noted in the deposition itself to the testimony by which this fact was established. There is no recital in the record proper or in the court's decree of any such objection, and there is no bill of exceptions showing that such objection was made. A recital in the transcript to that effect by the clerk simply cannot be considered. It does not show proper authentication of the objection. *Tharpe* v. *Western Union Tel. Co.,* 94 Ark. 530; *Snyder* v. *State,* 86 Ark. 456; *Murphy* v. *Citizen's Bank of Junction City,* 84 Ark. 100; *Beecher* v. *State,* 80 Ark. 600; *Beecher* v. *Beecher,* 83 Ark. 424. The same rule applies to the decitals in the transcript as to objections made to the introduction of other evidence.

The tax receipts in evidence show that for some of the years, during the seven, the taxes were paid by the "Stecher Cooperage Works," and that for others they were paid by the "Stecher Cooperage Company." Appellant contends that these might have been different corporations. But the chancellor found that the taxes were paid for seven years in succession by the "Stecher Cooperage Works." It was shown that the taxes were paid by the agent of "Stecher Cooperage Works," appellee. Throughout the depositions the lands are referred to as the lands of the "Stecher Cooperage Works." It is obvious from the entire testimony that "Stecher Cooperage Company" in the tax receipts meant "Stecher Cooperage Works," and that the insertion of the former instead of the latter was merely a misprision of the collecting officer. The finding of the chancellor that the taxes were paid by the Stecher Cooperage Works was not clearly against the preponderance of the evidence, but on the contrary is according to such preponderance. Such payment under the conditions prescribed by section 5057 gave appellee.

not a *prima facie,* but a perfect title, and the court was correct in so holding.

Fourth. As to the following tracts: N. W. ¼ and W. ½ S. W. ¼, Sec. 10, S. W. ¼ S. W. ¼ and S. E. ¼ Sec. 25, E½ S. E. ¼ and S. E. ¼ N. E. ¼ Sec. 26, W. ½ N. E. ¼ Sec. 27 and N. E. ¼ N. E. ¼ Sec. 28, all in Twp. 7 N., R. 5 W., learned counsel are incorrect in stating that there is no allegation in the complaint that appellee has or ever had color of title to these. The allegation set forth in statement shows that appellee did allege color of title to these, and exhibited the deeds, and the deeds were therefore properly introduced. As to the S. E. ¼ Sec. 21, Twp. 7 N., R. 5 west, the evidence showed that it had been in the adverse possession of appellee for more than seven years. As to the N ½ S. W. ¼ Sec. 25, Twp. 7 N., R. 5 west, the tax receipts in evidence show that it was paid on by appellee more than seven years. For some of the years it was paid on under the above description, and for other years under the following description: "E. of R. S. W.," sec. 25. This latter description correctly designated the lands. From this description they could readily be ascertained on the sectional plats of the government survey as the S. W. ¼ east of river in section 25. As to the N. E. ¼ N. E. ¼ Sec. 28, Twp. 7 N., R. 5 W., the appellant's abstract of the evidence states the following:

"The taxes on the northeast quarter of the northeast quarter of section 28, in township 7 north, of range 5 west, were paid for the years, on the dates and by the persons named herein:

Year.	Day and Month.	Receipt Issued to
1900	April 10	Stecher Cooperage Co.
1901	April 11	Stecher Cooperage Co.
1902	May 5	Stecher Cooperage Works
1903	January 20	Stecher Cooperage Works
1904	March 11	Stecher Cooperage Works
1905	April 18	Stecher Cooperage Works
1906	April 24	Stecher Cooperage Works
1907	January 6	Stecher Cooperage Works"

This shows payment on the above tract for more than seven years in succession.

Fifth. Appellant could have no affirmative relief on his intervention. Appellee alleges in its answer to the intervention that appellant and those under whom he claims had not paid

taxes on the lands for over twenty-five years and that they had enhanced in value to the sum of ten or fifteen dollars per acre. These allegations were not denied by pleading or refuted by proof. The testimony shows that appellee had been paying taxes on all the land for more than twelve years, and on some of it as long as seventeen years. During this time the land had greatly enhanced in value. In the very recent case of *Chancellor* v. *Banks,* 92 Ark. 497, we said:

"There are cases in which the owner of land had failed to pay taxes on the same for many successive years exceeding the statutory period of limitations of seven years, and another, claiming the land, had paid the taxes thereon for such time, and in the meantime the land had greatly enhanced in value, and in which this court held that a court of equity will not grant the owner relief on account of laches; and in which it so held obviously for the reason that it would be unjust to permit the owner to induce another, by his silence and failure to act, to pay the taxes until the lands have become valuable or greatly increased in value, and then enforce his right. *Clay* v. *Bilby,* 72 Ark. 101; *Turner* v. *Burke,* 81 Ark. 352; *Craig* v. *Hedges,* 90 Ark. 430." See also other cases cited in the opinion.

The court therefore did not err in dismissing the intervention. The decree of the lower court is in all things correct, and it is therefore affirmed.

WATSON *v.* WOLFF-GOLDMAN REALTY COMPANY.

Opinion delivered May 2, 1910.

1. DEEDS—BODILY HEIRS.—A deed to A and her "bodily heirs" means the same as to her and to the heirs of her body, and, under Kirby's Digest, § 735, creates a life estate in A with remainder in fee simple to her surviving children and *per stirpes* to the issue of such as die during A's life. (Page 21.)

2. SAME—EFFECT OF TERM "AND ASSIGNS FOREVER."—In a conveyance unto A "and unto her bodily heirs *and assigns forever*" the words italicized do not add to or take from the estate granted, but are merely declaratory of the power of alienation which the grantee possesses without them. (Page 21.)

3. SAME—CONVEYANCE TO A AND BODILY HEIRS—ESTATE OF HEIRS.—A conveyance unto A and unto her bodily heirs created a contingent remainder in the bodily heirs. (Page 22.)
4. INJUNCTION—WASTE BY LIFE TENANT.—A contingent remainderman may obtain relief in equity by injunction to prevent the life tenant or his assignee from committing future waste. (Page 23.)
5. EQUITY—ACCOUNTING OF WASTE BY LIFE TENANT.—Where a life tenant or his assignee had committed waste of the *corpus* of the estate, equity, at the instance of a contingent remainderman, will take an account of the amount of damage suffered and impound the same and invest it for the benefit of the persons entitled thereto at the expiration of the life estate. (Page 24.)

Appeal from Jackson Chancery Court; *George T. Humphries,* Chancellor; reversed.

STATEMENT BY THE COURT.

On the 1st day of January, 1875, Atlas J. Dodd executed the following deed to certain lands in Jackson County, Arkansas: "Know all men by these presents that I, Atlas J. Dodd, for and in consideration of the natural love and affection that I have for my daughter, Martha F., and for the further sum of one dollar to be paid by the said Martha Florence, my daughter, do hereby grant, bargain and sell unto the said Martha Florence and unto her bodily heirs and assigns forever the following lands: (Here follows description of the lands). To have and to hold the same unto the said Martha Florence and unto her bodily heirs and assigns forever, with all the appurtenances thereunto belonging. And I hereby covenant with the said Martha Florence that I will forever warrant and defend the title to said lands against all claims whatever."

Before that time his daughter, Martha Florence, had intermarried with R. P. Watson, and five children were born unto them. R. P. Watson died, and Martha Florence was subsequently married to W. S. Walls, and on the 14th day of January, 1901, they conveyed the lands above referred to to Wm. T. Day, who, on January 22, 1904, conveyed said lands to the Wolff-Goldman Realty Company. The latter company sold the timber on said lands to W. O. Wilkins and W. B. Gregory on the 12th day of April, 1906. The said Wilkins and Gregory entered upon said lands and began to cut and remove the timber therefrom. It is agreed that the value of the timber on said

lands is $3,806.88. On the 2d day of November, 1908, Silvey Watson, Baxter Watson, Belle Fry and Grace Whitten instituted this action in the Jackson Chancery Court against the Wolff-Goldman Realty Company, Sigmund Wolff, Isaac Goldman and Marjorie Simmons, who is another daughter of Martha Florence Walls. The object and purpose of the suit was to restrain the defendants from cutting or permitting to be cut the timber on said lands, and to have an accounting for the timber already cut; or, if the court held they were not entitled to a present accounting for the waste already committed, that the defendant Wolff-Goldman Realty Company be required to pay the proceeds into court, and that such proceeds be invested for their benefit, and for an injunction to prevent said defendant from committing further waste.

The chancellor found the effect of the deed of Dodd was to convey a life estate to his daughter, Martha Florence, with a contingent remainder over to her children. That the deed of Martha Florence only conveyed her life estate, and that the defendant Wolff-Goldman Realty Company had no right to sell the timber on said lands. That the plaintiffs as contingent remaindermen had a right to an injunction to prevent further waste, but were not entitled to any relief for waste already committed, and a decree was entered in accordance with his findings. Both plaintiffs and defendants have appealed to this court.

John W. & Jos. M. Stayton, for appellant.

The deed created a life estate in the grantee, with remainder over to her children in fee simple. Kirby's Dig., § 735; 44 Ark. 458; 49 Ark. 125; 67 Ark. 517; 72 Ark. 336; 17 O. St. 446; 7 N. J. Law 363; 49 *Id.* 475. The remainder created in the children a vested remainder, and they are entitled to an injunction to prevent further cutting, as well as an accounting for that already cut. 68 Ark. 376; 61 Md. 149; 2 Sandf. Chy. 533; 5 Wall. 268; 6 Wall. 458; 19 Wall. 167; 4 Pet. 1; 6 Pet. 622; *Id.* 595; 74 Ark. 347; 44 Ark. 476; 63 Ark. 15; 15 Barb. 225; 70 N. Y. 147; 55 Ind. 71; 36 Ga. 97; 64 Pa. Sup. Ct. 324; 1 Bland, Ch. 569; 2 Peere W. 240; 10 Ves. 273; 3 Atk. 209; 31 W. Va. 621; 19 Am. Dec. 350; 42 N. Y. Sup. Ct. 921; 1 Ves. Jr. 78.

Joseph W. Phillips, for appellee.

There was no such thing as an estate tail at common law. 44 Ark. 475. If the reversion was cut off, then it was no longer an estate tail, but became a fee simple. 58 Ark. 306. The word "assigns" in a deed evidences an intention to give the grantee the power to sell and dispose of the property. 28 Tex. 296.

John W. & Joseph M. Stayton, in reply.

Appellants are entitled to an accounting. 113 U. S. 340; 6 Wall. 458; 25 Wend. 119; 1 Allen 223; 36 Ark. 364; 59 Miss. 289; 93 Mo. App. 277; 100 S. W. 258; 3 J. J. Marsh. 93; 127 N. C. 198; 99 N. C. 198; 75 N. C. 193; 228 Ill. 507; 139 N. C. 9; 240 Ill. 486; *Id.* 361; 25 S. C. 163.

HART, J., (after stating the facts). In this State no distinction is made between the meaning of the words "bodily heirs" and "heirs of the body," when used in a conveyance, and it is a principle firmly established in this State that, under section 735 of Kirby's Digest, a deed of conveyance to the grantee and his bodily heirs creates a life estate in the grantee with the remainder in fee simple in his children that survive him, and the issue of such as die during his life *per stirpes. Horsley* v. *Hilburn,* 44 Ark. 459; *Wilmans* v. *Robinson,* 67 Ark. 517.

So it may be said that the rule of construction laid down in these cases will govern in the case at bar unless the addition of the phrase "and assigns forever" to the words "bodily heirs" has the effect to make the estate to Martha Florence by the deed an estate in fee simple.

The word "forever" is one of time, but the term relates to the person to whom the property is given, and not the estate granted. If the words "bodily heirs" are presumed to have been used by the grantor in their legal sense, so the word "forever" will be presumed to have been likewise used; and if it relates to the person and not to the property, it can not serve to either add to or take from the estate granted by the former words, "bodily heirs;" and the use of the words together does not enlarge the estate to a fee simple.

In Williams on Real Property (17th ed.), p. 178, it is said that the words "and assigns forever" have no conveyancing virtue at all, but are merely declaratory of that power of alien-

ation which the purchaser possesses without them. And in the case of *Pollock* v. *Speidel,* 17 Ohio St., at p. 446, the court said that the use of the word "assigns" in the connection in which it was used in the present case "only imports that the estate granted may be transferred, and can not operate to enlarge the grant or defeat its express limitations." To the same effect see *Weart* v. *Cruser,* 49 N. J. L., at p. 479, and cases cited; *Corbin* v. *Healy,* 37 Mass. 514; *Lessee of Hall* v. *Vandergrift,* 3 Binney (Pa.) 374; *Lessee of Wright* v. *Scott,* 4 Wash. C. C. 16; and *Dennis* v. *Wilson,* 107 Mass. 591, where it is held that the term "forever" does not impart inheritable qualities; *Haynes* v. *Bourn,* 42 Vt. at p. 691.

If the words "and assigns forever" do not serve to add to or take from the estate granted, the deed, in all essential respects, is similar to that in the above-mentioned cases, and this case is ruled by them. That is to say, under section 735 of Kirby's Digest, Martha Florence took a life estate, and the remainder passed in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of the conveyance.

The next question that presents itself for our consideration is whether the remainder passed by section 735 of Kirby's Digest is vested or contingent. It is urged with much force by counsel for appellant that the remainder is a vested one, but this court has decided adversely to their contention in the case of *Horsley* v. *Hilburn, supra.* In that case the property was conveyed to Marietta Hilburn "and the heirs of her body." At the time the conveyance was made Mrs. Hilburn had issue living, Robert and Ida. Subsequently, other children were born unto her. Ida died before her mother, without issue. After the death of Ida, Mrs. Hilburn conveyed her interest in the property. In construing section 735 of Kirby's Digest, which was enacted in 1837, the court held that Mrs. Hilburn took only a life estate, and that her conveyance could affect that alone, unless Ida had a vested interest which her mother inherited. In discussing this question the court said: "The statute says that the remainder shall pass in fee simple absolute to the person to whom the estate tail would first pass according to the course of the common law. It never could, under the circumstances, have passed to Ida at common law. During

her mother's lifetime she was not heir at all. At her mother's death she was gone without leaving issue. There had been only a contingency that she might get an interest by surviving the mother, and that a vague and uncertain interest, which might be more or less according as there might be no more or many brothers and sisters. Nothing was vested as a right which she might transmit. At common law, the surviving brothers, sisters and their descendants *per stirpes* would be entitled to have the estate pass to them on the death of the mother, without any portion being intercepted by inheritance from Ida. (See Fearne on Remainders, vol 2, p. 202). The estate vested in the surviving children and their issue at the death of the mother, and did not vest in remainder at all in any one during her life. The mother inherited nothing from Ida, and the court erred in holding that she did, and that the interest of Ida passed by her deed through Greenwood to Burrell Horsley."

The effect of the decision was to hold that only a contingent remainder passed to Ida by the deed; for, if Ida took a vested remainder with a defeasible interest, the court would not have held that Mrs. Hilburn did not inherit from her.

The case was decided at the November term, 1884, of the court, and has become a rule of property in this State. Therefore, whether the decision was right or wrong is not a question of law for the court to determine, but is one of expediency that addresses itself to the Legislature. Following the rule of construction announced in that case, it is plain that, under the deed now in question, the plaintiffs took a contingent remainder.

This brings us to a consideration of the question, what are the rights of a contingent remainderman in regard to the commission of waste by the life tenant or his grantee?

It is well settled that the rights of a remainderman, whether vested or contingent, are more extensive in equity than at law; and it is equally well settled that he may obtain relief in equity by injunction to prevent the life tenant or his grantee from committing waste. 5 Pomeroy's Equity Jurisprudence, § § 491, 492; 16 Cyc. 658. "An injunction to stay waste may be granted in favor of one who is entitled to a contingent or executory estate of inheritance." 30 Am. & Eng. Enc. Law (2d ed.), p. 290.

The most serious question in the case is whether a contingent remainderman may seek relief in equity for waste already committed. The courts of this country have held that a contingent remainderman can not maintain an action at law to recover damages for waste already committed. For a collection of the principal cases on the subject see 30 Am. & Eng. Enc. Law (2d ed.), p. 1. The reason a contingent remainderman has no standing in a court of law is that it can not be known in advance of the happening of the contingency whether he would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost.

On the other hand, it is a rule of universal application that a contingent remainderman may obtain relief in equity by injunction to prevent waste, and this remedy is given him on the theory that he is entitled to prevent the loss or destruction of that which may become his at the termination of the life estate. If a contingent remainderman has a right to appeal to a court of equity for the preservation and security of the property, to the end that it may be forthcoming at the termination of the life estate, with like reason he should have some remedy for waste already committed. Neither the life tenant nor his grantee have the right to commit waste, and it necessarily follows that they should not be entitled to or enjoy the fruits of their wrongdoing. As we have already seen, the contingent remainderman has no remedy at law in such cases, and it is obvious that, if he can not obtain relief in equity, he must suffer irreparable injury.

Two of the cardinal principles of chancery jurisprudence are, that equity will not suffer a wrong to be without a remedy, and equity looks to the substance rather than the form. According to the views we have expressed in this opinion, if any of the plaintiffs or their issue are alive at the death of their mother, the life tenant, their estate will become a vested remainder in fee simple. Some of the plaintiffs are married, and in the ordinary course of nature the strong probabilities are that at least some of them or their children will outlive their mother, the life tenant.

In the case of *Kollock* v. *Webb*, 113 Ga. 762, the court held that "remaindermen, whether their interest be vested or

contingent, may appeal to a court of equity to prevent the life tenant from wasting or destroying the *corpus* of the estate;" and the court quoted from the opinion in the case of *Clarke* v. *Deveaux*, 1 Rich. Eq. (S. C.) 172, as follows: "If the remainder is only contingent, still the party representing it, as we have said, is not prevented from seeking the aid of this court for its safety and preservation. A *cestui que trust*, though entitled to a mere contingent benefit, may, upon reasonable cause shown, apply to this court to have his interest properly secured. * * * It might not, probably, be stretching the jurisdiction of equity too far to say that one who holds for a contingent remainderman, and who fraudulently converts the estate confided to him to his own use, may be held to answer for such disposition, either by requiring an account and the payment of the money into court, or, if the property is still under his control, to transfer it to the succeeding trustee." This view is supported by the English authorities. See *Bateman* v. *Hotchkin*, 31 Beav. 486; *Garth* v. *Cotton*, 3 Atk. 751; *Bewick* v. *Whitfield*, 3 Peere Wms. 266; *Bagot* v. *Bagot*, 9 Jurist (N. S.) 1022.

For these reasons it seems to us that the plaintiffs are entitled to equitable relief. They should not be entitled to it now by way of indemnity, for it can not be certainly known that they will suffer loss; but we are of the opinion that it is in accord with the principles of equity for the chancellor in cases like this to take an account of the amount of the damage suffered and impound the same and invest the proceeds for the benefit of the one to whom the estate tail would first pass according to the course of the common law by virtue of the deed in question, in which interest the plaintiffs have an expectancy.

For error in not doing this the decree of the chancery court will be reversed with directions to proceed in accordance with this opinion; in all other respects the decree will be affirmed.

A. H. ANDREWS COMPANY v. DELIGHT SPECIAL SCHOOL DISTRICT.

Opinion delivered May 2, 1910.

1. SCHOOL DISTRICTS—POWER.—A school district is a *quasi* corporation which can exercise only those powers expressly conferred by statute or which arise therefrom by necessary implication. (Page 28.)
2. SAME—POWERS OF SCHOOL DIRECTORS.—School directors may exercise such powers as are expressly conferred upon them, or are necessary for the due and efficient exercise of such express powers, or which may fairly be implied from the statute granting the express powers. (Page 28.)
3. SAME—POWER OF DIRECTORS TO PURCHASE DESKS.—From Kirby's Digest, § 7614, providing that "the [school] directors shall have charge of the school affairs and of the school educational interests of their district," and other statutes recognizing their powers, it is a fair implication that they are authorized to purchase school desks. (Page 29.)
4. SAME—RATIFICATION OF CONTRACT.—A purchase of school desks by two school directors at a special meeting of which the third director had no notice may be ratified at a full meeting of all the directors. (Page 30.)
5. SAME—ESTOPPEL.—Where a school district accepted school desks, and, together with its successor, continued to use them, the latter cannot avail itself of an irregularity in the execution of the contract. (Page 30.)
6. SAME—NOT A MUNICIPALITY.—A school district is not a municipality within section 1 of article 16 of the Constitution of 1874, providing: "Nor shall any county, city, town or municipality issue any interest-bearing evidences of indebtedness." (Page 30.)
7. SAME—VALIDITY OF SCHOOL WARRANT.—A school warrant given in payment for school desks is not invalidated by the fact that the price of the desks was made larger by reason of the postponement of the date of its payment. (Page 31.)
8. SAME—WARRANTS—INTEREST.—Interest is not recoverable upon school warrants, in the absence of a statutory provision to that effect. (Page 31.)
9. SAME—ORGANIZATION OF SPECIAL DISTRICT—LIABILITY.—A special school district organized to take the place of a general school district becomes liable under Kirby's Digest, § 7690, for the debts of the latter lawfully incurred. (Page 32.)
10. FOREIGN CORPORATION—RIGHT TO SUE.—Acts 1901, c. 216, prohibiting foreign corporations from doing business in this State without complying with its terms, does not prohibit such corporations from suing to enforce a contract made in another State. (Page 32.)

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

McMillan & McMillan, for appellants.

If the contract was made at a board meeting by the three directors, the fact that it was signed by only two does not affect its validity. 83 Ark. 491; 52 Ark. 511. The school district is estopped to deny the validity of the contract. 87 Ark. 389; 40 Ark. 105; 61 Ark. 397; 67 Ark. 236; 81 Ark. 244; 82 Ark. 531; 81 Ark. 143; 83 Ark. 275. Such a contract may be ratified, and thus made binding on the school district. 39 Kan. 347; 35 N. H. 477; 38 Me. 164; 4 Cush. 494; 1 Beach, Pub. Corp. 248, 250; 11 Ark. 189; 21 Ark. 554. The unauthorized act must be ratified or repudiated *in toto.* 54 Ark. 216; 49 Ark. 320; 55 Ark. 112. It matters not that the promise was to pay in a manner not authorized by law. 96 U. S. 341.

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

The board of directors can do nothing except that which is expressly authorized. 32 L. R. A. 413; 49 Ark. 98; 87 Ark. 93; 84 Ark. 516; 60 Conn. 230. They cannot ratify a contract which they have no power to make. 58 Ark. 270; 10 Wall. 676; Dill. Mun. Corp., § 548. The contract being void, the contract price is not the measure of recovery. 123 Ind. 1; 114 Ind. 210.

FRAUENTHAL, J. The appellant is a foreign corporation with its place of business and domicil located in the State of Illinois, and School District No. 47 was on June 24, 1904, one of the duly formed common school districts of Pike County. On that day two of the directors of that district entered into a written contract with appellant, by which they agreed to purchase from it a number of school desks for the school district. It was therein agreed that the purchase price should be $344.77, and payable on September 1, 1905; and, inasmuch as the payment for the desks would not be made until said day in the future, the cost of the desks was arrived at and agreed upon by adding interest to the cash price thereof. The third director was not present at the making of said contract, and had no notice of the meeting at which it was made. The contract, however, provided that it might be countermanded within fifteen days from its date; and in about three weeks thereafter there was a meeting of the board of directors of the school district at which the three directors were present.

At that meeting the three directors agreed to and ratified the contract for the purchase of the desks and authorized the issuance of a warrant therefor upon receipt thereof. At the annual school meeting held previous to the making of this contract the electors of the school district voted a five mill tax for building purposes, but gave no expression relative to the purchase of desks. After the contract was agreed to by the three directors appellant shipped the desks, which were received and accepted, and a warrant of the school district was issued therefor. This warrant was executed by the three directors for $344.77 in common form, and stated that it was due September 1, 1905. The desks were used by School District No. 47 from the time they were received until in 1905 when said school district was organized into a special school district, under the provisions of sections 7668 *et seq.* of Kirby's Digest, known as "Delight Special School District." From that time up to the trial of this case the desks were in the possession of and used by said special school district, and at no time did either of these school districts ask or offer to return the desks. The cause was tried by the court sitting as a jury, who declared the law to be that the contract made by the directors of School District No. 47 for the purchase of the desks was beyond their powers and therefore invalid; and that the warrant executed therefor was void. It entered a judgment in favor of appellee, from which the A. H. Andrews Company has appealed to this court.

The question involved in this case is whether or not the directors of a common school district have the power to purchase school desks for the district without being expressly authorized to do so by the electors at its annual meeting. A school district is a *quasi* corporation created pursuant to legislative enactment, and it can exercise only those powers which are expressly conferred by statute or which arise therefrom by necessary implication. The powers of the school directors are likewise derived only from the statute, and they can exercise no power which is not therein expressly granted or which does not arise as a result from fair implication. The directors can enter into contracts only in the mode prescribed by the statute; and where the directors proceed in a mode prohibited by statute, or enter into a contract which is in excess of their powers, the district will not be bound by their acts. Thus, it is pro-

vided by statute that, before the directors shall purchase a school site or charts, they must be impowered to do so by a vote of the electors of the district. A contract made by the directors for the purchase of such property without a vote of the electors authorizing it would be made in a mode contrary to the statute, and would be in excess of the powers of the directors. *First National Bank of Waldron* v. *Whisenhunt,* 94 Ark. 583.

But school directors are authorized, not only to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom and from the duties which are expressly imposed upon them. Such powers will be implied when the exercise thereof is clearly necessary to enable them to carry out and perform the duties legally imposed upon them. School directors are public officers, and the rules respecting their powers are the same as those that are applicable to the powers of public officers generally. "The rule respecting such powers is that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has by implication such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or which may be fairly implied from the statute granting the express powers." Throop on Public Officers, § 542; 25 Am. & Eng. Enc. Law, 56; 28 Cyc. 307.

By the express provisions of section 7614 of Kirby's Digest the directors "have charge of the school affairs and school educational interests," and the care and custody of all its properties. By section 7590, Kirby's Digest, the electors determine the length of time that the school shall be taught during the year. But it becomes then the duty of the directors to make the necessary arrangements to have the school carried on. As a fair implication from this express power to manage the affairs and educational interests of the district and to make the arrangements for carrying on the school, the power arises to provide all those things that are clearly necessary in order to have the school conducted and taught. Thus, stoves, fuel and receptacles for water must necessarily be furnished in order that a school may be carried on; and, although there is no express power given by statute to the directors of common school districts to make purchases of these articles, yet it is fairly implied, from the duty imposed upon the directors to have the

school carried on, that they may exercise such power; and so, too, they may purchase other articles that are clearly necessary in order to have the school taught. By section 7631 of Kirby's Digest it is provided that the clerk of the school board shall keep an account of the expenditures made by the board in having the school taught, and present same at the school meeting. These items of the expenses of the school include what has been expended for "houses, fences, stovewood, maps, charts, blackboards, dictionary, and other necessaries for a school." These items, thus mentioned in the statute, include those which the directors have the power by express grant to purchase and also those they have the power by fair implication to purchase. All these items of expenses are thus recognized by the statute as such as the directors had the legal right to make, whether from the powers expressly or impliedly granted. By section 7627 of Kirby's Digest the directors are impowered to draw orders or warrants "for the payment of wages due teachers or for any lawful purpose." By fair implication from these provisions of the statute we are of opinion that the directors of common school districts have the power to make contracts for the purchase of those articles which are clearly necessary to be provided in order that a school may be carried on and taught; and we are further of the opinion that under the circumstances of this case the desks purchased from appellant were clearly necessary for the conduct of the school in this district. The directors had, therefore, the power to purchase the desks; and we think that at the meeting of the board at which all three directors were present the contract therefor was entered into in conformity with the law, and that thereby the district was bound.

Furthermore, the board of directors of the original district and its successor accepted the desks and have used them continuously since the purchase thereof with full knowledge of the contract so made. They have thereby in effect fully ratified such contract. *Springfield Furniture Co.* v. *School District,* 67 Ark. 236; *School District* v. *Goodwin,* 81 Ark. 143; *Forrest City* v. *Orgill,* 87 Ark. 389.

It is urged that the warrant is void because interest was charged upon the original purchase price and included in the

warrant. This contention is made by virtue of art. 16, § 1, of the Constitution, which provides: "Nor shall any county, city, town or municipality issue any interest-bearing evidences of indebtedness." But in the case of *Schmutz* v. *School District,* 78 Ark. 118, it was held that a school district is not a "municipality" within the meaning of this provision of the Constitution, and is not thereby inhibited from entering into a contract agreeing to pay interest, if given statutory authority to do so. But we do not think that it is necessary in this case to decide as to whether or not a school district has the power to enter into a contract for the payment of interest without express statutory authority. The amount named in the warrant was agreed upon as the price to be paid for the desks. A number of considerations might fairly affect the amount of the price; and delay in the payment thereof could be reasonably taken into consideration in fixing the price. The manner in which the parties arrived at the price, based upon the fact that they took into consideration the postponement of payment, would not affect the validity of the contract or warrant. The district through its directors agreed to give, and the appellant to accept, for the desks the amount named in the warrant; and the warrant was not invalidated because that price of the desks was made larger by reason of the postponement of the date of its payment. *Brakefield* v. *Halpern,* 55 Ark. 265.

It is contended by appellant that it is entitled to interest on the warrant from the time that payment thereof was refused. But there is no statute in this State which provides for the recovery of interest upon school warrants; and the weight of authority is that, in the absence of a statutory provision to that effect, such warrants do not bear interest. *Ashe* v. *Harris Co.,* 55 Tex. 49; *Oreole Fire Engine Co.* v. *New Orleans,* 39 La. Ann. 981; *Scranton* v. *Hyde Park Gas Co.,* 102 Pa. St. 382; *Pekin* v. *Reynolds,* 31 Ill. 529; *Warren County* v. *Klein,* 51 Miss. 807; 21 Am. & Eng. Enc. Law 25. See also *Nat. Bank of Jacksonville* v. *Duval County,* 3 Am. & Eng. Ann. Cases 457, and note thereto.

Our statute provides that the warrant of any board of school directors must be presented to the treasurer of the proper county, and he shall pay the same out of any funds in his hands

belonging to the district for that purpose (Kirby's Digest, § 7628). It is further provided that, if there are no funds with which to pay such warrant, the treasurer shall make an indorsement thereon that it is not paid for want of funds, and shall number and record each warrant in a book, and thereafter shall pay the warrants in the order of their number. (Kirby's Digest, § 7666). The treasurer is thus only impowered to pay the amount of the face of the warrant, and no authority is given by the statute to him to pay interest thereon. School districts are only *quasi* corporations, and are governmental agencies organized under legislative enactment for the carrying out of certain public purposes. The issuance of warrants on the county treasurer by school districts is done under the provisions of the statute. The statute does not provide, and it cannot be fairly implied therefrom, that the warrants shall bear interest; and, until the Legislature shall by express enactment grant to school districts the power to issue interest-bearing warrants, we think that it is the policy of the law that such warrants shall not bear interest.

We are of opinion that the warrant sued on was a lawful and binding obligation of School District No. 47 for the amount thereof, and by section 7690 of Kirby's Digest it became a legal liability against Delight Special School District, into which it was organized.

In its answer the appellee also alleged that the appellant was a foreign corporation, and had not complied with the laws of this State, and on that account could not maintain this action. Counsel for appellee do not urge this contention in their brief, and we do not think that it is well founded, under the decision rendered in the case of *Simmons-Burks Clothing Co.* v. *Linton,* 90 Ark. 73.

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

MURPHY v. MYAR.

Opinion delivered May 2, 1910.

1. SALE OF LAND—ELECTION TO TREAT AS TENANCY.—The parties to a contract for the sale of land may contract that upon the vendee's failure to pay any installment of the purchase money the contract of

sale shall be void and the premises shall revert to the vendor, and that the relation of landlord and tenant by the year shall arise. (Page 35.)

2. SAME—CONSTRUCTION OF CONTRACT.—A contract for the sale of land stipulated that, upon failure of the vendee to pay any installment of purchase money the contract of sale should be terminated and the relation of landlord and tenant should arise for one year from December 1 immediately preceding the date of default. The contract was entered into on January 28, 1908, and the first installment of purchase money fell due on December 1 following, and was not paid when due. *Held* that by the terms of the contract the vendee became a tenant of the vendor, and his tenancy related back to January 28, 1908. (Page 36.)

3. LANDLORD AND TENANT.—LIEN—COMMENCEMENT.—A landlord's lien becomes a charge upon the tenant's crop as soon as it comes into existence. (Page 37.)

4. SAME—CONVERSION OF PROPERTY SUBJECT TO LIEN.—One who wrongfully takes and sells property upon which a landlord's lien exists is liable in equity to the landlord for the loss or destruction of his lien. (Page 37.)

5. PARTIES—NONJOINDER—WAIVER.—The objection to a complaint that there is a defect or nonjoinder of parties plaintiff is waived unless it is raised by a specific demurrer. (Page 38.)

Appeal from Columbia Chancery Court; *James M. Barker,* Chancellor; reversed.

Lile & Hawkins, for appellant.

A lien may be retained upon the crop on land to secure the payment of the purchase price thereof. 60 Ark. 595.

C. W. McKay, for appellee.

If the vendee fails to exercise his option to purchase within the time limit, his contract to pay rent is absolute. 61 Ark. 270. A landlord's lien for rent will, even before it is due, take precedence over a lien by attachment. 25 Ark. 417; 27 Ark. 1. The remedy of a landlord for the recovery of rent is by specific attachment while in the defendant's polssession, or, after sale, by suit in equity to recover payment out of the proceeds. 36 Ark. 576; 72 Ark. 132; 48 Ark. 357; 44 Ark. 110; 56 Ark. 501. A purchaser with notice of the landlord's lien is liable for the rent. 31 Ark. 470.

FRAUENTHAL, J. This was an action instituted by the appellee in the chancery court to recover the amount of rent for certain land, which he alleged he leased to one of the defend-

ants for the year of 1908, and to fix his landlord's lien on the proceeds of the cotton raised on the land during that year in the hands of the other defendants, who, he alleged, had purchased the cotton with notice of said rent, and by sale had wrongfully converted same; and to secure a judgment against the defendants for the amount of said rent.

In January, 1908, the appellee entered into a contract with Eph. H. Hicks, by which he agreed to sell to him certain land in Ouachita County upon deferred payments to be made in four installments of $375 each, the first of which was to be made on December 1, 1908, and the others on December 1 of each year thereafter. The contract further provides:

"But in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and at the times limited, and likewise to perform and to complete all and each of the agreements and stipulations aforesaid strictly and literally, without any failure or default, time being of the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all right and interests hereby created or then existing in favor of the said second party, his heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in said first party, his heirs or assigns (without any declaration of forfeiture or reentry, or without any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or improvements made), as absolutely, fully and perfectly as if this contract had never been made. And it is hereby further covenanted and agreed by and between the parties hereto that, immediately upon the failure to pay any of the notes above described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord and tenant shall arise between the parties hereto for one year from December 1, immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of one hundred and seventy-five dollars for occupying the premises from the said December 1 to the time of default, such rent to be due and collectable immediately upon such default."

Hicks went into possession of the land under the above contract, and cultivated and raised on the land ten bales of cotton during the year of 1908. He sold nine of these bales prior to December 1, 1908, to the appellants, and sold one bale to them after that date. At the time of the purchase of the cotton the appellants had full notice of the above contract under which Hicks held the land. Hicks failed to pay to appellee the first installment on the land on December 1, 1908, or at any time thereafter. The appellants sold the cotton for a sum far in excess of $175, the amount of the alleged rent.

The appellee made the above allegations in his complaint, and the appellants denied these allegations in their answer, and also incorporated in the answer a general demurrer to the complaint, which was overruled.

Upon the hearing of the cause the chancellor found that the allegations in the complaint were sustained by the evidence adduced in the case. He found that the relation of landlord and tenant existed between appellee and Hicks, and that there was due to appellee $175 for rent of said land for 1908. He declared the amount of said rent a lien on the proceeds of the cotton which had been sold and converted by appellants, and entered a judgment in favor of appellee and against appellants therefor.

Contracts similar to the one entered into by appellee and Hicks relative to said land have been construed by this court several times, and the nature and effect thereof determined. By the first clause of the contract an agreement to sell the land was made, but only upon an express condition of payment of the purchase money at a stated time. Upon the failure to perform that condition, the relation of landlord and tenant existed between the parties, which related back to the time of the execution of the contract. In the case of *Ish* v. *Morgan*, 48 Ark. 415, in speaking of such a contract, this court said: "The first stipulation of the contract is one of purchase and sale. It binds the vendor to convey to the defendant; but to the terms of this agreement there is annexed the condition that, in case of failure of performance of the agreement to pay the first installment of purchase money, the intended vendee shall thereafter pay rent for the use of the land. It was certainly competent for the parties to enter into a binding agreement of this nature.

* * * The vendee here has in effect agreed that his rights shall depend upon the scrupulous adherence to the engagement he made to pay the purchase price, and that time should be a material consideration in the contract. The contingency thus provided for by the vendor had occurred, * * * and the defendant was then holding under his agreement to account to the owner for the rental value of the land." *Block* v. *Smith,* 61 Ark. 266; *Thomas* v. *Johnston,* 78 Ark. 574; *Colonial & U. S. Mortgage Co.* v. *Jeter,* 71 Ark. 185; *Carpenter* v. *Thornburn,* 76 Ark. 578; *Smith* v. *Caldwell,* 78 Ark. 333.

By the terms of the contract involved in this case it is manifest that it was the intention of the parties thereto that their relation should be determined by the performance or failure to perform the condition of payment named in the contract. If the condition was performed, then the relation of vendor and vendee should exist; but if it was not performed, then the relation that should exist between them was that of landlord and tenant. The relation that thus was created and arose between the parties sprung from the contract, and began with its execution, whether it was that of vendor and vendee or of landlord and tenant. The exact nature of the relation that would exist was determined on December 1, the date of the performance or non-performance of the condition, but the inception of that relation arose at the date of the making of the contract. So that when, by the performance or non-performance of the condition, the relation between the parties was determined, that relation went back to the time of the execution of the contract and continued thereafter. In the case of *Thomas* v. *Johnston,* 78 Ark. 574, the rule is thus quoted with approval from 18 Am. & Eng. Enc. Law, pp. 168-169:

"The parties to an agreement for the sale of land may also contract with the right, at the election of either party in the future, upon the performance or non-performance of certain conditions, to treat the transaction either as a purchase and sale contract or a lease; and if the election is made to treat it as a tenancy, it relates to the time of making the contract, and the relation of landlord and tenant, with all the incidents and liabilities, will be regarded as having begun at that time."

Under the terms of the contract herein Hicks was the tenant of appellee upon his failure to make the payment of the

purchase money on December 1, and his tenancy related back and began on January 28, 1908, the date when the contract was made, and continued from that date.

The lien of the appellee as landlord became a charge upon the crop raised upon the land as soon as it came into existence. *Sevier* v. *Shaw,* 25 Ark. 417; *Adams* v. *Hobbs,* 27 Ark. 1.

It was immaterial, in the enforcement of the lien upon the cotton so raised on the land, whether the appellants purchased it prior to or after December 1, 1908, if they purchased with notice of the appellee's rights as landlord. This they did, under the evidence. The appellee had a lien on this cotton for the payment of the rent of the land; and, after the appellants had, with notice of his rights, purchased the cotton from the tenant, and by sale had wrongfully converted it, the appellee had a right to fix his lien on the proceeds thereof in equity, and in that court to obtain judgment against appellants therefor. In the case of *Judge* v. *Curtis,* 72 Ark. 132, the rights and remedies of an owner of personal property and of a holder of a lien on such property wrongfully converted by another are thus stated:

"When the plaintiff is the absolute owner of the property taken and sold, * * * he must sue at law for the value of the property against the wrongdoer, and thus be indemnified for the loss he has been put to by the deprivation. Where the plaintiff has a lien on the property taken and sold by the conversioner, * * * his remedy is in equity, not for the value of the property taken, for he is not in that case the owner thereof, but to fix his lien upon the proceeds of the property in the hands of the conversioner, it being an equitable doctrine that a lien may be fixed upon the proceeds of the property where the lien on the property itself has been destroyed by the wrongdoer." The party who wrongfully takes and sells property upon which a landlord's lien exists is liable to the landlord for the violation or destruction of his lien, and in a court of equity can be made to account for such liability. *Reavis* v. *Barnes,* 36 Ark. 575; *Anderson* v. *Bowles,* 44 Ark. 108; *Dickenson* v. *Harris,* 48 Ark. 355; *Merchants & Planters Bank* v. *Meyer,* 56 Ark. 499; 7 Am. & Eng. Enc. Law, 477; 3 Pomeroy, Eq. (3d ed.) 1233.

It is urged by counsel for appellant that the court erred in rendering a decree against them without rendering judgment

against the tenant. But we do not think that this contention is well founded. The tenant, Hicks, was made a party defendant, but appears not to have been served with summons. The appellants did not demur to the complaint on the ground of a defect or nonjoinder of parties. Without making any objection upon this ground, they filed their answer and proceeded to a trial of the case upon its merits. It is provided by section 6093 of Kirby's Digest that a demurrer may be interposed upon the ground that there is a defect of parties. This must specifically be made a ground of demurrer. By section 6094 of Kirby's Digest it is provided that "the demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so, it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action."

The objection made to a complaint on the ground that there is a defect of parties, which is in effect a nonjoinder of parties, must, therefore, be made in the manner above provided for in the statute; and if it is not so done it will be waived. *Eagle* v. *Beard,* 33 Ark. 497; *Chapline* v. *Robinson,* 44 Ark. 202; *Fordyce* v. *Merrill,* 49 Ark. 277.

Furthermore, the action herein brought against appellants in equity for the wrongful violation or destruction by them of appellee's lien is similar in its effect to an action brought at law against one who purchases the property from the first taker and then converts the same. The first taker in the action of trover and conversion and the tenant in the equitable proceeding to fix the landlord's lien on the property converted may be proper parties, but they are not necessary parties to the determination of the case. And if the defendant does not by special demurrer raise the question of defect of parties, or by motion ask that such person be made a party to the suit, he waives such objection. Upon examination of the evidence, we find that the appellee instituted this suit within the time required by the statute for the enforcement of a landlord's lien, and that the lien covered every portion of the cotton purchased by the appellants.

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

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

Opinion delivered May 2, 1910.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S NEGLIGENCE.—A master is not liable for the negligence of his servant in the matters outside of his employment. Thus, where a railway employee negligently permitted a child to ride on a handcar on a Sunday, when he was not engaged in work for the railway company, the latter will not be liable for the child's death caused by falling from the handcar.

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

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and *James H. Stevenson*, for appellant.

The verdict is not sustained by any evidence of negligence on the part of appellant. 59 Ark. 295; 153 Mass. 191; 69 Pa. 210. A railway is bound for the tortious acts of its employees only when they are in the line of its service. 87 Ark. 540; 81 Ark. 369; 65 Fed. 969; 66 Mo. 572; 3 Ell. on Rds. § 1255; 75 N. H. 111; 71 Atl. 535; 21 L. R. A. (N. S.) 93; 122 App. Div. 590; 107 N. Y. 530; 127 App. Div. 580; 111 N. Y. S. 1057; 123 App. Div. 579; 108 N. Y. S. 228; 19 L. R. A. (N. S.) 235; 71 Atl. 296; 103 App. Div. 577; 93 N. Y. S. 161; 94 N. Y. S. 771; 103 N. W. 946; 59 S. E. 338; 217 Pa. 339; 10 L. R. A. (N. S.) 202; 35 Pa. Sup. Ct. 69; 6 C. & P. 501; 75 Conn. 718; 55 Atl. 561; 116 La. 550; 40 So. 894; 73 Conn. 338; 47 Atl. 681; 47 App. Div. 159; 62 N. Y. S. 208; 109 N. C. 152; 13 S. E. 702. In law there is no such thing as unconscious pain and suffering. 68 Ark. 1.

B. F. Merritt, for appellee.

Whether a particular act was or was not done in the line of the servant's duty is a question to be determined by the jury. 40 Ark. 324; 48 Ark. 181; 42 Ark. 542; 89 Ark. 92. The jury are the sole judges as to whether a child's contributory negligence was the cause of the injury. 55 Ark. 254; 59 Ark. 185; 63 Ark. 185; 77 Ark. 395; 88 Ark. 484.

FRAUENTHAL, J. This was an action instituted by Crawford Robinson against the St. Louis, Iron Mountain & Southern Railway Company to recover damages which he alleged that

he sustained by reason of the negligent killing of his son, Joe Robinson, who was a minor. The appellant maintains a station at Macon Lake, a point upon its line of railroad, at which one of its section foremen resided. On the afternoon of Sunday, July 21, 1907, this section foreman requested some men to take the handcar and get a keg of water for him. The day being Sunday, the section foreman was not engaged during the entire day in performing any work for the appellant. The handcar was situated on an offset or spur on the side of the railroad track, and had been locked to the rails, and not used during the entire day for the purposes of appellant. The men got the handcar, and placed it on the railroad track to proceed to the place where the water was located—about 300 yards from the station. A number of boys were lingering about the station, amongst whom was Joe Robinson, who was twelve years old. When the men started the handcar, these boys got on it for the purpose of taking a ride. There is a sharp conflict in the testimony as to whether or not the section foreman permitted these boys to ride on the car; but the testimony on the part of the appellee establishes the fact that he permitted them to do so. After the water was secured, and while they were returning to the station upon the handcar, the boy, Joe Robinson, fell therefrom. The car ran over him, and he was so seriously injured that he died from the effect of this injury on the following day. There is a conflict in the evidence as to the manner in which the injury occurred. Some witnesses on the part of the appellant testified that the boy jumped from the car just as it neared the station and had slackened its speed, and that after jumping from the car he fell under its wheels. The testimony on the part of the appellee, however, establishes the fact that the car was going at a high rate of speed, and that the boy fell off the car without any fault on his part.

The uncontroverted testimony, however, establishes the fact that the section foreman was not on that day (which was Sunday) engaged in work of any kind for appellant. He sent for the water for his sole private use at his house. The men whom he requested to go after the water were not in appellant's employ. The foreman had no authority to employ these men for this purpose; and he had no authority from, nor was there any

custom of, the appellant to permit boys to ride on its handcars. The procurement of the water was not for the benefit of the appellant or for any of its employees while engaged in work for it, but was solely for the independent purpose and use of Williams, the section foreman.

A verdict was returned in favor of appellee for $1,500, and from the judgment entered thereon the railroad company has prosecuted this appeal.

We do not think that it is necessary to set out the instructions that were given by the lower court or which were refused, and the rulings thereon of which appellant complains, because we are of the opinion that, under the uncontroverted testimony, the appellant was not liable for the unfortunate accident which resulted in the death of the boy, and therefore the appellant was entitled to the peremptory instruction in its favor which it asked.

In the case of *Railroad Company* v. *Dial,* 58 Ark. 318, a boy fifteen years old, at the request of the conductor of a freight train, mounted one of the box cars and undertook to throw off the brake on the car. While thus engaged, he was injured by striking his head against an iron bridge as the car was moving under it. In that case it was held that the railroad company was not liable on account of the permission or direction of the conductor to the boy to go upon the car, because the conductor had no express or implied authority to employ the boy or to direct or permit him to go upon the car. In that case it was further held that the proof showed that the conductor had no power to employ brakemen, and that it was not within the scope of his authority or employment to direct boys to assist the regularly employed brakemen of the company, or to direct them to go upon the cars, and that the company could not be bound and thus made liable for the act of the conductor in so doing.

In the case of *Railway Company* v. *Bolling,* 59 Ark. 395, a child of tender years was taken on a handcar at the direction of a section foreman, and received injuries while riding thereon. At the time of the injury the section crew who were propelling the car were not engaged in any work for the benefit of the company, but were bent on purposes solely their own. In that case this court held that the railway company was not liable

for any injuries which the child received by reason of any negligence on the part of the section crew in charge of the handcar. In speaking of the liability of the railway company for the act of a servant done without the scope of his authority and employment the court, quoting from approved authority, says: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. Thus it will be seen that, in the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment." In the case of *Sweeden* v. *Atkinson Improvement Co.*, 93 Ark. 397, a child was invited into a passenger elevator by a servant of the defendant for the purpose of taking her for a ride, and was injured thereby. It was held in that case that this act of the servant was not in the line of his employment, and was unauthorized by the master, and was for the purpose of carrying out the independent object of the servant; and that the defendant was not liable for injuries received by the child through the negligence of the servant. In that case we said: "It will thus be seen that the test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was done while carrying out the object and purpose of the master's business; for, if the act was done without authority and solely for purposes exclusively the servant's, then the master is not liable during such time that such acts are done. During such time he steps aside from his master's business and his employment."

In the case at bar the undisputed evidence shows that the section foreman during the entire Sunday upon which the injury occurred was not engaged in any work for the appellant. In sending after the water he was carrying out an object that was solely his own and exclusively for his own benefit. He was not authorized to permit boys to ride on the handcar, and it was not within the apparent scope of his authority to do so; and it was not the custom of the company to allow this to be done. The men who were actually propelling the car at the time of the injury were not in the employment of appellant;

and, if the injury occurred through any negligence on their part, the appellant cannot be held responsible therefor. Nor can the appellant be held liable for the act of the section foreman in permitting the boy to ride on the handcar. This permission was outside the scope of his employment and authority; it was connected with an act that was done for the exclusive benefit and purpose of the section foreman, and during a time when he had stepped aside from the business of the appellant and his employment.

The judgment is reversed, and the cause dismissed.

KILGORE LUMBER COMPANY v. THOMAS.

Opinion delivered May 2, 1910.

1. JUSTICES OF THE PEACE—JURISDICTION—COUNTERCLAIM.—Under Const. 1874, art. 7, § 40, providing that justices of the peace have jurisdiction in matters of contract where the amount in controversy does not exceed the sum of $300, exclusive of interest, a justice of the peace has no jurisdiction of a counterclaim for $500 where defendant asks that it be used as an extinguishment of plaintiff's claim for $219, and that he recover the remainder against plaintiff. (Page 46.)
2. SAME—APPEAL—JURISDICTION.—On appeal from a justice of the peace the circuit court can render no judgment that the justice might not have rendered. (Page 47.)
3. SAME—COUNTERCLAIM AND SETOFF—VALIDITY OF STATUTE.—Kirby's Digest, § 4605, providing that a setoff or counterclaim, *though exceeding in amount the jurisdiction of the court,* may be used to bar and extinguish the demand of the plaintiff, but no judgment shall be rendered in favor of the defendant for the excess, unless such excess is within the limits of the court's jurisdiction," is unconstitutional in so far as it provides that the excess only of the counterclaim or setoff shall determine the jurisdiction of the court. (Page 47.)
4. COUNTERCLAIM AND SETOFF—WHEN PREMATURE.—In a suit by a vendor to recover for lumber sold to be paid for as delivered, it is no defense that the contract required plaintiff within a certain time to cut all of the merchantable pine timber on defendant's land, and that it had not done so, if the time limit for cutting the timber had not expired. (Page 48.)

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

STATEMENT BY THE COURT.

Thomas & Hammonds sued the Kilgore Lumber Company before a justice of the peace for the sum of $247.43, alleged to be due on an account for lumber. The defendant filed the following answer and counterclaim:

"Defendants deny that they are indebted to plaintiffs in the sum of $247.43 or in any other sum.

"II. They allege that plaintiffs and defendants entered into a contract by which plaintiffs were to cut and deliver to defendants the timber on certain lands described in the contract, owned by the defendants, at the price and on the terms named and stated in said written contract, which contract is in possession of defendants, and a copy of which is in possession of the plaintiffs; that plaintiffs totally failed to comply with and perform their part of said contract, and, by reason of their said failure to perform their part of said contract, and the terms and agreement thereof, they became indebted to the defendants in the sum of $500, on which sum the plaintiffs are entitled to a credit of $219 for two cars of lumber containing — feet. That plaintiffs are therefore still indebted to defendants in the sum of $281, with interest on said sum since the — day of ——, 1907. Wherefore defendants demand judgment against plaintiffs in the sum of $281 and for costs of suit."

The judgment in the justice's court was for the defendant in the sum of $219, and plaintiffs appealed to the circuit court. In the circuit court the plaintiffs introduced the following contract: "Whereas the Kilgore Lumber Company, party of the first part, agrees to let Thomas & Hammonds, party of the second part, cut all the merchantable pine timber 12 in. and up at the stump being and standing on one parcel of land, to-wit: W. ½ N. E. ¼, E. ½ N. W. ¼; W. ½ S. E. ¼, E. ½ S. W. ¼, containing in all 320 acres, more or less, and further agrees to pay said Thomas & Hammonds $9.25 for all lumber F. O. B. cars (board measure) including No. 2 common and better; said Thomas & Hammonds shall cut, grade and load said lumber as the Kilgore Lumber Company shall direct; the Kilgore Lumber Company shall pay to Thomas & Hammonds 85 per cent. cash on receipt of the bill of lading and invoice, balance 15 per cent. when cars are unloaded. In case the said Thomas & Hammonds should fail to cut the above timber as per

contract or cut part of it and quit, they shall pay to the Kilgore Lumber Company $500 as damages; and if they comply with the entire part of this contract, and the Kilgore Lumber Company should stop them from cutting, the Kilgore Lumber Company shall pay them $500. Said timber must be removed within two years from June 2, 1907. Said lumber must be cut plump in thickness and width. Said Thomas & Hammonds is to cut all of the 1¼ in. finish they can, and cut the common into 1 in. boards, excepting bucking boards as otherwise directed. And if they sell any lumber locally they are to turn in the amount and pay Kilgore Lumber Company $2 per thousand for their timber."

The contract was executed on June 21, 1907. After plaintiffs had cut two cars of lumber, other parties, claiming to own the land, forbade them cutting any more timber. Plaintiffs quit cutting, and, upon the refusal of the defendant to pay them for the two cars of lumber, commenced this suit to recover the price therof under the contract.

The court thereupon, at the close of the testimony for plaintiffs, instructed the jury to retire from the court room, and after the jury had retired asked defendant if it admitted that plaintiffs had delivered to them the two cars of lumber under the contract, and if the amount of $219.76 was the amount it came to at the contract price. Defendant said that it did. The court thereupon held that, the suit having been commenced by plaintiffs in a justice of the peace court, the defense of counterclaim set up by the defendant in the second paragraph of its answer was for an amount beyond the jurisdiction of the justice of the peace, and therefore the court had no jurisdiction, and that defendant could not have the benefit of said counterclaim as a defense, setoff or counterclaim to plaintiffs' cause of action and the breach of said contract by plaintiffs, as alleged; and would not be allowed to introduce any testimony to sustain the allegations of the said second paragraph of its answer.

The court then directed a verdict for the plaintiffs, and from the judgment rendered thereon the defendant has appealed to this court.

McMillan & McMillan, for appellants.

A party to a suit at law must interpose all his defenses, both legal and equitable. Kirby's Dig., § 6098; 70 Ark. 505; 71 Ark. 484; 56 Ark. 455; 66 Ark. 97; 71 Ark. 415. The circuit court may permit amendments and allow new issues to be made keeping clear of new causes of action. 44 Ark. 375; 46 Ark. 254. The jurisdiction is determined by the demand. 7 Ark. 258; 60 Ark. 146.

Hardage & Wilson and *J. H. Crawford,* for appellees.

An answer which sets up a counterclaim must state facts which constitute a cause of action against plaintiff. Bliss, Code Pldg., § 367; 43 Ark. 296; 54 Ark. 525. A complaint stating conclusions of law only is demurrable. 72 Ark. 478. Setoffs, counterclaims and cross demands are never to be regarded as payments unless made so by agreement of the parties. 19 Ark. 230; 50 Ark. 380; 64 Ark. 554.

HART, J., (after stating the facts). In matters of contract justices of the peace have jurisdiction where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest. Const. 1874, art. 7, § 40.

Section 4605 of Kirby's Digest reads as follows: "A setoff or counterclaim, though exceeding in amount the jurisdiction of the court, may be used to bar and extinguish the demand of the plaintiff; but no judgment shall be rendered in favor of the defendant for the excess, unless such excess is within the limits of the court's jurisdiction as to amount. The judgment shall ascertain the amount due to the plaintiff and give him a credit therefor on the claim used as a setoff or counterclaim."

In the case of *Bunch* v. *Potts,* 57 Ark. 257, the defendant interposed a counterclaim for $360. The court said: "The amount of the counterclaim placed it beyond the jurisdiction of the justice; and the appeal to the circuit court invested that court with no power to try any issue that might not have been tried by the justice." That is to say, the court held that the sum demanded, and not the amount recovered, determines the question of jurisdiction. It is no answer to say that here the defendant only seeks to recover the excess, which is an amount within the jurisdiction of the justice court; for the defendant asked that a part of his counterclaim be used to bar or extin-

guish the claim of the plaintiff, and that makes it as much a part of its demand as a judgment in its favor for the excess. The Constitution contemplates that a justice of the peace shall only have jurisdiction to adjudicate matters within his jurisdiction. Here the defendant proposes that the justice shall pass upon an amount beyond his jurisdiction; for it is settled that the circuit court on appeal can render no judgment that the justice might not have rendered. The pleading of the defendant in the present case required the justice to pass upon the question of whether it was entitled under the contract between the parties to the suit to recover the sum of $500 as liquidated damages.

The effect of the defendant's pleading is to ask a recovery for the sum of $500; for if a part of this sum is to be applied to the extinguishment of plaintiff's claim under the judgment of the court, it, being a part of the judgment, is as much a recovery as that part of the judgment which is for the excess. This principle is illustrated in the case of *Hunton* v. *Luce,* 60 Ark. 146, where the court held that "a plaintiff may bring his action for less than is due him, remitting the balance, and thus bring his case within the jurisdiction of a justice of the peace." The court, after calling attention to the opposing authorities on the question, said: "We will only announce our conclusion that the appellants had the right to bring their case within the jurisdiction of the justice of the peace by remitting a portion of the principal of their note. We do not see that it is any violation of the rights of a debtor to allow his creditor to remit by voluntary credits a portion of his debt, and thus bring his claim within the jurisdiction of an inferior court. After the judgment of the inferior court is rendered upon the reduced claim, the part remitted is completely extinguished, and can never afterwards be asserted against the debtor."

Applying that principle to the case at bar, it will be seen that the defendant has not offered to remit a portion of his counterclaim so as to bring it within the jurisdiction of the justice; but, as already shown, is endeavoring to enforce his whole demand.

As stated in the case of *Derr* v. *Stubbs,* 83 N. C., p. 539: "The remission must be absolute of all demand in excess of the justice's jurisdiction, and such as would be cognizable before him if prosecuted by the defendant as an original cause of

action." Remission implies forgiveness, and means a voluntary relinquishment of a claim or a part thereof by the party capable of asserting it, and does not refer to the extinguishment of a debt or claim by agreement of the parties or by judgment of a court. It follows that so much of section 4605 of Kirby's Digest as provides that the excess only of the counterclaim or setoff shall be within the jurisdiction of the justice is unconstitutional. The court was correct in holding that it had no jurisdiction of the counterclaim in the form in which it was presented.

Again, it is contended by counsel for defendant that the matters set up are available as a defense to the action. Now, a defense goes to the plaintiff's right of action. Under the terms of the contract between the parties to the suit, a complete performance of the contract on the part of the plaintiffs was not required before they should be entitled to any pay for the timber cut and manufactured into lumber. On the contrary, it contemplated that they should be paid when the lumber was loaded on the cars and delivered to the defendant. Hence the matters set up could not be used to defeat plaintiffs' right of action by disproving it. This is borne out from the fact that the time limit given plaintiffs by the terms of the contract had not expired, and they had more than a year within which to finish removing the timber. The pleading was a counterclaim, which is defined to be "a demand existing in favor of the defendant against the plaintiff, and one which he might have prosecuted although the plaintiff had brought no action." Bliss on Code Pleading (3d ed.), § 348.

The judgment will be affirmed.

QUERTERMOUS v. STATE.

Opinion delivered March 14, 1910.

1. FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment for forgery of the books of a banking corporation, under Kirby's Digest, § 1726, which alleges that defendant was cashier of the Bank of Humphrey, "a corporation organized and incorporated under the laws of the

State," and that he did feloniously, etc., alter and change "the books of accounts of said bank kept by said corporation," sufficiently charges that the bank is a corporation. (Page 51.)

2. SAME—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 1726, providing that "every person who, with the intent to defraud, *shall make any false entry* or *shall falsely alter* any entry made in any book of accounts by any banking corporation * * * by which any pecuniary obligation, claim or credit shall be, or purport to be, discharged, diminished, increased, created or in any manner affected, shall, on conviction thereof, be punished as for forgery," does not define two offenses or two modes in which the offense may be committed. (Page 52.)

3. SAME—INDICTMENT.—An allegation, in an indictment for falsely altering the books of a bank, that a customer had deposited money in the bank and that defendant feloniously and unlawfully altered the books of said bank, with the intent to defraud such customer, "in such a way and manner as to diminish and make said account to appear as same had been discharged," was equivalent to a direct allegation that the credit of the customer had not in fact been diminished or discharged. (Page 54.)

4. SAME—SUFFICIENCY OF EVIDENCE.—Where the cashier of a bank conveyed his own real estate to a depositor of the bank for the purpose of securing his deposit, but without any agreement that such land should be accepted in lieu of such deposit, and thereafter, without authority from such depositor, transferred the latter's deposit credit to his own account, a finding of the jury that such change was made with fraudulent intent to alter the depositor's account will be sustained. (Page 54.)

5. APPEAL AND ERROR—WHEN INSTRUCTION HARMLESS.—Where, in a prosecution of a bank cashier for fraudulently altering the accounts of a depositor with the bank, there was no contention by either side that defendant made a complete settlement of the depositor's claim against the bank, an instruction that "it is no defense that the defendant has made *complete* or partial settlement of the indebtedness shown by account, if any," was not prejudicial. (Page 59.)

6. INSTRUCTION—SINGLING OUT ONE CIRCUMSTANCE.—While it is not necessarily error to give an instruction which singles out one circumstance and directs the jury's attention to it without reference to other circumstances in the case, it is better practice not to give an instruction in that form, and a case will not be reversed on account of the failure to give such an instruction. (Page 59.)

7. FORGERY—EVIDENCE.—It was proper, in a prosecution of a bank cashier for falsely altering the account of a depositor in the bank, to permit the prosecution to prove the state of defendant's account with the bank and his indebtedness to the bank. (Page 60.)

8. APPEAL AND ERROR—REHEARING—NEW MATTER.—The rule that matters not raised by counsel in their brief on the submission of a case will

not be considered on a petition for rehearing does not apply in felony cases. (Page 60.)

9. CRIMINAL LAW—SUFFICIENCY OF INDICTMENT.—Nothing can be taken by intendment or by way of recital to supply the want of certainty in an indictment. (Page 61.)

10. FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment, under Kirby's Digest, § 1726, which alleges that defendant "did feloniously and unlawfully alter and change," etc., "the books of account of said bank, kept by said corporation, said alteration and change having been made feloniously and unlawfully in said book accounts aforesaid," and that said felonious, fraudulent alterations and changes aforesaid were made in such a way and manner as to diminish and make said account to appear as same had been discharged," etc., is defective in failing to allege that the alterations or changes were made falsely. (Page 61.)

Appeal from Arkansas Circuit Court; *Eugene Lankford,* Judge; affirmed.

W. N. Carpenter and *Wiley & Clayton,* for appellant.

1. The indictment is bad for uncertainty and for failure to charge an offense. Kirby's Digest, § 1726; 80 Ark. 310. The statute must be strictly construed, and in order to make out a charge under it the language must state facts within its terms. 84 Ark. 136. Every material fact necessary to constitute an offense must be stated with reasonable distinctness and precision. 12 Ark. 608; 29 Ark. 68; 38 Ark. 519; 43 Ark. 93; 47 Ark. 575; 80 Ark. 310. The charge that accused "falsely" swore to certain facts is insufficient; there must be a charge that they were untrue with particulars. 54 Ark. 584-6; 59 Ark. 113-119; 153 U. S. 584. Statutory words alone are not sufficient. 68 Ark. 251; 73 Ark. 139; 105 U. S. 613; 153 U. S. 584.

2. It is not alleged that the bank was a banking corporation, and the verdict is contrary to the evidence.

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

1. The indictment is sufficient. The statute defines two offenses in the same transaction, but only one crime. 34 Fed. Rep. 30. It is sufficient to charge the offense with such a degree of certainty as to enable the court to pronounce judgment on

conviction, etc. Kirby's Digest, § 2228-9, 2241-3; 84 Ark. 487; 63 Ark. 613; 93 Ark. 406; 5 Ark. 444; 19 Ark. 613.

2. The offense was punishable at common law. 94 Pa. St. 85; 75 Am. Dec. 568; 57 Miss. 793.

McCULLOCH, C. J. Defendant, Frank Quertermous, was indicted by the grand jury of Arkansas County under the following statute: "Every person who, with the intent to defraud, shall make any false entry or shall falsely alter any entry made in any book of accounts by any banking corporation within this State, or in any book kept by such corporation or its officers, by which any pecuniary obligation, claim or credit shall be, or purport to be, discharged, diminished, increased, created or in any manner affected, shall, on conviction therof, be punished as for forgery." Kirby's Dig., § 1726.

The indictment is as follows: "The grand jury of Arkansas County, in the name and by the authority of the State of Arkansas, accuse Frank Quertermous of the crime of falsely altering bank book accounts, committed as follows, towit: The said Frank Quertermous, in the county and State aforesaid, on the thirteenth day of July, A. D. 1908, then and there being over sixteen years, and being the cashier of the Bank of Humphrey, a corporation organized and incorporated under the laws of the State of Arkansas, and doing business at Humphrey, Arkansas County, Arkansas, and having in his possession, and having come into his possession as said cashier aforesaid, the sum of two thousand, two hundred and seventy-two dollars and twenty-nine cents, of gold, silver and United States currency, a more particular description to the grand jury unknown; said money being the personal property of the common school fund of Arkansas County, Arkansas, and the said money having been deposited by Joseph Ireland, the duly acting and qualified treasurer of said county, for safekeeping, and the said sum of money having been entered on the books of accounts to the credit of Joseph Ireland, treasurer aforesaid; he, the said Frank Quertermous, as cashier aforesaid, and having in his custody the book accounts of said bank containing the account of the said Joseph Ireland's deposit, as aforesaid, of said money aforesaid, did feloniously and unlawfully alter and change, with the intent to defraud the said Joseph Ireland and his bondsmen and the common school fund of Arkansas County, Arkansas, the books

of accounts of said bank kept by said corporation, said alteration and change having been made feloniously and unlawfully in said book accounts aforesaid by the said Frank Quertermous; said felonious, fraudulent changes and alterations aforesaid in said books aforesaid were made in such a way and manner as to diminish and make said account to appear as same had been discharged, against the peace and dignity of the State of Arkansas."

Defendant demurred to the indictment on the following grounds: First, that the indictment charges more than one offense; second, that the indictment is uncertain in its allegations as to the offense charged; third, that the facts set forth do not constitute a public offense. In support of the third ground of demurrer, which we will dispose of first, it is contended that the indictment fails to state that the Bank of Humphrey was a banking corporation, and on account of this omission no public offense is charged. We are of the opinion, however, that, construing the language of the indictment in its usual acceptation, in accordance with the liberal policy of our statute, it does allege that the Bank of Humphrey was a banking corporation. *State* v. *Peyton,* 93 Ark. 406; *Harding* v. *State,* 94 Ark. 65.

It alleges that defendant was "the cashier of the Bank of Humphrey, a corporation organized and incorporated under the laws of the State of Arkansas, and doing business at Humphrey, Arkansas County, Arkansas;" that, "as cashier aforesaid, and having in his custody the book accounts of said bank," etc., he did feloniously, etc., alter and change "the books of accounts of said bank kept by said corporation." This language leaves no escape from the conclusion that the Bank of Humphrey is alleged to be a banking corporation. The case of *Gage* v. *State,* 67 Ark. 308, is relied on by counsel for defendant in support of their contention, but we think the descriptive language in the present indictment is more definite than in the Gage case, and we are not disposed to further extend the rule announced in that case.

The determination of the question presented by the other two grounds for demurrer calls for an analysis of the statute under which the indictment is preferred. The gravamen of the offense is the falsification of the books of accounts or any

book kept by a banking corporation by which "any pecuniary obligation, claim or credit shall be, or purport to be, discharged, diminished, increased, created or in any manner affected." The statute does not prescribe two offenses. Nor does the statute prescribe two modes in which the offense may be committed, for the false alteration of an entry in the books, by erasure and substitution, or otherwise, which works a change in the accounts, necessarily constitutes a false entry in effect. An entry can not be altered without the act resulting in a new entry, so the expression in the statute "falsely alter any entry" is embraced in the other expression, "make any false entry," and either or both of these expressions may properly be employed in an indictment. Proof of the making of a new false entry which purports to discharge, diminish, increase or otherwise affect an obligation, claim or credit is sufficient to support a charge of false alteration of an entry in a book of accounts, and proof of a false alteration, by erasure or otherwise, of an entry previously made is sufficient to support a charge of making a false entry.

The only authority bearing directly on the question which has been brought to our attention, or which we can discover in the books, is an opinion by the late Judge Thayer construing a statute of the United States which makes it a misdemeanor for an officer or agent of any national bank to make any false entry in any book, report or statement belonging to the bank. He said: "When a person makes an entry in books of account, the act may involve, and oftentimes does involve, an alteration of an entry previously made; but the act does not lose its character on that account. An entry is made, notwithstanding the fact that a previous entry is altered. Adopting the definition before stated of the words 'entry' and 'false entry,' it appears to me that a person makes a false entry, within the meaning of the statute, who erases one or more figures from a number already written in a book of account, and writes other figures in lieu thereof, so that the fact intended to be recorded is falsified. I can see no substantial difference between erasing certain figures of a number and writing different ones in their place, and making an entry every part of which is in the writer's handwriting. The act in question, as I conceive, may be correctly termed either the alteration of an entry or the making of an

entry. It may appropriately be said of such an act that an 'entry has been made' rather than 'altered,' because a new number is the result of the act, and for the reason that a new record is created which bears different testimony as to the fact or transaction intended to be authenticated. If attention is paid to the purpose which underlies the law under which the indictment is framed, there is ample ground to base an inference that the construction above given is in accordance with the legislative intent. The statute was obviously enacted to prevent bank officials and employees from concealing the actual financial condition of national banking associations by means of a falsification of any of the books of account or statements or reports which they are by law required to make."

It is also contended that the indictment is fatally defective in not alleging that the credit on the account of Ireland had not in fact been diminished or discharged according to the purport of the entry. The allegation that there was a deposit of the sum of money named by said Ireland, and an entry therof on the books of the bank, and that said entry had been falsely altered and changed so as to purport to diminish and discharge the credit, was equivalent to a direct allegation that the credit had not in fact been diminished or discharged. Otherwise the alteration would not have been a false one.

Our conclusion is that the indictment was sufficient, and that the demurrer was properly overruled.

The following are the facts proved at the trial. Defendant was cashier of the Bank of Humphrey, a corporation engaged in the banking business at Humphrey, Arkansas County, Arkansas. J. M. Ireland was treasurer of Arkansas County, and deposited some of the county funds in said bank. On July 13, 1908, there was a balance of $2,272.29 of said public fund in the bank standing as a credit on the books in the name of Ireland as county treasurer. The bank was then hopelessly insolvent, and had ceased to transact business several days prior to that time, though no insolvency proceedings had been begun. It does not appear when the bank became insolvent, but it was known to be so as early as June, 1908. On June 11, 1908, the defendant caused his wife to convey to Ireland some lots in the town of Humphrey on which several buildings were situated. The conveyance was in absolute form, reciting a cash

consideration of $2,000, but it was in fact executed as security for Ireland's deposit in the bank, and the latter gave defendant a writing showing that any surplus realized from the sale of the property over and above the deposit was to be returned to defendant. There was then an outstanding mortgage lien of $1,000 on the property. In April, 1909, Ireland sold the property for $3,000, which amount, after deducting the expenses and discharging said prior mortgage lien, netted him the sum of $1,541, as a credit on the amount due him on his bank deposit, and left a balance of $731.29 still due him. This had never been paid at the time of the trial. All of the witnesses who testified on the subject fixed the fair market value of the property conveyed to Ireland at $4,000 or more at the time of the conveyance.

Defendant tendered his resignation early in July, 1908, and J. M. Acklin was elected as his successor; but the latter did not assume charge as cashier till July 13, defendant remaining in charge of the books and retaining the keys to the building, etc. The doors of the bank were closed on July 6, and the transaction of business ceased; but a meeting of the directors was held in the office of the bank on July 13, and some time during that meeting, by direction of defendant, the account of Ireland as treasurer was charged with $2,272.29, thus balancing that account and extinguishing the credit, and a like amount was credited to the account of defendant. These changes in the account were made without Ireland's knowledge or consent, and must therefore be treated as false entries, for the effect of making them was to purport to discharge the credit standing in Ireland's name on the books of the bank for his deposits. At that time there was a balance of $873.24 standing to the credit of defendant on the books, which was augmented by the credit of the Ireland balance; but he owed the bank several stock notes, aggregating the sum of $4,004.06. The authorized capital stock of the bank was $25,000, all of which had been subscribed, but only $1,000 had been actually paid, the remainder being evidenced by the notes of the stockholders.

There is a conflict in the testimony concerning the above-named entries changing the Ireland account. Defendant denies that he made or authorized the entries, and says that the same was done by some one else upon instructions of the directors,

who did this on the theory that defendant had conveyed property sufficient in value to discharge the Ireland deposit, and was entitled to have a credit on the books to that extent. There is testimony to the effect that the entries were made by the assistant cashier upon defendant's instructions, but that the directors consented to the change when defendant claimed the right to have the Ireland deposit placed to his credit. The jury found against defendant, and it must be treated as settled by the verdict that he caused the false entries to be made, purporting to discharge Ireland's credit on the books of the bank without the latter's knowledge or consent. It is immaterial, so far as the guilt or innocence of defendant is concerned, whether or not the directors consented to the change of the account.

It is earnestly insisted by counsel, however, that there is no evidence of any intent on defendant's part to defraud Ireland by making the entries. They contend that, as all the witnesses testify that the fair market value of the property conveyed to Ireland, after deducting the prior mortgage debt, exceeded the amount of his credit on the books of the bank, the evidence on the point is undisputed, and that no fraudulent intent on defendant's part could have existed under those circumstances.

It does seem to us improbable that, after defendant had voluntarily caused his wife to convey to Ireland property of sufficient value apparently, and which the witnesses say was in fact of sufficient value, to discharge the debt, he had any intent to defraud Ireland in transferring the deposit credit from Ireland's account to his own. But we cannot say that the jury were wholly unwarranted by the evidence in finding the existence of an intent to defraud. Ireland's credit was not discharged by the conveyance of the property, and defendant's own admissions show that he did not so understand it. The bank still owed Ireland as treasurer a balance on his deposit of public funds, and it stood to his credit on the books of the bank. His remedy against the bank for the recovery of the amount, and whatever remedies he may have had to require payment of the stock notes, including those of defendant, were not impaired by acceptance of the conveyance from appellant's wife; but the false entries purported to discharge his credits on the books of the bank, and thus purported to cut off any other remedy he may have had for the collection of his debt. Though the

property conveyed appeared to be sufficient in value to fully satisfy Ireland's claim, he did not accept the conveyance in satisfaction, and it was necessarily a matter of some speculation whether or not the sale of the property would satisfy it. Defendant had no right to treat the conveyance as a satisfaction of the claim when it had not in fact been accepted as such, and to assume the authority of transferring to his own account the credit of Ireland on the books of the bank without the latter's consent. It was within the province of the jury to find, from all the circumstances, that the transfer was made by defendant with intent to defraud Ireland. There being evidence from which the jury could find the existence of an intent to defraud, it is not within our province to disturb the verdict.

The case was submitted to the jury on the following instructions given at the request of counsel for the State:

"1. If you find from the evidence that the defendant was cashier of the Bank of Humphrey, or assumed to act as such cashier, and that the book of acounts of said bank showed a true credit to the account of Joseph Ireland as treasurer, and that the defendant, in Arkansas County, within three years next before the finding of this indictment, and on or before the 13th day of July, 1908, the defendant procured or caused said account to be altered, or changed, so that he should have credit for same, and that the account of said Ireland as treasurer should be diminished or closed thereby, and that said alteration or change was false and made with the intent to defraud Joseph Ireland as treasurer, or the common school fund of Arkansas County, or the bondsmen of the said Joseph Ireland as treasurer, you will find the defendant guilty.

"2. It is not necessary that the defendant should have himself falsely changed the account. He would be guilty if he procured or caused it to be done with the intent to defraud the said Joseph Ireland as treasurer, or his bondsmen, or the common school fund of Arkansas County.

"3. It is no defense that the defendant has made complete or partial settlement of the indebtedness shown by the account, if any. Evidence of such action on his part will only be considered by you in determining the motive of defendant in procuring or causing the account to be altered, if he did procure it to be done. And, even though you may believe that the

defendant settled or secured the indebtedness, if any, either wholly or in part, yet if, at the time he caused or procured the alteration to be made (if you find that he caused or procured it), he had the intent to defraud the said Joseph Ireland as treasurer, or his bondsmen, or the common school fund of Arkansas County, and, if said alteration was false, you will convict him.

"4. You are instructed that in determining the intent of the defendant in causing the alteration to be made, if you find that the defendant caused such change in the account or procured it to be done, you may consider the state of the defendant's individual account with said bank and his indebtedness, if he was indebted, along with all the other facts and circumstances in the case.

"5. You are instructed that the fact that others than the defendant may have consented to, or acquiesced in, or assisted in, said alteration or change of said account is no defense. Even though others may have consented to, or acquiesced in, or assisted in, changing said account, if you find that said account was changed, if the defendant caused or procured said account to be changed, and said change was false and made with intent to defraud the said Ireland as treasurer, or his bondsmen, or the common school fund of Arkansas County, it is your duty to convict the defendant."

The court also gave the following instructions at the request of defendant:

"2. You cannot convict the defendant unless the State has proved beyond a reasonable doubt that the entry was made with the intent to defraud; and if you find that the entry, even though illegally made, was with an innocent purpose or made under a mistaken idea of the proper method of making the books show the facts, your verdict should be for the defendant.

"6. If you believe from the testimony that the board of directors of the Bank of Humphrey considered the matter of Ireland's account at the time the entry complained of was made, and then decided that the defendant had assumed the Ireland account and secured it, it was proper, as between the said bank and the defendant, that said bank should be relieved of the payment of the Ireland account; and if you believe that the entry complained of was made to effect that purpose, and with no

intent to defraud, even though it was not the proper entry to make for that purpose, the entry would not justify a conviction in this case."

The third instruction given at the request of the State is objected to on the alleged ground that it misleads the jury in saying that a complete settlement of the indebtedness, even before the alleged alteration, would not be any defense. It was inaccurate to refer in the instruction to a complete settlement, for it is not contended, either on the part of the prosecution or by the defendant, that any complete settlement was ever made. Defendant does not contend that he conveyed the land to Ireland in satisfaction of his claim, but admits that it was only given as security. It is not possible that any harmful effect to defendant's rights could have resulted from this instruction.

The fifth instruction is objected to on the alleged ground that the jury might have understood from it that, if the directors consented to the change in the accounts, and did so with the intent to defraud Ireland, the defendant would be guilty, even though he had no such fraudulent intent. We cannot see that this instruction is at all open to that construction, or that the jury could have been misled by it. All the instructions given by the court conveyed the idea that before defendant could be convicted it must be found that he caused the false alteration to be made with the intent to defraud Ireland. The purport of instruction number five was to tell the jury that the consent of the directors to the transaction would not relieve defendant from guilt if he participated in the act with fraudulent intent.

The defendant asked the court to give the following instruction, which was refused: "3. An intent to defraud Joe Ireland or his bondsmen is a necessary element to justify any conviction in this case; and if you believe from the testimony that it was the belief of those making the entry on the books at the time it was made that Joe Ireland was fully secured by the property conveyed to him by defendant, you may consider that fact in determining whether there was any intent to defraud, even though it appears that the property was afterwards sold for a sum insufficient to pay the account of Ireland."

We think that the substance of this instruction is covered by those given, and that there was no prejudicial result from the court's failure to give it. Moreover, the form of the in-

struction is open to the objection that it singles out one circumstance and directs the jury's attention to it without reference to the other facts and circumstances in the case. It does not necessarily constitute prejudicial error to give such an instruction (*Hogue* v. *State,* 93 Ark. 316); but this court has several times held that it is better practice not to give an instruction in that form, and that a case will not be reversed on account of the failure of a trial court to do so. *Carpenter* v. *State,* 62 Ark. 286; *Ince* v. *State,* 77 Ark. 418.

Error of the court is assigned in permitting witnesses to testify concerning the state of defendant's account with the bank and his indebtedness to the bank on the stock notes. These were matters which were competent for the jury to consider in determining the intent with which he made the changes in the account.

Upon a careful consideration of the whole record in this case, we reach the conclusion that the case was correctly tried below, that the defendant had a fair trial and has been convicted upon legally sufficient evidence. The judgment is therefore affirmed.

WOOD, J., dissents on the ground that the evidence fails to show an intent to defraud.

ON REHEARING.

Opinion delivered May 2, 1910.

HART, J. We have carefully considered the brief of counsel for appellant on his motion for a rehearing, and on the matters considered and determined therein we adhere to our original opinion. Counsel for appellant now urge that the indictment is defective because it does not charge that the entry was falsely altered. This question was not raised by counsel for appellant in their brief on the submission of the case, and the point was overlooked by us. The rule that matters not raised by counsel in their brief on the submission of a case will not be considered on a petition for rehearing does not apply in felony cases. Hence the question is now before us for determination. A majority of the court is of the opinion that the objection is well taken. "Nothing can be taken by intend-

ment or by way of recital, to supply the want of certainty in an indictment." *State* v. *Ellis*, 43 Ark. 93.

"The charge must contain such a description of the crime, etc., that, without intending anything but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give." *United States* v. *Watkins*, 3 Cranch C. C. 441; 1 Chitty on Pleading, 237.

The charge in the indictment is that appellant "did feloniously and unlawfully alter and change," etc., "the books of account of said bank, kept by said corporation, said alteration and change having been made feloniously and unlawfully in said book accounts aforesaid by the said Frank Quertermous; said felonious, fraudulent charges and alterations aforesaid in said books aforesaid were made," etc.

The language of the statute under which the indictment was found is "shall falsely alter any entry," etc. We do not think the words "said felonious fraudulent change," as used in the indictment, take the place of, or are equivalent to, a charge that the entry was falsely altered. The latter is an essential ingredient of the offense. To charge that a thing is done falsely is an averment of a fact. The word "false" "distinctively characterizes a wrongful act known to involve an error or untruth." Anderson's Law Dictionary, p. 447. On the other hand, the word "fraudulent" relates, not to the act done, but to the intent with which it was done. It is rather a conclusion or inference that may be drawn from a given state of facts. The word "falsely," as used in the statute, not only imports an element of fraud or bad faith, but goes further and relates to the act done.

The gist of the offense is to "falsely alter the books," and, following the general rule that nothing material shall be taken by intendment, this fact should be apparent upon the face of the indictment by positive and direct allegations. Therefore, the court should have sustained the demurrer to the indictment.

Mr. Justice WOOD also thinks the testimony is not sufficient to support the verdict.

The petition for a rehearing will therefore be granted. The judgment, for the reasons given herein, will be reversed, and

the cause remanded with directions to sustain the demurrer to the indictment and for further proceedings.

McCULLOCH, C. J., (dissenting). We have said in recent cases that an indictment need not set forth the offense in the precise words of the statute if words of like import are used or if the indictment contains "a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended." *Garner* v. *State,* 73 Ark. 487; *Richardson* v. *State,* 77 Ark. 321; *State* v. *Peyton,* 93 Ark. 406; *Harding* v. *State,* 94 Ark. p. 65.

It is alleged in the indictment that the defendant "did feloniously and unlawfully alter and change, with intent to defraud the said Joseph Ireland, * * * the books of account of said bank kept by said corporation, said alteration and change having been made feloniously and unlawfully in said book accounts by said Frank Quertermous, said felonious, fraudulent changes and alterations aforesaid in said books aforesaid were made in such a way and manner as to diminish and make said account to appear as same had been discharged."

It seems to me this language can not be reasonably construed otherwise than to mean that the alteration was falsely made. The language is not susceptible to any other construction without doing violence to the plain meaning of words. It certainly is sufficient "to enable a person of common understanding to know what is intended," and that is all that is required by our code of criminal practice. Kirby's Dig., § 2243.

The indictment alleges that it was a felonious, fraudulent alteration and this was necessarily a false alteration. These words are used in one place as descriptive of the intent and in another as descriptive of the criminal act. I think that the indictment was sufficient.

Mr. Justice FRAUENTHAL concurs.

BAKER v. MARTIN.

Opinion delivered April 25, 1910.

1. APPEAL AND ERROR—MOTION FOR NEW TRIAL.—Errors of the circuit court in its finding of facts cannot be reviewed on appeal where no motion for new trial was presented to the court for its action. (Page 64.)

2. SAME—HOW MATTERS BROUGHT UP.—An order of the court overruling a motion for new trial must appear in the judgment record, and cannot be supplied by the bill of exceptions. (Page 65.)

3. CONTINUANCE—ABSENCE OF ATTORNEY.—The refusal of the trial court to grant a continuance on account of the absence of one of appellants' attorneys, who was also one of their witnesses, was not error where no reason was stated why such attorney was not present, and no diligence shown to obtain his attendance. (Page 65.)

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin,* Judge; affirmed.

J. E. London and *J. N. Beakley,* for appellants.

When one tenant in common buys in an outstanding title or incumbrance, it inures to the benefit of all. 21 Ore. 59; 55 Ark. 104; 47 O. St. 437; 44 Wash. 31; 50 Ia. 312; 173 Pa. 101; 9 S. Dak. 116; 98 Ia. 32. Dower is a legal, equitable and moral right, and next to life and liberty. Scribner on Dower, § 33; 5 Conn. 462; 31 Ark. 576. The rights of a purchaser of a widow's dower before assignment to her will be protected in equity. 62 Ark. 51; 53 N. Y. 298; 20 N. Y. 412; 7 Paige 408; 22 Wis. 501; 6 Allen 305; 13 Ala. 60; 4 B. Mon. 215; 53 How. Pr. 97; 49 Hun 265; 119 N. Y. 324. A tenant in common must, in order to set the statute of limitations in motion, indicate his intention to claim the property exclusively. 61 Ark. 527; 7 Wheat. 121; 4 Mason 326; 3 Met. (Mass.) 91; 5 Wheat. 116; 117 Ill. 92; 29 Wis. 226; 95 Mich. 410; 86 Ia. 385; 85 Ia. 427; 84 Me. 1; 47 Minn. 141; 48 Minn. 402; 105 Mo. 492; 94 Cal. 653; 83 Tex. 580; 133 Ill. 619; 35 Neb. 795.

H. L. Ponder, for appellee.

This case should be affirmed because the motion for a new trial was never formally presented to the court and overruled. 12 Ark. 401; 13 Ark. 600; 40 Ark. 338; 57 Ark. 597; 66 Ark. 184; 89 Ark. 107. The widow of a tenant in common is not a tenant with the others before assignment of dower. 2 Stew. 356; 22 N. E. 1006; 29 Ind. 618; 23 How. Pr. 247. The statute of limitations begins to run against the heirs immediately upon sale or abandonment by the widow. 44 Ark. 490; 62 Ark. 313; 2 Scribner on Dower, § 64.

McCULLOCH, C. J. Appellants, N. L. C. Baker and others, instituted an action in the circuit court of Lawrence County

against appellee, C. H. Martin, to recover a tract of land. The answer of appellee put in issue all the allegations of the complaint as to the title to the land, and also pleaded adverse possession for seven years. The case was heard by the court sitting as a jury on an agreed statement of facts, and the court made a finding in favor of appellee, except as to some of the plaintiffs who were exempt from the bar of the statute of limitations by reason of coverture and infancy, and judgment was entered accordingly. This judgment was rendered on March 11, 1909, and a motion for new trial was filed on the same day, but the record does not show that the motion was ever presented to or passed on by the court.

N. L. C. Baker and the other unsuccessful plaintiffs presented to the trial judge on that day their bill of exceptions, which was signed by the judge and filed; and in October, 1909, they prayed an appeal, which was granted by the clerk of this court. The bill of exceptions contains a recital to the effect that the motion for new trial had been overruled by the court, and exceptions to that ruling saved.

During the September term, 1909, of the circuit court, appellants filed a motion in that court alleging that during the March term they presented their motion for a new trial to the court, and that the court overruled same, and also made an order allowing them to present their bill of exceptions within thirty days; and they prayed that said order of court overruling said motion for new trial, and granting time for filing bill of exceptions, be entered then as of the March term. Upon a hearing of the motion, the court found that the motion for new trial had not been overruled, and that no such orders had ever been pronounced by the court, and the court overruled the motion for a *nunc pro tunc* entry. Appellants prayed an appeal from that decision.

The judgment of the circuit court is responsive to the pleadings, and is within the issues presented thereby, and, in the absence of a bill of exceptions, we cannot review the action of the circuit court in its finding of fact, no error appearing on the face of the judgment. *Smith* v. *Hollis*, 46 Ark. 17. Neither can we review the judgment where the motion for new trial was never presented to the court for its action thereon. *Young* v. *King*, 33 Ark. 745; *Kearney* v. *Moose*, 37 Ark. 37.

The recitals of the bill of exceptions can not be looked to in order to ascertain whether or not the motion for new trial has been presented to and overruled by the court. An order overruling a motion for new trial is one which should appear on the records of the court. *Carpenter* v. *Dressler,* 76 Ark. 400. That being the appropriate place for it to appear, it has no place in a bill of exceptions. The office of a bill of exceptions is to bring on the record only things which are not properly matters of record. It is not proper to embody therein things which properly belong on the record, such as the judgment of the court, the order overruling motion for new trial, or order granting an appeal. *Anthony* v. *Brooks,* 31 Ark. 725.

Error of the court is assigned in refusing to postpone the hearing of the motion to amend the record. Appellants were represented by two attorneys, one residing at Walnut Ridge and the other at Van Buren, Arkansas. The motion was presented to the court by the attorney residing at Walnut Ridge, and he moved for a postponement until the next term of the court in order to procure the attendance of the other attorney, who, he alleged, would testify that the motion for new trial was presented to the court and overruled. No reason was stated why the attorney was not present, and no diligence was shown to obtain his attendance. The matter of continuance was one within the discretion of the court, and no abuse of that discretion is shown.

Judgment affirmed.

BRINNEMAN *v.* SCHOLEM.

Opinion delivered May 2, 1910.

1. TAXATION—EFFECT OF SALE OF STATE LAND.—A donation deed purporting to convey land as having forfeited to the State for taxes is ineffective to convey any title where at the time of the alleged forfeiture the land was not subject to taxation, being property of the State. (Page 67.)

2. PUBLIC LAND—SWAMP AND OVERFLOWED LAND—PRE-EMPTION.—The act of March 18, 1879, providing that pre-emptors and settlers on the unconfirmed swamp lands of the State "shall have a preference right

to purchase such lands by making satisfactory "proof" of their rights as pre-emptors and settlers, applies only to *unconfirmed* swamp lands, and not to lands which were confirmed. (Page 68.)

3. LIMITATION OF ACTION—SALE OF STATE LAND FOR TAXES.—Kirby's Digest, § 5061, providing that no action for the recovery of lands shall be maintained against a purchaser at tax sale "unless the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the lands in question within two years next before the commencement of such suit or action," does not apply in case of a tax sale of land which belonged to the State, and was therefore not subject to taxation. (Page 70.)

4. ADVERSE POSSESSION—VOID TAX DEED AS COLOR OF TITLE.—A tax deed which is void because the land was public land and not subject to taxation is not color of title, and does not become such when the land is acquired by a private owner. (Page 70.)

5. TAXATION—VOID SALE—IMPROVEMENTS.—A purchaser of State land at a void tax sale who made improvements thereon is not entitled to reimbursement for improvements placed by him thereon prior to a third person's purchase of the land from the State. (Page 70.)

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

J. F. Summers, for appellant.

The donation deed was void. 66 Ark. 48. The State is liable only to the extent of the power actually given its officers. 39 Ark. 580. The patent issued by the State to appellant is evidence of title in appellant. 39 Ark. 120. Therefore the burden of proof is upon appellee to show a superior right.

C. F. Greenlee, for appellee.

The donation deed is valid, and appellee acquired a good title. Kirby's Dig., § § 4820, 4802, 4804; 49 Ark. 266; 56 Ark. 276; 43 Ark. 543. Besides, the two years statute of limitation, under the donation deed, gave appellee a good title to the land. 85 Ark. 584; 87 Ark. 185; 84 Ark. 614; 77 Ark. 324. Even if the judgment should be reversed, appellee would be entitled to a refund of taxes paid on the land, and also to pay for improvements. Kirby's Dig., § 2754.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Woodruff County in September, 1907, against appellant to quiet his title to a tract of land containing forty acres in that county, and to cancel, as a cloud on his title, a deed to appellant by the Commissioner of State Lands as swamp

and overflowed land. The facts are undisputed. The land in controversy was swamp and overflowed land, within the meaning of the act of Congress of September 28, 1850, granting such lands to the State of Arkansas, and was duly selected as such prior to March 3, 1857, the date of the act of Congress confirming to the State the swamp and overflowed lands which had then been selected but not approved.

In 1870 the land was selected by the Memphis & Little Rock Railroad Company as land inuring to it under the act of Congress of 1853 granting lands to the State for railroad purposes; but the selection was rejected by a decision of the Commissioner of the General Land Office of the United States, dated July 16, 1891. On January 16, 1902, said tract was certified to the Land Commissioner of the State by the Commissioner of the General Land Office as swamp and overflowed lands, and was subsequently patented to the State as such. The State Land Commissioner, by deed duly executed September 28, 1904, conveyed this tract to appellant.

The land was declared forfeited to the State under an overdue tax decree in 1882, and in 1894 appellee's grantor, one Runnells, obtained a donation certificate therefor as State lands which had been forfeited to the State for non-payment of taxes. On ———, 1897, having produced proof of improvements and occupancy, the State Land Commissioner executed to him the State's donation deed, conveying the State's interest in the land as forfeited land. Runnells occupied the land continuously up to the date of his conveyance to appellee, June 4, 1904, and the latter occupied it by tenant up to the commencement of the present action. The land was not subject to taxation before the title passed from the United States to the State of Arkansas and from the State as swamp land; and therefore the tax sale was void. Only lands forfeited to the State for non-payment of taxes are subject to donation under proof of improvements and occupancy (Kirby's Digest, § § 4809 *et seq.*), and the State Land Commissioner had no authority to convey in this manner swamp lands which were still owned by the State. The donation deed to appellee's grantor only purported to convey the State's interest in the land as land which had been forfeited for taxes. This deed was void, and conveyed no title. *St. Louis Ref. & Wooden Gutter Co.* v. *Langley,* 66 Ark. 48.

The learned chancellor decided, on what he conceived to be the authority of *Chism* v. *Price,* 54 Ark. 251, that the land was *unconfirmed* swamp land, held by appellee's grantor as an actual settler, who had, under the statute, a preference right to purchase from the State; that appellant's title was obtained in fraud of such preference right, and that the latter should be held as a trustee. A decree was therefore rendered in appellee's favor, quieting his title on repayment to appellant of the purchase money with interest which the latter had paid to the State for his patent.

The act of March 18, 1879, provides that "pre-emptors and settlers on the unconfirmed swamp lands of the State * * * shall have a preference right to purchase such lands by making satisfactory proof to the Commissioner of State Lands of their rights as such pre-emptors and settlers," and that "any person not a pre-emptor or settler who shall apply to purchase any of such lands shall make and file with the Commissisoner of State Lands an affidavit stating that the land applied for has no improvement on it and that no person is residing upon it or claims it by virtue of any pre-emption certificate issued by authority of law." In *Chism* v. *Price, supra,* this court held that the statute above referred to applies only to *unconfirmed* swamp lands, and that the term "unconfirmed swamp lands," as used in the statute, meant those lands the selected lists of which had been transmitted to the General Land Office and returned to the Governor as approved, and did not mean those lands the selection of which was confirmed by the act of Congress of 1857 but not returned to the Governor as approved. In that case the lands were still unconfirmed when the patent to the purchaser was issued by the State Land Commissioner. In the present case the land was unconfirmed when settled on and improved by appellee's grantor, but it had been confirmed and patented to the State when purchased by appellant. It was then no longer unconfirmed swamp land, and did not come within the provisions of the act of March 18, 1879, giving a preference right of purchase to the actual settler and requiring any other person applying for purchase to file an affidavit with the Commissioner stating that the land had no improvement thereon, and that no person was residing thereon. The actual settler had then lost his preference right to purchase, and the

land was open to purchase by any person who applied. The act of March 18, 1879, was the first act to authorize the sale of swamp land before confirmation, though the prior statute of December 14, 1875, confirmed sales theretofore made of unconfirmed swamp lands. The Swamp Land Act of January 12, 1853, required the land agents of the several districts (now the State Land Commissioner) to give notice by publication of the sale of confirmed swamp lands. Subsequent statutes, enacted in 1854, 1857 and 1875, required such land agents to give notive by publication of additional confirmations, notifying pre-emptors of their rights and requiring all persons claiming the right of pre-emption on any of such lands to come forward and prove their pre-emption before the day of sale; also stating that all lands so confirmed by the State which should not be purchased under pre-emption or preference right within sixty days from the date of notice would be sold at public sale to the highest bidder.

The act of January 12, 1853, granted the right of pre-emption to any settler of swamp land, and provided that to obtain it the settler should, within thirty days after settlement, make a declaration in writing setting forth the fact that he claimed said land as a pre-emption right, etc. The act further provided that, if a settler failed to make such entry before the day set apart for making the sale, then the right should be lost, and the land sold to the highest bidder.

By the act of January 16, 1855, the right of pre-emption was given to any citizen who had an improvement on any swamp land, and who should, within sixty days after the land had been advertised by the land agent, file his declaration in writing setting forth the fact that he claimed said tract of land as a pre-emption right.

It is seen from these statutes that the preference right of settlers on confirmed lands ceased unless asserted within the time and manner prescribed by the statute after the publication of notice by the several land agents, or the Commissioner of State Lands after the creation of that office. After the preference right of a settler ceased, any applicant could purchase the land. As already stated, the act of March 18, 1879, applied only to unconfirmed lands, and it was not the design of that statute to extend the preference right of a settler be-

yond the period after confirmation provided by the prior statute. In other words, a settler on unconfirmed swamp land had a preference right to purchase, of which he could avail himself at any time before confirmation and within sixty days after publication of notice by the land agent or State Land Commissioner. After that time the land was open to purchase by any person applying therefor, and the settler lost his improvement by his failure to assert his right within the period prescribed by statute. The purchaser thereafter from the State was not required to file the affidavit required by the act of March 18, 1879, and could not be treated as a trustee for the settler.

We are therefore of the opinion that the chancellor erred in holding that appellee was entitled to the land on repayment to appellant of the purchase price.

It is also contended on behalf of appellee that he acquired title to the land by adverse possession under his donation deed for a period of two years after appellant's purchase from the State. It is conceded that the statute of limitation did not commence running before the purchase. Such a contention could not be sustained, for statutes of limitation do not run against the State so as to divest it of its title. The seven-year statute of limitation (Kirby's Digest, § 5056) was set in motion by the conveyance to appellant from the State; but not so with the two-year statute (Kirby's Digest, § 5061), for the title had not passed from the State, and it was not subject to taxation. The purchaser was not chargeable with notice of the void deed which antedated his purchase from the State, and for this reason the two-year statute did not run. We have held that adverse possession for two years under a tax deed or donation deed based on a void tax sale bars a recovery by the owner (*Ross* v. *Royal,* 77 Ark. 324); but that rule does not apply to a void deed executed before the title passed out of the State. The deed was not color of title while title was in the State, and did not become such when title passed to the State's vendee, who, by his purchase, took title free of all cloud. For the same reason appellee is not entitled to compensation under the betterment statute for improvements made prior to appellant's purchase from the State. *Floyd* v. *Ricks,* 14 Ark. 286.

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

WINGFIELD v. STATE.

Opinion delivered May 9, 1910.

1. CRIMINAL LAW—RIGHT TO HAVE JURY POLLED.—Kirby's Digest, § 2419, providing that, upon a verdict being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his verdict, and if one answers in the negative the verdict cannot be received, is mandatory and confers an absolute right, on demand, to have a jury polled. (Page 72.)
2. BILL OF EXCEPTIONS—AFFIDAVITS OF BYSTANDERS—CONCLUSIVENESS.—A bill of exceptions as certified by the bystanders in accordance with Kirby's Digest, § 6226, in the absence of controverting affidavits, must be taken as representing the true state of facts, unless controverted by affidavit filed by the opposite side. *Boone* v. *Holder,* 87 Ark. 461, followed. (Page 72.)

Appeal from Clark Circuit Court; *Jacob M Carter,* Judge; reversed.

Hamby & Haynie and *Hardage & Wilson,* for appellant.

Threats are admissible to show who was the probable aggressor in the difficulty. 82 Ark. 595. The jury should have been polled. Kirby's Dig. § 2419; Thompson on Trials, § 2632; 63 Ala. 97; 20 Cal. 69; 31 Ark. 196; 69 Ark. 626. Where the jury may be polled as of right, it is error to receive the verdict in the absence of defendant's counsel whereby the right is lost. 31 Wis. 615.

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

In filing a bill of exceptions proved by bystanders, the statute must be strictly complied with. 71 Ark. 577; 57 Ark. 1; 56 Ark. 594. The case of *Boone* v. *Holder,* 87 Ark. 461, should be overruled. Appellant's effort to impeach the verdict of the jury by their affidavits is without authority of law. Kirby's Dig. § 2423; 70 Ark. 224; 67 Ark. 266; 59 Ark. 132; 37 Ark. 519; 29 Ark. 223; Bish. Crim. Proc. 1170. The punishment should be reduced to the minimum and then affirmed. 84 Ark. 292; 83 Ark. 268; 88 Ark. 579; 122 S. W. 727; 72 Ark. 276; 66 Ark. 270. Instructions not set out in appellant's abstract are presumed to be correct. 90 Ark. 161; 45 Ark. 348.

McCULLOCH, C. J. W. O. Wingfield was convicted of the crime of manslaughter, and appeals. Among other assign-

ments of error, he shows that when the jury returned a verdict against him he requested the court to poll the jury, but that the court refused to do so. The statute, which is a part of the Code of Criminal Procedure, provides that, "upon a verdict being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his verdict, and if one answers in the negative the verdict cannot be received" (Kirby's Digest, § 2419).

There seems to be some doubt whether defendant could, as a matter of right, in the absence of a statute expressly conferring that right, demand a polling of the jury, or whether it rests in the discretion of the trial court. The authorities are conflicting on that question. But there can be no serious doubt that our statute on the subject was intended to be mandatory, and that it confers an absolute right, on demand, to have a jury polled.

In Alabama there is a statute on the subject reading as follows: "When a verdict is rendered, and before it is recorded, the jury may be polled, on the requirement of either party, in which case they must be severally asked if it is their verdict, and, if any answer in the negative, the jury must be sent out for further deliberation." The Supreme Court of that State decided that the statute is mandatory. *Brown* v. *State,* 63 Ala. 97.

If the statute is mandatory, it follows that the refusal to poll the jury was a prejudicial error, for it deprived the defendant of a substantial right to ascertain to a certainty from the individual expression of each juror whether or not the verdict reported by the foreman was concurred in by all.

But the circuit judge refused to certify this exception in the bill of exceptions, and defendant procured and filed within the time allowed the certificate of two bystanders attesting the truth of the exception as by him prepared. No controverting affidavits were filed by counsel for the State, and we must treat the exception as having been properly taken and preserved. *Smith* v. *State,* 87 Ark. 459; *Boone* v. *Holder,* 87 Ark. 461.

The Attorney General insists that the cases cited above are wrong, and that we should overrule them, and accept the certificate of the trial judge, refusing the exception. We decline to overrule those decisions, for they represent the deliberate judg-

ment of this court in construction of a statute prescribing a rule of practice on appeals to this court. Moreover, we are more fully convinced on further consideration of this question that those decisions are correct. The Legislature is entirely untrammeled by constitutional limitation in prescribing the mode in which exceptions to ruling of trial courts must be preserved in order to have them reviewed by the appellate court. No judicial act is involved in recording an exception, and the statute authorizing the attestation by bystanders of the truth of an exception is not unconstitutional, as contended by the Attorney General.

"The object of a bill of exceptions," says the Supreme Court of Mississippi, in opinion by Judge Simrall, "is to perpetuate, for the use of the appellate court, a full and complete history of what transpired on the trial, or so much as may be needed for the purpose of reviewing the proceedings. It is the creation originally of the statute of Westminster the 2d. The sole purpose is to certify to the court of review matters during the progress of the cause which are not noted in the record proper, and which in this mode becomes part of it. It is purely narrative and historical, and not judicial, except in the sense that it is the duty of the judge to sign and seal it. No judgment of the court is pronounced, it is a ministerial act, which by legislation could be committed to the clerk or other fit person." *Vicksburg & M. R. R. Co.* v. *Ragsdale,* 51 Miss. 447.

The statute makes it the duty of the trial judge, primarily, to sign the bill of exceptions prepared by the party if he conceives it to be true, or to correct it if he believes it to be incorrect. Then, "if the party excepting is not satisfied with the correction, upon his procuring the signatures of two bystanders attesting the truth of his exceptions as by him prepared, the same shall be filed as a part of the record" (Sec. 6226). When the trial judge allows the exception as presented to him by the party, his certificate of the fact is conclusive of the truth of the exception, and cannot be inquired into. But, if he refuses to allow it, then the statute points out another method of bringing the exception into the record—that is, by the certificate of two bystanders. The certificate of the bystanders is not conclusive when controverted; but it establishes the truth of the exception, and must be accepted by this court, unless controverted in the

manner pointed out in the statute, which does not contemplate nor require the maintenance, by other affidavits, of the certificate of the bystanders unless controverted. The statute ought to provide for notice to the adverse party of the filing of the certificate of bystanders, so as to give opportunity for controverting its truth. But this is a defect which must be corrected by the Legislature, if done at all. This court can only enforce the statute, not change it.

Other assignments of error need not be discussed. For the error in refusing to poll the jury, the judgment is reversed, and the cause is remanded for new trial.

BRAKE v. SIDES.

Opinion delivered May 9, 1910.

LIMITATION OF ACTIONS—WHEN SEVEN YEARS STATUTE BEGINS TO RUN AS TO FEMALE INFANT.—Under the proviso in the seven years statute to the effect that a female infant may sue within three years after full age, the exception in her favor expires three years after she attains the age of 18 years.

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

Johnson & Burr, for appellants.

An executor or administrator cannot become the purchaser of the property he represents. 27 Ark. 637. And the deed may be avoided by any one interested in the land. 46 Ark. 25; 36 Ark. 383; 40 Ark. 393; 48 Ark. 248; 75 Ark. 184; *Id.* 40; 112 S. W. 373; 119 S. W. 654. The same rule applies to tenants in common. 49 Ark. 242; 54 Ark. 627; 61 Ark. 575; 60 S. W. 420; 75 Ark. 184; 73 Ark. 575. The deed, not having been delivered, is void. 77 Ark. 89; 74 Ark. 104; 25 Ark. 225. Repeals by implication are not favored. 11 Ark. 103; *Id.* 496; 23 Ark. 304; 24 Ark. 479; 76 Ark. 443; 28 Ark. 317; 29 Ark. 225; 76 Ark. 32; 50 Ark. 132. Subsequent laws do not abrogate prior one unless they are clearly in conflict with each other. 123 S. W. 771; 81 Ark. 440; 80 Ark. 411; 72 Ark. 119; *Id.* 135; 63

Ark. 397; 60 Ark. 59; 57 Ark. 474; 54 Ark. 235; 53 Ark. 417; *Id.* 337; 52 Ark. 447; 51 Ark. 559; 114 S. W. 708. The statute runs only against parties and privies. 101 Fed. 98; 82 Ark. 52. The five-year statute does not apply to judicial sales unless they are confirmed. 61 Ark. 80; 69 Ark. 539. But when confirmed the statute begins to run. 76 Ark. 146. A court of chancery should not divest the owner of title on the ground of laches for a period of time shorter than the statute of limitations. 99 S. W. 84; 83 Ark. 154; 112 S. W. 161; 119 S. W. 645; 123 S. W. 650.

Block & Kirsch, for appellee.

The recording of a deed at the instance of the grantor is a sufficient delivery. 25 Ark. 234; 19 So. 324; 72 Ark. 93. The delivery being good, the conveyance is binding between the parties. 45 N. Y. 406; 67 Ark. 325; 34 Ark. 291; 77 Ark. 60. The word "void" in sec. 3658, Kirby's Dig., means "voidable." 67 Ark. 329. A female is of age for all purposes at the age of 18 years. Kirby's Dig., § 3756; 64 Ark. 415; 79 Ark. 194.

McCULLOCH, C. J. The controlling question to be determined on this appeal is whether the exception in the seven-years statute of limitations in favor of an infant expires in the case of a female infant three years after she attains the age of 18 years, or three years after she becomes 21 years of age. This statute relates to actions to recover land held adversely by another, and the exception in favor of infants and others under disability reads as follows: "Provided, if any person or persons that are or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be at the time said right or title first accrued, come or fallen within the age of twenty-one years, *femme covert* or *non compos mentis,* that such person or persons, his, her or their heirs, shall and may, notwithstanding said seven years may have expired, bring his or her suit or action, so as such infant, *femme covert* or *non compos mentis,* his, her or their heirs, shall bring the same within three years next after full age, discoverture or coming of sound mind." Kirby's Digest, § 5056.

This statute was enacted in its present form in 1851, and at that time all persons under the age of 21 years, both male and female, were declared by statute to be minors. An act of the General Assembly, approved April 22, 1873, provides that "males of the age of twenty-one years, and females of the age of eighteen

years, shall be considered of full age for all purposes, and, until those ages are attained, they shall be considered minors." (Kirby's Digest, § 3756). That statute was entitled "An act defining the powers and regulating the duties of guardians, curators and wards," and it was a comprehensive statute covering the whole scope of guardianship of minors and the control of their estates.

It is insisted that the case of *Rankin* v. *Schofield,* 81 Ark. 440, is decisive of the question, but we do not think that case reaches to it at all. There the court construed a statute which gives an infant the right to show cause against a judgment "within twelve months after arriving at the age of twenty-one years." (Kirby's Digest, § 6248). Judge BATTLE, in delivering the opinion of the court, said: "Section 6248 is a special or particular statute, providing a remedy in particular cases, and it is not repealed or modified by any general affirmative statute, unless it contains negative words or is invincibly repugnant thereto."

The court held in *Jones* v. *Pond & Decker Mfg. Co.,* 79 Ark. 194, that under the same statute a female who was 18 years of age when judgment was rendered against her had no right to show cause thereafter, and we do not understand that the rule in that case was overruled by the later case of *Rankin* v. *Schofield.* Two of the judges concurred in both those opinions, and there was no intimation of an intention to overrule the first-named case.

However, we do not think the decision in either of those cases is decisive of the question presented now. Other decisions of this court do shed considerable light on this question, and lead clearly to the conclusion that the suit of a female infant must be brought within three years after she arrives at 18 years of age. The same section of the statute contains an exemption in favor of married women, and provides that they may bring an action in three years after *discoverture.* This court in several cases has held that the act of 1873 impowering married women to sue alone and in their own names, on account of their separate property, did not repeal by implication the saving clause in their favor in the statute of limitations. Mr. Justice SMITH, delivering the opinion of the court in the first of those cases, said: "The wording of our statute limiting the time for the bringing of the action

for the recovery of real property is peculiar. It gives the married woman three years after discoverture; that is, after the release from the bonds of matrimony by the death of the husband, or by divorce. If the language had been 'three years after the removal of her disability,' we might very well hold that her disability could be removed by an act of the Legislature as well as by the husband's death." *Hershy* v. *Latham,* 42 Ark. 305.

The limitation statute of December 14, 1844 (which had no application to the seven-year statute of limitation enacted in 1851), provided that "if any person entitled to bring any action, in this or any other act of limitations now in force specified, shall, at the time of the accrual of the cause of action, be under twenty-one years of age, or insane, or a married woman, or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within the time now specified by law, or in this act for bringing such action, after such disability may be removed." Kirby's Digest, 5075. This court held that the married women's enabling act of 1873 (Kirby's Digest, § § 5212-20) by implication repealed the exemptions in favor of married women contained in the above-quoted limitation statute of 1844. Mr. Justice SMITH again delivered the opinion of the court, and in distinguishing the two cases said: "*Hershy* v. *Latham,* 42 Ark. 305, stands on the peculiar language of the act of 1851, limiting actions for the recovery of lands. That act gives a married woman three years within which to sue after she becomes discovert, not after removal of her disability." *Garland County* v. *Gaines,* 47 Ark. 558.

Other decisions follow this to the same effect. The distinction made by the court in those two lines of cases is controlling in the present case, and distinguishes it from the case of *Rankin* v. *Schofield, supra.* There the peculiar language of the statute construed was that the infant, "within twelve months after arriving at the age of twenty-one years, may show cause against such order or judgment." The statute now under consideration provides that the infant may bring such action within three years next after full age. The later statute of 1873 provides that "females of the age of eighteen years shall be considered of full age for all purposes." Kirby's Digest, § 3756. We perceive no reason why this is not applicable, and

we think it modifies the statute of limitation so as to bar the action of a female to recover land in three years next after arriving at the full age fixed by the later statute.

It is urged that the purpose of the lawmakers in passing the act of 1873 was to encourage early marriages by enabling females to contract marriage at an earlier age than twenty-one years without the consent of parents or guardians. That may have been a reason that appealed to the lawmakers, but there is nothing to show that this was the sole purpose of the act. The statute is broad enough to completely emancipate females at the age of 18 years.

The decree of the chancellor is therefore affirmed.

DICKIE v. HENDERSON.

Opinion delivered May 9, 1910.

1. NEW TRIAL—REQUIRING REMITTITUR.—Where the losing defendants in an action at law filed a motion for new trial upon the ground merely that the evidence was insufficient, and at the next term of court moved for new trial on the ground of newly discovered evidence, no question was raised as to the excessiveness of the damages awarded, and it was error to make an order requiring plaintiff to remit a part of the judgment. (Page 80.)
2. SAME—NEWLY DISCOVERED EVIDENCE—DILIGENCE.—A new trial on the ground of newly discovered evidence tending to show that the verdict was excessive was properly denied where no excuse was shown for not having produced the evidence at the trial. (Page 80.)

Appeal from Lonoke Circuit Court; *Eugene Lankford,* Judge; reversed in part.

Carmichael, Brooks & Powers, for appellants.

A livery stable keeper is not an insurer of the suitableness of a horse let to a customer. 73 Atl. 324. He is liable for damages only when he knows or should have known of the viciousness of the horse. 73 Atl. 324; Van Zile on Bail. § 125. The verdict is excessive. 87 Ark. 113; 82 Ark. 61. A new trial should have been granted. 66 Ark. 612; 21 Ark. 232.

James B. Gray, Thomas C. Trimble, Joe T. Robinson and *Thomas C. Trimble, Jr.,* for appellee.

An allegation not denied must be taken as true. 13 Barb. 103. A motion for new trial based on newly discovered evidence must be construed with great strictness. 26 Tex. 217; 40 S. W. 619. Evidence which merely tends to impeach one's adversary or his witnesses will not avail as a ground for new trial. 47 Ark. 196; 28 Ark. 531; 53 Ark. 200; 36 Ark. 260; 38 Ark. 498; 45 Ark. 328; 85 Ark. 488; 72 Ark. 404; 36 Ark. 260; 38 Ark. 498; 39 Ark. 221; 40 Ark. 445; 47 Ark. 196; 90 Ark. 435.

McCULLOCH, C. J. Appellants, Dickie & Goelzer, are liverymen in the town of England, Lonoke County. Appellee Henderson sued them to recover damages for alleged negligence in hiring to him for use a vicious or unbroken horse. He recovered judgment below for damages in the sum of $1,500, and a reversal of the case is sought on the ground that the evidence is not sufficient to sustain the verdict.

There is ample evidence to justify a finding that the horse that appellants hired to appellee ran away with him and injured him; but it is insisted that there is no evidence tending to show that appellants knew of the vicious tendencies of the horse, or failed to exercise diligence in discovering the horse's condition. After careful consideration of the matter, we are of the opinion that there is sufficient evidence to warrant the jury in finding that appellants were guilty of negligence, either in failing to discover the vice or lack of training of the animal, or in hiring to appellee a horse which was not suitable for use.

Appellee asked for a gentle horse, and was given one which ran away with him as soon as he started on his journey, and seriously injured him. The horse's actions, as soon as he was driven out of the barn (according to the statements of appellee and his witnesses), showed that he was without training, and was not a gentle horse. Other witnesses who had tried to purchase the horse from appellants for saddle purposes testified that they tried to ride him, and that his actions on the occasion showed that he was unbroken, at least to the saddle, and, as they expressed it, that he was not "bridlewise." It is true these witnesses did not attempt to drive the animal, but the fact that the horse was shown to be entirely lacking in

training for the saddle, and was not bridlewise when so used, had some tendency to establish the fact that the horse was not a trained horse, and could not be deemed a gentle horse, such as appellee had asked for when he went to hire one. Appellee testified that a few weeks after he received the injury both of the appellants, on different occasions, admitted to him that they had made a mistake in giving him a wild horse, instead of a gentle one. The testimony on this point is conflicting, but we think it made a question for the jury to determine, and that the verdict should not be disturbed.

The motion for new trial, filed during the term in which the judgment was rendered, raised only the question of the sufficiency of the evidence, no other error being assigned. At the next term of court another motion for new trial was presented, on the ground of newly discovered evidence. On the hearing of this motion, the court did not grant a new trial, but found that the judgment was excessive, and made an order reducing it from $1,500 down to $750. Both parties took an appeal from that order—one from the refusal of the court to grant a new trial and the other from the order of the court reducing the judgment.

We are of the opinion that the court erred, and exceeded its powers, in reducing the judgment. No question was raised in the first motion for new trial as to the excessiveness of the damages. The judgment was final, and passed beyond the control of the court when the term ended, save as to the right of the party to move for a new trial upon the discovery of new evidence. The power of the court was limited on the hearing of this motion to the granting or refusing of a new trial; it had no power to modify the judgment. If it be conceded that the court had the power (which we do not decide) to require the successful party either to submit to a new trial or enter a remittitur, that was not done. No such alternative was presented to the successful party. The court simply made an order reducing the amount of the judgment, and requiring the successful party to enter a remittitur.

The alleged newly discovered evidence related principally to the excessiveness of the verdict. On the trial of the case the evidence was amply sufficient to sustain the amount of damages assessed by the jury, basing it entirely on the physical

injuries and the suffering which resulted therefrom. The newly discovered evidence on this issue tended in some degree to contradict appellee's contention that he was deprived by the injury of an opportunity to perform services for another under a contract. We are of the opinion, however, that appellants have not shown sufficient reason for having the verdict set aside on account of the discovery of the evidence. They were sufficiently apprised in the complaint that appellee would introduce the evidence which they now seek an opportunity to rebut, and they should have prepared themselves for the trial.

No error was committed in refusing to grant a new trial on account of the discovery of this evidence, and the ruling of the court does not call for a reversal on that point. But the order of the court reducing the judgment is reversed and set aside, and the judgment rendered on the verdict for $1,500 is affirmed.

BUCHANAN v. PARHAM.

Opinion delivered May 9, 1910.

1. COSTS—STATUTORY AUTHORITY.—The courts have no authority to give judgment for costs in contested election cases unless the statute expressly authorizes it. (Page 83.)
2. SAME—ELECTION CONTESTS.—There is no statutory authority for allowing costs in an election contest originating in the county court. (Page 83.)
3. SAME—ENFORCEMENT.—Where a cause was appealed to this court from the circuit court, and judgment entered here for the costs of the appeal, the remedy of the circuit clerk to collect his fee for making the transcript for the appeal is to apply to this court to have his costs taxed, and when taxed to apply to the clerk of this court for a fee bill. (Page 85.)
4. ELECTIONS—BOND FOR COST OF CONTEST—LIABILITY OF SURETY.—A surety upon the bond of an election contestant, given in pursuance of the requirements of Kirby's Digest, § 2865, is not liable for the costs awarded against his principal on appeal where the contest was determined in the principal's favor, but the costs of appeal were adjudged against him because a judgment of ouster was erroneously adjudged to him by the lower court. (Page 85.)

Appeal from Garland Circuit Court; *W. H. Evans*, Judge; reversed.

Wood & Henderson, for appellants.

If Parham had any right to proceed on the bond in the circuit court, it was by a regular suit on the bond. Kirby's Dig., § § 2865, 2867.

C. V. Teague, for R. L. Williams and Ed Parham.

The right to recover costs is statutory. 60 Ark. 194. There is no statute authorizing the recovery of costs in special proceedings like this. 70 Ark. 240. But Parham was entitled to a judgment against the contestant for the cost of the transcript. 68 Ark. 130.

M. S. Cobb, for Ed Parham.

The mandate of the Supreme Court gave the circuit court jurisdiction of the parties and the subject, and it was bound to proceed in accordance with the judgment rendered by this court. 60 Ark. 50; 18 Ark. 292; 56 Ark. 170. The bondsmen were not entitled to notice before judgment was rendered against them. 68 Ark. 130.

McCULLOCH, C. J. The present appeal grows out of the election contest between S. A. Buchanan and R. L. Williams for the office of sheriff of Garland County, which was decided by this court on the appeal of Williams. *Williams* v. *Buchanan,* 86 Ark. 259. Buchanan was the contestant, and judgment in his favor was rendered by the circuit court, declaring him to have been elected to the office of sheriff and ousting the contestee, Williams, from office; and, also, a judgment was rendered in his favor for the emoluments of the office which had been collected by the contestee. This court affirmed that part of the judgment which declared the contestant to have been elected, but reversed the judgment of ouster and for the emoluments; and this court rendered judgment in favor of Williams for all the costs of the appeal.

At the commencement of the contest Buchanan, the contestant, gave a bond, with William McGuigan as surety, in accordance with the statute, conditioned to pay to the contestee and the officers of the court such sums as should be adjudged against him. After the rendition of the aforesaid judgment of this court, Buchanan filed a motion in the Garland Circuit Court to tax the costs of the contest against Williams, his unsuccessful adversary. The latter was served with notice or sum-

tions, and appeared and resisted the motion on the ground that the court was without jurisdiction to render a judgment in favor of the contestant for costs in an election contest. At the same time Ed Parham, who was clerk of the circuit court during the pendency of the contest, filed a motion praying that his fee for making the transcript on the appeal to this court be taxed, and that judgment be rendered in his favor for the amount of the unpaid balance against Buchanan and the surety on his bond. This motion was resisted by both Buchanan and McGuigan, his surety. On the hearing of both motions together, the circuit court rendered judgment in favor of Buchanan against Williams for the amount of the costs of the contest in the county court and in the circuit court, and also rendered judgment in favor of Parham against Buchanan and McGuigan for the amount of his unpaid cost for making the transcript on appeal to this court. Williams appeals from the judgment in Buchanan's favor against him; and Buchanan and McGuigan appeal from the judgment in Parham's favor against them. It is therefore seen that two distinct controversies are presented.

First, as to the controversy between Buchanan and Williams: No express authority is found in the statute for rendering judgment against an unsuccesful contestant in an election contest which originates in the county court. In *Rhodes* v. *Driver,* 69 Ark. 606, this court said that in an election contest originating in the county court the jurisdiction of the court is limited "to an order declaring the contestant elected, and, incidentally, to a judgment for cost." In *Davis* v. *Moore,* 70 Ark. 240, the court, in an opinion by Chief Justice BUNN, intimated that there is no authority to render judgment for cost in favor of a successful contestant, and cited cases in support of that view. In both opinions the language referring to judgments for costs was *dictum;* but in the last cited case the court decided that "election contests are special proceedings, and not civil actions under the Code, and everything must be done therein according to the statute regulating such proceedings, where such statute exists."

In *Williams* v. *Buchanan, supra,* Chief Justice HILL, in delivering the opinion of the court, discussed the several statutes relating to election contests, and pointed out that the sec-

tion authorizing circuit courts in contests for the office of supreme judge, judges of the circuit, chancery and county courts, and prosecuting attorney, to render judgments of ouster and for damage and cost of suit, had no application to contests originating in the county courts. He further said, however, that "the Legislature has decided that it is not wise to give to the county court power to oust the contestant from office and to give judgment for anything other than the costs." The question of costs of the contest does not seem to have been argued in the briefs, and the Chief Justice was merely discussing the question of the authority to render judgment of ouster.

Taking the language of all these opinions, it can be said to be yet an open question whether there is any authority for rendering judgment for costs in favor of a successful contestant for office, the contest of which is by statute originated in the county court. It is plain that the statute does not expressly confer such authority, and it is significant that the Legislature expressly authorized judgment for costs against the unsuccessful contestant and also expressly authorized judgment for costs in favor of the successful contestant for an office, the contest of which is by statute originated in the circuit court. We need not seek a reason for the omission to authorize judgments for costs in favor of successful contestants in the first-named class of contests, as it is within the power of the lawmakers either to give or to withhold such authority. Probably the Legislature did not deem it expedient to impose the costs of a contest on a county officer who defends the title vested in him by the declared result of the election, even though he does not succeed in his defense.

Wilson v. *Fussell,* 60 Ark. 194, was an appeal from a refusal of the circuit judge to tax costs against the unsuccessful appellants from an order of the county court approving the bond of a tax collector. Judge RIDDICK, speaking for the court, said: "The right to recover costs did not exist at common law. It rests upon statute only, and it is to the statute we must look for the authority to recover costs in any given case. * * * There is a general provision in our statute that a plaintiff or defendant recovering judgment at law is entitled to his costs, but this is not an action at law or in equity."

In *Buckley* v. *Williams,* 84 Ark. 187, the court said: "It (the cost of suit) is a liability created by statute, and, in the absence of the statute allowing same, there could be no judgment rendered in favor of a defendant against a plaintiff, where the latter fails in his suit."

The authorities seem to all agree, as far as they go, that courts have no authority to give judgment for costs in contested election cases unless the statute expressly authorizes it. 15 Cyc. 440; *Knox* v. *Fesler,* 17 Ind. 254; *Patterson* v. *Murray,* 53 N. C. 278; *Borgstede* v. *Clark,* 5 La. Ann. 733; *West* v. *Ferguson,* 16 Gratt. (Va.) 270; *Bayard* v. *Klinge,* 16 Minn. 249.

We believe that is the correct view of the question; and if it is deemed expedient to authorize such judgments, the Legislature should so declare by appropriate legislation. It therefore follows that the judgment of the circuit court awarding costs to Buchanan was void, and that the judgment now appealed from taxing the costs should be reversed.

This court rendered judgment against Buchanan for the costs of the appeal. The circuit court had no power to tax the costs of the appeal, or to enforce the judgment of this court against Buchanan. Parham's remedy for the collection of his fee for making the transcript, which constituted a part of the costs of the appeal adjudged against Buchanan, is by enforcement of the judgment of this court. The judgment against Buchanan inured to his benefit, to the extent of the unpaid balance due him for making the transcript. He can apply here for taxation of his unpaid costs, or, if the same has already been taxed, he can apply to the clerk for a fee bill, which has the force and effect of an execution against the goods and chattels of the party against whom the costs were adjudged. Section 3538 of Kirby's Digest provides that "all fees which shall not be paid shall be indorsed on the execution, and collected by virtue thereof, for the benefit of the person rendering the service, or the same may be collected on fee bills, according to the preceding provisions of this chapter; but only the cost of the prevailing party shall be so taxed on such execution."

McGuigan, the surety on Buchanan's bond, is not liable for the costs of the appeal, for Buchanan won the contest, and only the judgment of ouster was reversed. His liability for

costs was not affected by the improper judgment of ouster. Both judgments of the circuit court are therefore reversed, and the proceedings instituted below to tax costs are dismissed.

ARKANSAS FERTILIZER COMPANY v. BANKS.

Opinion delivered May 9, 1910.

1. INSTRUCTIONS—APPLICABILITY TO ISSUES.—Where the issues in a case were as to whether defendants were liable to plaintiff for the value of fertilizers consigned to defendants by plaintiff to be sold and accounted for, it was error to instruct the jury upon the theory that the fertilizers were sold outright to defendants. (Page 93.)
2. FACTORS ANB BROKERS—DUTY OF CONSIGNEE OF GOODS TO SELL FOR PRINCIPAL.—Where goods are consigned to an agent to sell and account for the proceeds to the consignor, it is the duty of the consignee to be reasonably diligent in selling the goods, to exercise reasonable care in selecting responsible purchasers, and to sell same for their fair value or market price upon a reasonable term of credit or for cash, and to exercise reasonable diligence in collecting purchase money when entrusted with the collection, and to promptly account for all money and property which has or may come into his hands by virtue of such agency. (Page 93.)
3. ACCOUNT STATED—APPLICABILITY OF INSTRUCTION.—It was not error to refuse to instruct as to an account stated where no such issue was raised by the pleadings. (Page 93.)
4. SAME—CONCLUSIVENESS.—Where the parties to an open account came to an agreement whereby the debits and credits to which each was entitled were determined, and a balance was ascertained to be due to one of them, and time for payment thereof was extended, such agreement constituted an account stated, which could be impeached only for fraud and mistake. (Page 94.)

Appeal from Sevier Circuit Court; *James S. Steel,* Judge; reversed.

Collins & Collins and *Rose, Hemingway, Cantrell & Loughborough,* for appellants.

An agent must account to his principal for moneys collected, and he cannot defend on the ground of illegality. 48 Ark. 487; 23 Ark. 390. An account stated can only be impeached on the ground of fraud. 13 Ark. 609; 21 Ark. 420; 41 Ark. 502; 47 Ark. 541; 55 Ark. 376; 64 Ark. 39; 68 Ark. 534; 72 Ark. 234; 80 Ark. 438; *Id.* 469.

Otis T. Wingo, for appellee.

BATTLE, J. The Arkansas Fertilizer Company, for cause of action against J. N. Banks and W. C. Brummett, alleges:

"That plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, with its principal place of business at Little Rock, Arkansas. That defendants, J. N. Banks and W. C. Brummett, are indebted to plaintiff in the sum of two hundred and fifty dollars and seventy-two cents, with interest from December 1, 1908, at the rate of eight per cent. per annum, as evidenced by a certain promissory note, which in words and figures is as follows, towit:

"'$1,130.50. De Queen, Ark., May 1st, 1907.

"'On or before November 1st we promise to pay to the Arkansas Fertilizer Company, or order, eleven hundred thirty and 50-100 dollars, for value received, with interest at the rate of eight per cent. per annum from date until paid, and with current rate of exchange on Little Rock, Arkansas, if paid elsewhere. This promissory note is given in full settlement for fertilizers sold, and payment is secured by farmers' promissory notes as collateral.

"'Extended to Nov. 1st, 1908.

"'(Signed) "'J. N. Banks,

"'W. C. Brummett.'

"Wherefore plaintiff prays that it have judgment against the defendants, J. N. Banks and W. C. Brummett, for and in the sum of two hundred and fifty and 72-100 dollars with interest from the 1st day of December, 1908, at the rate of eight per cent. per annum, and for its costs in and about this cause expended."

Defendants claimed damages for money paid out and for loss of time in handling said fertilizers, which they claimed were worthless.

The issues were tried by a jury. The cause of action was based upon the following contract in writing:

"This contract, made between the Arkansas Fertilizer Company, of Little Rock, Ark., and J. N. Banks and W. C. Brummett of De Queen, State of Arkansas.

"Witnesses, that the Arkansas Fertilizer Company agrees to deliver at the prices and on the terms named herein to the

party above named such quantities of the White Diamond fertilizers as are specified below, to be ordered shipped by consignee, before the expiration of this contract, and authorizes them to sell the above named fertilizers and to be sole agents for their sale in the De Queen vicinity, provided that the Arkansas Fertilizer Company shall not be liable for any damages, commissions, or expenses because of failure to deliver goods promptly, if such delays are on their part unavoidable. And provided further that all goods shipped on this contract and the proceeds from the sale thereof shall remain the property of the Arkansas Fertilizer Company until full cash settlement has been made.

"We, J. N. Banks and W. C. Brummett, accept the above, and agree to act as agents for the sale of Arkansas Fertilizer Company's 'White Diamond' brand of fertilizers, and, in consideration of having the exclusive agency for these fertilizers in the above-described territory, agree to make or have made a thorough canvass of said territory for their sale at the proper time, and agree not to undertake the sale of any other fertilizers in said territory during the period covered by this contract; and further agree to pay freight charges, if unpaid, and if necessary store fertilizers in a dry place until sold or settled for, and not to sell or offer to sell the White Diamond fertilizers in the territory of any other agent for the same brand without such agent's consent.

"Terms and prices per ton of 2,000 pounds on cars in car lots at De Queen, Ark., in 100 pound bags.

"Five tons Ammoniated Bone Superphosphate for sandy soil, net to agent, $20.25; 5 tons 20th Century Fertilizer for clay soil, net to agent, $20.25; Nitrated Superphosphate with potash for vegetables' quick growth, net to agent, $26.25; Potash Special, Raw Bone Meal with potash, Pure Raw Bone Meal; 5 tons Kali Superphosphate for fruit soil to make fruit, net to agent, $17.75; Economy Fertilizer; 5 tons Acid Phosphate to make cotton open early, net to agent, $15.25; Orchard Fertilizer, and as much more as can be sold by us.

"Terms: Settlement for spring shipments due May 1; for all fall shipments due November 1. Settlements to be made in cash, or 8 per cent. interest-bearing notes to cover time sales, secured in every instance by the notes of the farmers to whom

sales are made, indorsed by agent as collateral. All fertilizers sold by agents for cash by settlement date are to be settled for with cash. Unsold fertilizers in agent's possession to be settled for by notes without interest, due at the next settlement date. Eight per cent. per annum allowed on payments made before due. It is mutually agreed that this contract may be cancelled by either party hereto when the other party shall fail to perform their part thereof. This contract not valid until approved by the Little Rock office of the Arkansas Fertilizer Company.

"Signed this the 18th day of December, 1906.

"Arkansas Fertilizer Company.
"J. N. Banks,
"W. C. Brummett.

"Accepted December 24, 1906,
"By Arkansas Fertilizer Company.
"Wm. S."

In pursuance of the foregoing contract the plaintiff shipped and delivered to the defendants three carloads of fertilizers to sell for it as agents. On the first day of May, 1907, defendants executed to plaintiff the note sued on, on which are indorsed various sums as credits, amounting in the aggregate to $960.95. They sold a considerable portion of the fertilizers to farmers. They took notes for a part of the purchase money, and delivered them to plaintiff to hold as collaterals. Plaintiff insists that, according to the evidence adduced in the trial, defendants sold fertilizers for $1,130.50, and remitted to plaintiff the same except $250.72, and that they are indebted to it for that amount. On the other hand, the defendants say that, according to the evidence, they remitted to the plaintiff all the moneys collected by them for fertilizers sold, and that plaintiff is indebted to them in the sum of $150.

In the progress of the trial a number of witnesses were allowed to testify in behalf of the defendants, over the objection of plaintiff, that they had purchased fertilizers of the defendants, and paid for them, and used them, and they failed to improve their crops; and others were allowed to testify, over the objection of the plaintiff, that the fertilizers of plaintiff did not improve crops in 1907 as much as other fertilizers.

After instructing the jury as to plaintiff's liability for warranty, the court instructed them, at the request of the plaintiff, as follows:

"7. The court further instructs the jury as a matter of law that under the terms and conditions of the contract entered into between the plaintiff and the defendant it became and was the duty of the defendants to use good judgment and exercise diligence in extending credit to purchasers of fertilizer, and to know that the parties to whom they sold were reasonably honorable annd responsible; it was also their duty to look diligently after the collection of all sums due for such fertilizer so sold, and they can not in this case recoup any amount as against plaintiff on account of their failure to collect any sum or sums due on notes of their customers unless they show that they did comply with their duty in these respects.

"8. You are instructed that the claim of defendants in this case for credits on the note sued on constitutes what is known at law as a severable account, and, before the defendants will be permitted to set off any item of said account as against the claim of plaintiff herein because of the failure of the fertilizer to be reasonably fit for the use intended, they must show by a fair preponderance of the testimony that said amount has not been collected by them; that their failure to collect the same is the direct result of the failure of the fertilizer furnished them by the plaintiff to come up to the implied warranty.

"9. You are instructed that, even though you find that the fertilizer furnished defendants by plaintiff was not reasonably fit for the purpose for which it was intended, yet if you find that defendants actually sold all the fertilizer with which they stand charged for the price for which they expected to sell it when they bought it, and if you further find that they have collected for practically all of it, you would not be warranted in allowing defendants credit for a greater amount by way of counterclaim or setoff than the amount represented by the difference between the amount actually received by them and the amount they would have received had the fertilizer been reasonably fit for the purpose intended, together with any additional amount which you may find that they were forced to expend and the reasonable value of any additional time which

they were forced to spend in handling the said fertilizer; and you would not be warranted in allowing them credit for any of these amounts unless you find from a fair preponderance of the evidence that their loss was occasioned as the direct result of the said fertilizer to be reasonably fit for the purpose for which it was intended."

And the court refused to instruct the jury at the request of the plaintiff as follows:

"16. The jury are instructed that in no case will defendants be entitled to credit on the notes sued on herein for any amount on account of any warranty, either express or implied, until they show that same was used on the character of soil for which it was intended; that it was used in a way calculated to produce good results; that the amount had not been collected, and that the failure to collect the same was wholly due to the failure of the fertilizer to measure up to the analysis.

"17. The jury are instructed that, before the defendants can claim as a setoff in this case any item represented by notes of their customers, they must show that they have used due diligence to collect the same; that they have endeavored to collect them according to law and reduce the same to judgment, and their failure to procure judgment on such note was solely on the ground of the breach of warranty on the part of the plaintiff."

And the court instructed the jury, over the objection of the plaintiff, at the request of the defendants, as follows:

"1. Although you may believe from the evidence that the defendants did not apprise the plaintiff of the worthless condition of the fertilizer, if you find that it was worthless, this could be considered by you only in determining whether or not the fertilizer was in fact worthless; and if you find from a preponderance of the testimony that it was worthless, or that it was not reasonably fit for the purpose for which it was bought, then defendants would not be liable for its value.

"2. You are told that any settlement which might have been made between plaintiff and defendants which did not take into consideration the question of the quality of the fertilizer can only be considered by you in determining whether or not the fertilizer was worthless; and if defendants made no claim on account of the quality of the fertilizer in such settlement,

this can only be considered in determining whether the fertilizer was in fact worthless, or that by their failure to assert such claim they intended to waive the defect, if any existed, in its condition. It is for you to say from all the evidence in the case whether or not the fertilizer was reasonably fit for the purpose for which it was purchased, and whether or not the defendants did in fact waive any claim on account of its worthless condition, if you find it was worthless.

"3. The court instructs the jury that, when a manufacturer offers his goods for sale, where the opportunity of inspection is not present before the purchase, the vendee necessarily relies upon the vendor's knowledge of his own manufacture. In such cases the law implies a warranty that the article shall be merchantable and reasonably fit for the purpose for which it was intended, and for a breach of such implied warranty, the vendee may return or offer to return the goods, if they are susceptible of being returned, after he discovers their unfitness for the purpose for which they were to have been used, or he may keep the goods and, when sued for the purchase money, may plead failure of consideration or recoup the amount of damages sustained by reason of their unfitness.

"4. If the jury believe from the evidence that the unfitness of the fertilizer for the purpose for which it was to be used, if you find that it was so unfit, could not have been known to or discovered by defendants by inspection, but that such unfitness had to be demonstrated by actual use, and that such use made it impossible to return the fertilizer after its unfitness was discovered, then and in that event the defendants were not required to return it or to offer to return it.

"5. If you find from a preponderance of the evidence that the fertilizer in question was entirely worthless for the purpose for which defendants bought it, you will find for the defendants on the question of warranty.

"7. If you find for the defendants on their counterclaim, you will fix their damages at such sum as you may find from the evidence will fairly compensate them for the money expended in payment of freight and the profits which they would have derived from the sale of it, if any.

"9. You are told that the vendor of fertilizer, by selling a compound as a fertilizer, thereby expressly warrants that

it is capable of giving additional producing capacity to land of the character for which it was represented to be suitable."

The jury returned a verdict in favor of the defendants for $120, and the court rendered judgment accordingly, and the plaintiff appealed.

The court erred in trying the issues in the case upon the theory that the fertilizers were sold to the appellee, instead of being consigned by plaintiffs to them to sell as its agent. Upon this theory witnesses were improperly allowed to testify that they purchased a part of them and used them and they failed to improve their crops; and upon the same theory the jury were instructed at the request of appellees. According to the express terms of the written contract, the appellant "authorized the appellees to sell the fertilizers and to be sole agents for their sale in the De Queen vicinity," and the appellees "agreed to act as agents for the sale of appellant's 'White Diamond' brand of fertilizers, and, in consideration of having the exclusive agency for these fertilizers in the above-described territory, agreed to make or have made a thorough canvass of said territory for their sale at the proper time, and agreed not to undertake the sale of any other fertilizer in said territory during the period covered by the contract." In that capacity it was their duty, under their contract with appellant, to be reasonably diligent in selling the fertilizers, to exercise reasonable care and prudence in the selection of responsible purchasers, and to sell the same for their fair value or market price, upon a reasonable term of credit, or to sell for such value or price for cash; and to exercise reasonable diligence in collecting purchase money when entrusted with the collection, and to promptly account to appellant for all money and property which has or may come into their hands during and by virtue of their agency. *Wynne* v. *Schnabaum,* 78 Ark. 402; Mechem on Agency, § § 1013, 1019, 5222.

The instructions given at the request of appellees should not have been given. The jury should have been instructed according to the issues in the case.

Appellant asked the court to instruct the jury as to an account stated. But appellant had not sued on such an account, and in such cases this court has held that it is proper to refuse such instructions. *Allen-West Commission Co.* v.

Hudgins, 74 Ark. 468, 472; *Bagnell Tie & Timber Co.* v. *Goodrich,* 82 Ark. 547, 555. But, as the cause will be remanded, appellant can amend his complaint in the circuit court so as to allege an account stated. If it be true, as stated, that appellant and appellees settled and agreed as to the debits and credits to which each was entitled, and a balance was ascertained to be due the appellant on the appellee's note, and time for the payment of such balance was extended to a future time, then such statement of accounts would be an account stated, and could be impeached only for fraud or mistake, and appellees became liable accordingly. *Charlesworth* v. *Whitlow,* 74 Ark. 277; *Weed* v. *Dyer,* 53 Ark. 155; *Dunavant* v. *Fields,* 68 Ark. 534; *Hamilton-Brown Shoe Co.* v. *Choctaw Mercantile Co.,* 80 Ark. 438, 440; *Fletcher* v. *Whitlow,* 72 Ark. 234, 240.

Reversed and remanded for a new trial.

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

Opinion delivered May 9, 1910.

RAILROAD—NEGLIGENCE—DISCOVERED PERIL.—Where, in a suit against a railroad company for injury to a traveller at a crossing, the evidence tended to prove that the railroad company was negligent in failing to signal, and that the trainmen discovered plaintiff driving a team across the track when the train was one hundred and fifty or two hundred feet from the crossing, and that as it was plaintiff almost succeeded in crossing the track before the train struck and injured him, it was a question for the jury whether, if the signals had been given, plaintiff would have escaped injury, and therefore it was error to direct a verdict for the defendant.

Appeal from Lee Circuit Court; *Hance N. Hutton,* Judge; reversed.

McCulloch & McCulloch and *Smith & Smith,* for appellant.

W. E. Hemingway, E. B. Kinsworthy and *James H. Stevenson,* for appellee.

A traveler who fails to look and listen in both directions before going upon a railway track is guilty of contributory negligence. 69 Ark. 134; 65 Ark. 235; 76 Ark. 224. The tes-

timony of the trainmen is consistent, reasonable and uncontradicted, and cannot be disregarded. 81 Ark. 365.

BATTLE, J. Henry Majors brought this action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages caused by a collision of defendant's engine with a wagon in which he was driving at the time. Plaintiff alleged that such collision was the result of negligence committed by the defendant as follows:

"First. A failure to either ring a bell or sound a whistle for the public crossing where he was injured.

"Second. In a failure to keep a lookout as the law requires.

"Third. In a wanton failure to ring a bell or sound a whistle or in any other manner warn the plaintiff after his perilous situation was by them discovered."

The defendant answered and denied the material allegations of the complaint, and pleaded that the plaintiff's injuries were caused by his contributory negligence.

A jury tried the issues made by the pleadings in the case. After they heard the evidence adduced by both parties, the court peremptorily instructed them to return a verdict for the defendant, which they did, and plaintiff appealed.

Was the evidence adduced in the trial legally sufficient to support a verdict in favor of the plaintiff? That is the only question for us to decide. In deciding it we should give the evidence in his favor its strongest probative force. *Crawford* v. *Sawyer & Austin Lumber Co.*, 91 Ark. 337.

Henry Majors, the plaintiff, testified that on the 9th day of October, 1908, he was traveling in a wagon on a public road approaching the Polk crossing on the defendant's railway from the south; that he had stopped at the Oil Mill crossing, about a half mile south of the Polk crossing, and looked for a train; that about one hundred yards before he reached the Polk crossing he looked south for a train and could see none approaching from that direction; that he drove on to the Polk crossing, not expecting a train from the south, but was looking north; that when upon the Polk crossing an engine of the defendant from the south struck his wagon, completely wrecking it, and threw him to the ground and injured him seriously; that there was no bell rung or whistle sounded until

the engine was upon the crossing; that the whistle and shock came at the same time; that the engineer came back to where he was, and asked, "Didn't you hear the whistle?" and witness replied: "No, you never whistled;" and the engineer said: "I did, and thought you were going to stop;" he didn't whistle until he struck the wagon.

There was evidence legally sufficient to prove that no bell was rung or whistle sounded until the engine struck the wagon. Montgomery, the engineer in charge of the engine, testified that he was running the engine at a speed of about twenty-five miles an hour; that when he first saw Majors his engine was about one hundred and fifty or two hundred feet south of the crossing, and that Majors was sitting in his wagon with his head "hanging down like," and the heads of his mules were five or six feet from the track. That "when he saw Majors he shut off steam and applied the lever and threw it on back motion and applied the air, and that is all an engineer can do to stop a train." The mules and one-half the wagon escaped injury. Had the engineer sounded the whistle when he first saw the heads of the mules within five or six feet from the track, and the engine was one hundred and fifty or two hundred feet from the crossing, Majors might have escaped injury. He came near doing so as it was. What might have been had the whistle been promptly sounded is a matter of conjecture. That was a question for the consideration of the jury.

Garrison v. *St. Louis, I. M. & S. Ry. Co.*, 92 Ark. 437, was similar to this case. The court in that case said: "In the case at bar the testimony tended to prove that, when the plaintiff drove upon the track, and his perilous situation was discovered by the fireman, the train was one hundred feet distant from him. The fireman saw that the plaintiff's back was towards the train, and that he was looking and had been looking away from the train, and had not seen the train, and the plaintiff's conduct and appearance gave evidence that he was wholly unaware of the train's approach. The train was then at such a distance that the plaintiff might have quit the track in safety if he had been warned of the approach of the train. It then became a question for the jury to determine as to whether or not the defendant's servants were guilty of negligence in failing to give the warning signals."

The court erred in instructing the jury to return a verdict for the defendant.

Reversed and remanded for a new trial.

PORTER v. HAMILL.

Opinion delivered May 9, 1910.

MORTGAGES—FORECLOSURE—PARTIES.—In a suit by a senior mortgagee to foreclose a mortgage it was proper for the court to permit a junior mortgagee to join in the complaint in order that his lien may be foreclosed, under Kirby's Digest, § 6005, providing that "all persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs," etc.

Appeal from Randolph Circuit Court in Chancery; *John B. McCaleb*, Judge; affirmed.

STATEMENT BY THE COURT.

R. N. Hamill as assignee brought this suit to foreclose a mortgage on the southeast quarter of the northeast quarter of section 1, in township 19 north, range (2) east, in Randolph County, Arkansas. The mortgage was given to secure a note for $265.86, of date 9th of February, 1891, and due November 15, 1891. P. H. Crenshaw and R. H. Black join in the complaint, stating that on the 9th day of February, 1892, said E. B. Porter was the owner in fee simple of the lands hereinafter described, being indebted to each of them in the sum of $75, and executed to them his several promissory notes of that date, which was the 9th day of February, 1892, payable on the 15th day of November, 1892, and, to secure the payment of the same, said E. B. Porter and wife on the 9th day of February, 1892, executed to P. H. Crenshaw and R. H. Black a mortgage to secure the same on the south half of the northeast quarter of section one (1), township nineteen (19) north, range two (2) east, Randolph County, Arkansas.

George T. Black was appointed guardian *ad litem* for the then infant defendants (appellants) on the 26th day of June, 1896, the acceptance of such appointment being indorsed on the complaint, and filed his answer on the 22d day of June, 1897, the day the decree was rendered.

The answer was simply a formal denial of all the allegations of the complaint.

Jones & Mack, for appellant.

The court is the guardian of the rights of minors, and should give them the benefit of all their defenses. 24 Ark. 43. The Supreme Court will protect the rights of a minor, whether he pleads or not. 60 Ark. 526. A guardian *ad litem* for an infant can admit nothing. 39 Ark. 235; 40 Ark. 42. The plea of misjoinder was a substantial defense, and should have been interposed by the guardian, or the court should have refused a decree. Kirby's Dig., § 6081; 65 Ark. 216; 64 Ark. 126; 80 Ark. 107. Persons having separate liens cannot join in one suit to foreclose them. Bryant's Code Pldg., § 110.

WOOD, J., (after stating the facts). The only question is, should the judgment be reversed because the senior mortgagee and junior mortgagees were joined in the complaint for foreclosure? Mr. Pomeroy on Code Remedies says: "It is a rule universally established that all subsequent incumbrancers, who are holders of general or specific liens on the land, whether mortgagees, judgment creditors, or whatever be the nature of the lien, if it can be enforced against the land, are not necessary parties in the sense that their presence is indispensable to the rendition of a decree of sale; but they are necessary parties defendant to the recovery of a judgment which shall give to the purchaser thereunder a title free from their liens and incumbrances. If they are not joined as defendants, their rights are unaffected; their liens remain undisturbed and continue upon the land while in the hands of the purchaser; and they retain the right of redemption from the holder of the mortgage before the sale, and from the purchaser after the sale. It is not, in general, considered that prior incumbrancers are even proper defendants, for, as their liens are paramount to the mortgage, they can not be in any manner affected by the action or decree therein. Section 239, p. 333.

Where a junior mortgagee comes in and joins in a suit to foreclose, it is not necessary to make him a party defendant, because he is then already before the court. The object in making him a party defendant is that he may be brought in, so that his rights may be protected and preserved as far as pos-

sible, and that the purchaser under the decree of foreclosure may get a title free from junior liens. Mr. Jones says: "In one sense every person who has acquired any interest in the property subsequent to the mortgage is a necessary party to the suit for foreclosure, whether that interest be by way of mortgage or judgment lien, an inchoate right of tenancy in dower or curtesy, or an unconditional estate in fee; because, in order to make the foreclosure complete, and to transfer a perfect title by the sale, it is necessary that the holder of every such right or interest should be brought before the court." Again he says: "All parties in interest should be joined, inasmuch as it is true that the proper object of a bill in equity to foreclose a mortgage is to cut off all rights subsequent to the mortgage." 2 Jones on Mortgages, § § 1394, 1396. At section 1442 the same author says: "New parties who are found to have an interest in the premises may be joined in the bill by amendment, or in a supplemental bill, if application be made within a reasonable time; or they may themselves intervene in the original cause by petition, or may maintain a separate bill. A suit may be stayed, even on final hearing, to bring in subsequent mortgagees and incumbrancers who are found to be proper parties." Our own court has held that in a foreclosure suit a senior mortgagee need not be made a party. See *White* v. *Holman,* 32 Ark. 753.

"It is a general rule in equity," says Mr. Pingrey, "that all persons materially interested, either legally or beneficially, in the subject-matter of the suit are to be made parties to it, either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree which shall bind them all." 2 Pingrey on Mort., § 1665. Our statute provides: "All persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs except where it is otherwise provided. Section 6005, Kirby's Dig. *"Subject of an action"* is not the *cause of the action,* nor the object of the action. It rather describes the physical facts, the things, real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. When there is a suit to foreclose a mortgage, all the mortgagees have an interest in "the subject" of the action and "in obtaining the relief demanded."

Therefore, treating the objection to the complaint as for "misjoinder and multifariousness" as properly raised, the judgment of the court is correct, and must be affirmed. It is so ordered.

BENNETT v. STATE.

Opinion delivered May 9, 1910.

1. HOMICIDE—HARMLESS ERROR.—One convicted of manslaughter cannot complain because the jury convicted him of a lower degree of homicide than that of which the evidence showed him to be guilty, if guilty at all. (Page 104.)
2. EVIDENCE—COMPETENCY.—In a prosecution of defendant for having killed a negro man, it was not error to permit a witness for the State to testify that, taking all of the circumstances, the deceased negro was afraid of defendant; it not appearing that the statement was based upon any statement of the deceased made in defendant's absence. (Page 104.)
3. SAME—CIRCUMSTANCE CONNECTED WITH KILLING.—It was not error, in a murder case, to permit a witness to testify that he found the deceased's hat on the day after the killing in the corner of defendant's room covered up with beer bottles. (Page 105.)
4. HOMICIDE—WHEN INSTRUCTION HARMLESS.—Error in giving instructions as to involuntary manslaughter in a prosecution for murder was not prejudicial where the jury found defendant guilty of voluntary manslaughter. (Page 106.)
5. SAME—INSTRUCTIONS.—One indicted for murder and convicted of voluntary manslaughter cannot complain of instructions that allowed the jury to find him guilty of a lower degree of homicide than he was guilty of under the evidence, if guilty at all. (Page 106.)
6. INSTRUCTIONS—REASONABLE DOUBT.—It is error to charge that a reasonable doubt is one "for which a good and valid reason should be given." (Page 107.)
7. SAME—NECESSITY OF REASONABLE DOUBT.—The objection to an instruction on the subject of reasonable doubt that it must be one "for which a good and valid reason should be given" must be raised specifically. (Page 107.)

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

STATEMENT BY THE COURT.

On or about the 23d day of November, 1908, at the town of Banks, in Bradley County, Arkansas, Ike Bennett killed a

young negro man named Young Hill. Bennett was engaged in the restaurant business. Hill a short time before had been working for Bennett. At the time he was killed, he was working for Doctor Thomas. Late in the afternoon, about dark, Hill was seen with two water buckets in his hand, going towards a well and also towards Bennett's restaurant. When he got close to the restaurant, Bennett called to him and said. come in and get a drink, or to come in and he, Bennett, would give him a drink. One witness said Bennett in a kind of laughing way said: "G— d—, come in and get a drink!" Another witness says he understood Bennett to say: "I feel like killing a damn negro," and the negro replied, "Why, Mr. Bennett!" When Bennett told the negro to come in, the negro replied "he did not care much about a drink, but would go anyhow." When Bennett "talked of killing the negro, he talked loud, like he did not care who heard him." About thirty minutes after Bennett and Hill passed into the house, the shooting took place. Hill was shot with a pistol just above the right eye. The constable was notified that something was wrong in Bennett's restaurant. He summoned a posse, and they guarded the house. At the time the negro was killed two other men besides Bennett were in the restaurant. They were working for Bennett. After Bennett killed the negro, he dragged him behind the counter. His explanation of this was that he had whisky in his house, and that people were coming in and out, and it was necessary to hide the body until he could get the whisky out of the house, and this he endeavored to do.

The two men that were working for Bennett as well as Bennett were arrested. After Bennett and they were arrested, Bennett said: "Turn the other two loose. I killed the negro, and all that I hate is that I hadn't killed the s— of b— two or three weeks earlier." Bennett was drinking. His explanation of the killing was that it was accidental.

Bennett was indicted for murder in the first degree, and was convicted of voluntary manslaughter, and sentenced to three years' imprisonment in the penitentiary. Appellant objected to the following questions and answers of witness Dr. Thomas: "Q. Did Young Hill, at any time just prior to his taking off, have any conversation, in which he was or wasn't present, in which he stated he was going to have to leave Banks on account

of Mr. Bennett? A. Yes, sir. Q. From what you saw, and know, and observed of the negro, was he or was he not afraid of Mr. Bennett? A. I can't answer that question direct and positive. Q. From what you saw, heard and observed, was the negro afraid of Ike Bennett? A. The negro was afraid of him, taking the circumstances connected there. The relationship between the deceased and the defendant at the time he worked for Ike Bennett I will answer like this: Ike and the negro were having conversations day after day while the negro was working for me. My wife was tired of it, and so was I, because it was taking up the time of the negro, and he came to him frequently. I was about half mad at him. My patience had got worried on account of the negro's time being lost. I told Young Hill, 'If you want to work for Mr. Bennett go and work for him.' I don't know that the conditions between Young Hill and Ike Bennett were strained."

The appellant also objected to the following questions and answers in the testimony of G. B. Colvin, sheriff, who testified in rebuttal on behalf of the State: "Q. Did you go to the place where this killing occurred? A. It was the following day; I suppose it was the middle of the morning, about 9 or 10 o'clock. Q. Did you see the interior of the house? A. Yes, sir. Q. Did you see any of the clothing or effects of the deceased in that house? A. Yes, sir. Q. What and where? A. I saw the clothing he had on. Q. Aside from that? A. I didn't see anything except his hat. Q. Where was it? A. Right in the corner of the room was a barrel of empty beer bottles. It fell to my lot to take charge of the liquors. In going through there we found the hat covered up in the beer bottles."

During the cross examination of witness E. C. Peak, who was a witness for appellant, the prosecuting attorney held in his hand a paper, and asked the witness questions in a manner indicating that the witness at the examining trial had made answers and given testimony contradictory of the testimony he was then giving. The following are illustrations of the manner in which the questions were asked:

"Q. You testified that Ike was pouring out wine before? A. I don't know whether he was or not, or whether he had gone behind the counter yet or not. Q. At the examining trial

you were asked that question, 'Did you go for a hack or buggy or something?' A. Yes, sir. Q. Isn't this your answer: 'Yes, sir; after a short while I took Ike's gun from him and put it away; then I went to Dr. Thomas to get a buggy. I really wanted to get away from there and make myself clear?' A. Yes, sir; I wanted to get the whisky away. Q. Did you answer that at the examining trial? A. Probably I did. Q. You say now that Ike told you to go. You said in the examining trial, 'Really, I don't know whether Ike sent me for the buggy or not; I don't think he had anything to do with that.' That is what you testified in the examining trial; is that true? A. I don't know, sir. Q. Which one of these statements is true; the one then or now?" etc.

The court gave the following among other instructions, over the objection of appellant:

"10. If the killing be in the commission of an unlawful act, without malice and without the means calculated to produce death, or in the prosecution of a lawful act done without due caution and circumspection, it shall be manslaughter.

"11. The killing of a human being without a design to effect death in the heat of passion, but in a cruel and unusual manner, unless it be committed under circumstances that would constitute excusable or justifiable homicide, shall be adjudged manslaughter.

"14. You are instructed that a reasonable doubt is not a mere imaginary or captious doubt, but is one for which a good and valid reason should be given; and if you believe that the State has proved to a moral certainty, by the circumstances, conduct and confessions of defendant, and by his actions and demeanor before and after the commission of the murder, then you will find the defendant guilty."

A motion for new trial assigning as error the various rulings to which objections had been made and exceptions taken was filed and overruled. This appeal has been duly prosecuted.

Herring & Williams, for appellant.

Involuntary manslaughter is committed where death results unintentionally. 74 Ark. 268. It is error to charge that a reasonable doubt is such doubt as the jury are able to give a reason for. 133 Ind. 677; 33 N. E. 681. A defect in an

instruction should be reached by a specific objection. 73 Ark. 320.

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

The manner and extent of the examination of witnesses is a matter resting in the discretion of the trial court. 63 Ark. 108; 75 Ark. 142; *Id.* 548; 66 Ark. 545. Appellant's objection to instructions should have been more specific. 73 Ark. 320; 65 Ark. 255; 73 Ark. 350; 69 Ark. 558; 75 Ark. 325. The idea of ability to respond if called upon to give a reason for the doubt is not required by the instruction complained of. 64 N. W. 130; 62 Mich. 329; 120 Ala. 303; 97 Ala. 37; 118 Wis. 621; 94 N. W. 375; 102 Wis. 364; 100 N. Y. 503; 67 Fed. 698; 43 La. Ann. 955; 25 Ore. 242; 41 Fla. 547.

WOOD, J., (after stating the facts). 1. We would not have disturbed a verdict, under the evidence, for murder in the first degree. There is evidence tending to show that appellant was guilty of murder in the first degree. There is no evidence tending to prove that appellant was guilty of voluntary manslaughter. His crime was murder in the first degree, if anything. By finding the appellant guilty, the jury accepted the testimony tending to prove guilt, and rejected the testimony of appellant tending to prove his innocence. Since there was testimony tending to show that appellant was guilty of murder in the first degree, he can not complain because the jury, believing him guilty of some offense, found for a lower degree than that of which he was guilty, if guilty at all. Appellant was not prejudiced by the verdict as to the degree of homicide of which the jury found him guilty, since they might have found him guilty under the evidence of the highest crime charged in the indictment.

2. There was nothing in the testimony of Doctor Thomas showing that he reached the conclusion that Young Hill was afraid of appellant from conversations had with Young Hill when appellant was not present. The first interrogatory and the answer thereto indicates that Young Hill in a conversation stated that he was going to leave Banks on account of appellant. But neither the question nor the answer indicated whether or not appellant was present when the conversation was had.

Indeed, the question was so indefinite it was impossible to say with whom the conversation was had, or who was present taking part in it. The whole of the testimony of Doctor Thomas simply tends to prove that he had reached the conclusion that Young Hill was afraid of appellant. But he nowhere testifies that this conclusion was reached from any conversations he, the witness, had with Hill. The witness reached this conclusion, "taking the circumstances connected there," and he details what these circumstances were. The case of *Casteel* v. *State,* 73 Ark. 152, upon which appellant relies, is not like the case at bar. There the witness was allowed to testify that some months prior to the killing deceased told her that the defendant did not like him, and had imposed upon him. Such testimony was bald hearsay. But such is not the character of the testimony of Dr. Thomas, *supra.*

3. The testimony of the sheriff to the effect that he found the hat of Young Hill the day after the killing in the corner of the room covered up in the beer bottles was not prejudicial to appellant. The sheriff identified the hat as "his" hat, meaning the hat of Young Hill. It was proper testimony to disclose to the jury the situation of the deceased and his articles of clothing, and all the circumstances of the place where the killing occurred. The hat was sufficiently identified as that of Young Hill by the term "his" which the witness used in designating it. If appellant disputed that it was the hat of Young Hill and desired a more specific statement of the reasons why the witness concluded that it was the hat of Hill, appellant should have called for such reasons by cross examination on the point, or by specific objection to the effect that the hat had not been sufficiently identified, nor appellant's connection with placing it among the beer bottles sufficiently established. But this was not done.

4. We find no prejudicial error in the ruling of the court concerning the cross examination of witness Peak. The appellant did not object to the manner of cross examining this witness by the prosecuting attorney until the cross examination had been nearly concluded. He did not then nor thereafter ask that all the testimony of the witness that had been elicited in the alleged objectionable manner be excluded. The testimony that was elicited on cross examination after the objection was

made was not prejudicial to appellant. We have examined the entire testimony of Peak, and there is nothing in his evidence (giving it full credit and conceding that it corroborated the testimony of appellant as to the reason why he temporarily secreted the body of Young Hill) that tends to excuse or justify appellant in the killing of Hill. The witness Peak did not see the killing. He did not know why or how it was done, and the jury under the undisputed evidence could have come to no other conclusion than that the attempt to hide the body for a time after the killing was for no other purpose than to give appellant time to remove the liquors he had in his restaurant for illegal sale, before the crowds should gather to investigate the killing. The testimony of appellant and the testimony of Peak show this, and it is not probable that the jury concluded that the hiding of the body of Hill behind the counter, etc., was for any other purpose. There is no evidence anyhere in the record that appellant attempted to deny the killing of Hill. On the contrary, he admitted it from the first. He did not attempt to conceal that fact at any time. We see no error in the ruling of the court in regard to the cross examination of witness Peak.

5. There was no error of which appellant can complain in the giving of instructions 10 and 11 concerning involuntary manslaughter, for the jury did not find appellant guilty of involuntary manslaughter, but of a higher crime. He was not prejudiced, therefore, by the instructions, and the verdict shows that the jury were not influenced by them.

6. The court correctly charged the jury as to voluntary manslaughter. The case of *Tanks* v. *State,* 71 Ark. 459; has no application here. Tanks was convicted of murder in the second degree, when there was no evidence to warrant conviction of any offense above manslaughter. There it could not be said that an erroneous and abstract application of the statute as to manslaughter did not prejudice the minds of the jury and cause them to find the accused guilty of a higher crime than the evidence warranted. As the verdict was for a higher crime and with no evidence to warrant it, and as the instruction was abstract, prejudice in giving it was apparent. But here the verdict was for a lower crime than the evidence warranted, upon any finding of guilt. Appellant, therefore, is not prejudiced,

and can not complain of instructions that allowed the jury to find him guilty of a lower grade of homicide than he was really guilty of under the evidence, if guilty at all. The jury found him guilty, but were more lenient in fixing the degree of the crime and its punishment than the law and the evidence warranted, on a finding of guilt.

7. In instruction number 14, the court told the jury that a reasonable doubt is not a mere imaginary or captious doubt, but is one *"for which a good and valid reason should be given,"* etc. This court, in *Darden* v. *State,* 73 Ark. 315-320, condemned the words "a reasonable doubt is one for which a juror could give a reason if called upon to do so," in an instruction defining reasonable doubt. The words under consideration are similar, and add an improper and erroneous qualification to the definition of reasonable doubt contained in the other language of the instruction.

The Supreme Court of Indiana, in passing on an instruction which told the jury that "a reasonable doubt is such a doubt as the jury are able to give a reason for," said: "A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers, if you have 'a reasonable doubt of the defendant's guilt, give a reason for your doubt.' And under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is satisfied of his guilt with the certainty which the law requires before there can be an acquittal. There is no such burden resting on the defendant or a juror in a criminal case."

We approve the above, and all that is said by the Supreme Court of Indiana in *Siberry* v. *State,* 133 Ind. 677, 88, 89, 90, concerning the definition of reasonable doubt as stated *supra.*

But in the Darden case we said: "If this be a defect, which we think it was, it should have been reached by a specific objection. It is one the court would have doubtless readily remedied if its attention had been called to it." So it may be said here. The instruction without these words contained others that have been often approved by this court; and, if appellant had wished the instruction confined to the definition as sanctioned

by the court, he should have made specific request for the elimination of the objectionable words.

Affirm.

WALLACE v. STRICKLER.

Opinion delivered May 9, 1910.

1. APPEAL AND ERROR—FAILURE TO ABSTRACT INSTRUCTIONS.—Where the appellant fails to set out in his abstract the instructions which were given by the trial court, the refusal of the court to give instructions asked by him will not be considered, as it will be presumed that the court correctly instructed the jury. (Page 110.)
2. SAME—PRESUMPTION WHERE INSTRUCTIONS ARE NOT ABSTRACTED.—Where only a part of the court's instructions are set forth in appellant's abstract, it will be presumed that the instructions which were given and are objected to were cured by others which were given, unless those set out were so radically defective that they could not be corrected by others. (Page 110.)
3. INSTRUCTIONS—CONFLICT—IGNORING ISSUE.—An instruction which ignores a material issue about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. (Page 111.)

Appeal from Woodruff Circuit Court, Southern District; *Hance N. Hutton,* Judge; reversed.

STATEMENT BY THE COURT.

I. N. Strickler brought this suit against W. W. Wallace to recover the sum of $320 alleged to be due him for services rendered in procuring a sale of certain lands.

The undisputed facts are that Mrs. M. L. Anderson owned certain lands in St. Francis County, Arkansas, and gave to one George H. Poston an option to sell said lands, which expired on May 12, 1909. Poston sold his option to the defendant, W. W. Wallace. On May 1, 1909, Poston and the plaintiff, I. N. Strickler, went to the office of Wallace at Hunter, Arkansas, and entered into a conversation with him in regard to the sale of the land. The testimony as to what occurred there and afterwards in regard to the land is conflicting. The testimony on the part of the plaintiff was to the effect that the defendant represented to them that he was the owner of the land, and that

he made a contract with them to sell the land for him, and that there was no time limit to the contract. That about the first of May they procured purchasers for the lands, who paid a part of the purchase money and agreed in writing to pay the balance on the 19th day of May, 1909. That on the latter date the purchasers came to the town of Hunter to complete the sale. That the balance of the purchase price was offered to, and a deed to the lands demanded from, the defendant. That defendant declined to make the sale. Subsequently, on the same day, defendant sold the lands to the same parties, and on the same terms as had been agreed upon between them and the plaintiff. He declined to pay the plaintiff any commissions for procuring the sale.

The testimony on the part of the defendant was that he did not enter into any contract with Strickler in his office on the said 1st day of May, but that his contract was with Poston. That he never told them that he was the owner of the land, but on the other hand represented that he had an option on the land that would expire on the 12th day of May, 1909, and that, if the sale of the land was made, it would have to be closed by that time.

There was a jury trial, which resulted in a verdict for the plaintiff. From the judgment rendered, the defendant has appealed to this court.

G. Otis Bogle and *Thomas & Lee,* for appellant.

When it is stipulated that the sale should be made within a specified time, the broker is not entitled to commission unless he procures a purchaser within that time. 83 Ark. 202; 75 Cal. 509; 17 Pac. 642; 71 Cal. 226; 16 Pac. 722; 100 Cal. 648; 106 Mo. App. 517; 81 S. W. 209; 83 Hun 116; 31 N. Y. S. 392; 11 Tex. Civ. App. 461; 35 Ill. App. 617; 34 Kan. 576; 71 Mo. App. 525; 48 How. Pr. 508.

Harry M. Woods, for appellee.

Appellant having failed to set out in his abstract all the instructions given, it will be presumed that the jury were properly instructed. 75 Ark. 347; 90 Ark. 230; 88 Ark. 449; 85 Ark. 123; 75 Ark. 571. A broker is entitled to his commission when he procures a purchaser who is willing and able to buy on the terms named. 87 Ark. 506; 44 L. R. A. 593; 53 Ark. 49; 76 Ark. 375; 89 Ark. 195.

HART, J., (after stating the facts). Counsel for the defendant urge upon us that the judgment should be reversed because the court refused certain instructions asked by them, but, as insisted by counsel for plaintiff, they are in no attitude to complain of this for the reason that they have not seen fit to abstract the instructions given by the court. In such case the presumption is that the court correctly instructed the jury, and that all of defendant's instructions which should have been given were covered by those given. *Carpenter* v. *Hammer*, 75 Ark. 347; *Files* v. *Law*, 88 Ark. 449; *St. Louis, I. M. & S. Ry. Co.* v. *Boyles*, 78 Ark. 374.

The court also refused to give instruction No 4 as asked by the defendant, but gave it over the objection of the defendant in the modified form as follows, towit: "You are instructed that if you believe from the evidence that the plaintiff was to sell the land on or before the 12th day of May, 1909, and he failed to do so, then he can not recover from the defendant in this action." By the court orally: "In connection with the foregoing instruction, I give you further instruction. If you find from the evidence that Strickler undertook to sell this land, and had procured a purchaser for the land at the price named, and the purchaser agreed to take the land at the price fixed within the time agreed upon, it was immaterial as to when the deed was executed or the money paid, although not completed by Strickler. If Mr. Wallace completed the sale afterwards on the same terms that Mr. Strickler procured it, it would have been a ratification of the trade of Strickler, and he would have a right to receive his part of the commission."

In such cases the rule is, "since the appellant has not abstracted the other instructions that were given on behalf of appellee and those that were given on his own behalf, we must assume that the instructions given, in the particulars of which appellant complains, were cured by others, unless the instructions as given were so radically defective that they could not be corrected by others." *Dobbins* v. *Little Rock Ry & Elec. Co.*, 79 Ark. 85; *Bourland* v. *McKnight*, 79 Ark. 427; *Jacks* v. *Reeves*, 78 Ark. 428. Defendant's contention was that Poston and the plaintiff, under the terms of the contract with him, must have made the sale and received the purchase money before the 12th

day of May, 1909, in order to be entitled to commissions. His theory of the case was entirely ignored by the court in the above instruction.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564, the court reviewed our previous decisions on the question of conflicting instructions, and said: "It has been decided by this court in an unbroken line of cases that an instruction which ignores a material issue in the case about which the evidence is conflicting, and allows the jury to find a verdict without considering that issue, is misleading and prejudicial, even though another instruction which correctly presents that issue is found in other parts of the charge. Where the instructions are thus conflicting, it is impossible for an appellate court to tell which of them the jury followed, and such an error calls for a reversal. Separate and disconnected instructions, each complete in itself and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole." It is manifest that the instruction as given, having entirely ignored defendant's theory of the case, could not have been cured by any other instruction which the court might have given.

Therefore, for the error in giving the fourth instruction as indicated in the opinion, the judgment must be reversed, and the cause remanded for a new trial.

PELT v. MARLAR.

Opinion delivered May 9, 1910.

BILLS AND NOTES—PRESENTMENT—DILIGENCE.—The drawer of a check payable at a certain bank had sufficient funds to pay the check; if the holder, who lived at another town, had promptly forwarded the check to a suitable agent at the drawee's domicil, it would have been paid; it was not so presented, but was mailed to the drawee bank, which failed without paying it. *Held* that the drawer was discharged by the holder's negligence.

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

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

The burden was on appellee to prove that the drawer was not injured by the delay in presenting the check. 2 Dan. Neg. Inst., § 1588; 44 L. R. A. 398. If the drawer is injured by inexcusable delay in presenting a check for payment, he is discharged from liability. 2 Dan. Neg. Inst., § 1598; 44 L. R. A. 397; 4 L. R. A. (N. S.) 132; 21 Atl. 661. Appellee was, as a matter of law, guilty of negligence in sending the check through his agent to the drawee bank. 67 Ark. 243; 27 L. R. A. 248; 7 Biss. 162; Dan. Neg. Inst., §§ 328a and 1599.

Searcy & Parks, for appellee.

Delay in presenting a check for payment does not release the drawer unless he is injured thereby. 38 L. R. A. 750; 53 *Id.* 432.

HART, J. This action was commenced in a justice of the peace court by T. C. Marlar against J. D. Pelt. The justice rendered judgment for Marlar, and Pelt appealed to the circuit court, where the case was tried before the court sitting as a jury. Marlar again recovered judgment, and Pelt has appealed to this court.

The action was brought on a check of which the following is a copy:

"$100.00 New Lewisville, Arkansas.
"January 14, 1909.
"Merchants & Farmers' Bank:
"Pay to T. C. Marlar one hundred dollars.
"No. 15. "J. D. Pelt."

The testimony is practically undisputed, and is substantially as follows: Appellant drew the check in question on the day it bears date, and at the time had on deposit sufficient funds with which to meet it, and which he did not thereafter draw out of the bank. Appellant indorsed the check in blank, and on the 18th inst. delivered it to the Citizens' Bank of Hope, Arkansas, for collection, which on the same day mailed the check to the German National Bank at Little Rock, Arkansas, properly indorsed for collection. On the 20th inst. that bank indorsed it and sent it forward to the Merchants & Farmers' Bank for collection. The latter bank is at New Lewisville, Arkansas, and closed its doors on the 20th inst. because of insolvency. Its assets were

placed in the hands of a receiver, and it is admitted that they are not sufficient to pay the creditors of the bank any substantial sum. The bank continued to pay checks presented in person or by agent up to the close of its business day on Saturday the 16th inst.; but collections presented to it through the mails were paid by exchange on other banks, and none of the exchange issued by it after the 15th inst. was honored.

The payee and the bank on which the check was drawn were in different places in the same county about 15 miles apart; and counsel for appellee contends that the testimony on his part shows that, had appellant forwarded the check in due course of mail, it would not have reached New Lewisville until the 15th inst. after banking hours, and that under the rule announced in *Burns* v. *Yocum,* 81 Ark. 127, he was not required to present it until the next day, at which time he contends that it would have been too late, for the reason that none of the exchange issued by the Merchants & Farmers' Bank on that day was paid; but learned counsel do not take into consideration the fact that checks presented in person or by agents for collection on the 16th inst. were paid. It may be conceded that the mere fact that appellee forwarded the check direct to the drawee itself, instead of having it presented through another agent, would not of itself discharge appellant. See *Citizens' Bank* v. *First National Bank* (Iowa), 13 L. R. A (N. S.), 303.

But other facts and circumstances enter into the present case. Appellant had sufficient funds on deposit to pay the check, and did not withdraw them. Had appellee promptly forwarded the check to a suitable agent at New Lewisville for presentation, it is conceded that it would have reached him on the evening of the 15th inst., and, had such agent presented it for payment the next day, the undisputed evidence shows that it would have been paid. The failure to do so occasioned loss to appellant, which would have been avoided had presentation and demand of payment been made by some suitable agent selected by appellee for that purpose. This principle is recognized in the case of *Citizens' Bank* v. *First National Bank, supra,* and *Plover Savings Bank* v. *Moodie* (Iowa), 110 N. W. 29, and cases cited.

It follows, therfore, that the judgment must be reversed, and, as there is no dispute about the facts, the case will be dismissed.

STATE v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Opinion delivered May 9, 1910.

1. STATUTES—CONSTRUCTION OF GENERAL WORDS.—When general words in a statute follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated. (Page 116.)
2. MONOPOLIES—COMBINATION AMONG RAILROADS.—The anti-trust act of 1905, p. 1, imposing a penalty upon any corporation, partnership or individual who shall enter into or become a member of or party to any pool, trust, combination, confederation or understanding to regulate or fix "the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, *or any article or thing whatsoever,*" the general words which are italicized take their meaning from the specific words which precede them, and do not apply to combinations among railroad companies fixing the rates for services in the carrying of freight or passengers. (Page 116.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant instituted this action against appellee in the Garland Circuit Court. The complaint alleges that the appellee is a foreign corporation, doing business in the State of Arkansas, and owns and operates a system of railroads in said State; that it has violated act No. 1 of the General Assembly of the State of Arkansas of 1905, commonly called the "anti-trust act," by entering into a pool, trust, agreement, combination, confederation and understanding with certain domestic corporations, also owning and operating lines of railroad within the State, for the purpose of fixing rates to be charged for the service of carrying freight and passengers.

The prayer of the complaint is that the right of appellee to do business in the State be forfeited, and, in addition, that the State recover of appellee the sum of $720,000 as accrued penalties for the violation of the provisions of the act.

The appellee filed a demurrer to the complaint, which was by the court sustained and the cause dismissed. The case is here on appeal.

Hal L. Norwood, Attorney General, *W. H. Rector,* Assistant, *H. B. Means,* Prosecuting Attorney, and *M. S. Cobb,* for appellant.

The complaint stated a cause of action. 166 U. S. 290; 171 U. S. 505. The act of January 23, 1905, includes railroads. 74 Ark. 528. Any combination of competing corporations, the result of which is to control prices, is void and violative of the anti-trust act. 74 Am. St. 189; 15 L. R. A. 361; 61 Fed. 993; 30 Fed. 2; 47 Am. Dec. 258; 37 So. 939; 113 Am. St. 551; 130 U. S. 396; 90 S. W. 214; 106 S. W. 918; 124 S. W. 397; 18 L. R. A. 657.

John M. Moore and *Thos. S Buzbee,* for appellee.

Penal statutes must be strictly construed. 66 Ark. 466; 53 Ark. 336; 76 Ark. 303; 70 Ark. 329; 6 Ark. 134; 43 Ark. 415; 64 Ark. 271; 87 Ark. 409; 67 Ark. 156; 74 Ark. 528; 70 Ark. 451; 61 Ark. 494; 120 S. W. 740; 116 S. W. 1016; 110 N. Y. S. 186; 91 S. W. 214; 118 N. W. 276. In the absence of repugnancy, the more specific statute will control the general. 71 Ark. 135; 84 Ark. 329; 80 Ark. 411.

HART, J., (after stating the facts). The question raised by the appeal is, do the provisions of the anti-trust act apply to the fixing of rates for services performed by railroads in carrying freight and passengers?

Section 1 of the act is as follows:

"Section 1. Any corporation organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association, or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State, or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or tornado, or to maintain said price, when so regulated or fixed, or who are now, or shall hereafter enter into, become a member of or a party to any pool, agreement, contract, combination, association or confederation, whether made in this State or elsewhere, to fix or limit in this State or elsewhere the amount or quantity of any article

of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act."

Section 2 of the act prescribes the penalty. Section 3 provides for the forfeiture of corporate rights and franchises of corporations that violate its provisions. Acts of 1905, p. 1.

Of course, a railroad corporation operating a line of railroad in this State is a corporation conducting a business in the State, but, as above stated, the question is, does such corporation violate the provisions of the act by entering into an agreement with other railroad corporations to fix the value of the services of railroads in the carriage of freight and passengers? Counsel for the State do not contend that freight or passenger rates are articles of merchandise, manufacture, mechanism, commodity, convenience or repair, or that they are products of mining; but they do contend that the words "or any article or thing whatsoever" include passenger and freight rates. We can not agree with their contention. This is a plain case for the application of the doctrine of *ejusdem generis*.

The rule is "when general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated." 2 Lewis, Sutherland on Statutory Construction (2 ed.), § 422.

As stated by this court, in the case of *Hempstead County* v. *Harkness*, 73 Ark. 600: "It is an old and settled rule of statutory construction which confines the meaning of additional and general descriptive words to the class to which the preceding specific words belong." See also *Eastern Arkansas Hedge Fence Co.* v. *Tanner*, 67 Ark. 156; *St. Louis I. M. & S. Ry. Co.* v. *Love*, 74 Ark. 528. The Legislature has delegated to the State Railroad Commission the power to fix rates for the transportation of freight and passengers. Many other acts having for their object the regulation of railroads have been enacted, and severe penalties prescribed to secure their enforcement. The questions

affecting transportation by common carriers have always been the subject of separate and independent legislation in this State. Congress has created a commission to investigate and act upon complaints made in regard to rates affecting interstate commerce. These facts were matters of common knowledge at the time the "anti-trust act" of 1905 was enacted. The act does not purport to deal with the subject of transportation by common carriers, or the fixing of rates therefor, as do the acts in the cases cited by counsel for the State to sustain their contention. Counsel for the State rely chiefly upon the decisions in the cases of *State* v. *Missouri, K. & T. Ry. Co.* (Texas), 91 S. W. 214, and *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290.

In the first of these cases, the Supreme Court of Texas was construing the act of 1903 passed by the Legislature of that State. The court said: "The act of 1903 expressly deals with combinations affecting transportation, competition therein, and the cost thereof," and the decision was based on that fact. An examination of the statute shows that it dealt directly and in express terms with the subject. The Supreme Court of the United States had under consideration the "Sherman Anti-trust Act." The court said: "Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce, Transporting commodities is commerce, and, if from one State to another, it is interstate commerce." Hence it will be seen that these authorities recognize the rule of construction above announced, but did not apply it for the reason that the statutes under consideration, by their express terms, undertook to deal with the subject of transportation by common carriers and the fixing of rates therefor.

As above stated, our "anti-trust act" does not in express terms attempt to deal with the question of transportation by railroads or other carriers, or the fixing of rates therefor. It would be a violent presumption, indeed, to say that the Legislature in this vague and indefinite manner attempted to deal with a subject which so vitally affects the welfare of the people, and a proper solution of which has ever been one of the greatest con-

cern and complexity. It seems evident to us that the framers of the act intended that the words "or any article or thing whatsoever" should take their meaning from the things specifically mentioned before, and that, when so construed, the allegations of the complaint do not constitute a violation of the terms of the act. *State* v. *Williams,* 120 S. W. (Mo. Sup Ct.), 740; In re *Attorney General,* 110 N. Y. Supp. 186; *Rohlf* v. *Kasemeier,* 118 N. W (Iowa), 276.

The judgment will therefore be affirmed.

AUTOMATIC WEIGHING COMPANY v. CARTER.

Opinion delivered May 9, 1910.

1. MANDAMUS—REQUIRING COURT TO HEAR CASE.—The writ of mandamus to compel the circuit judge to proceed to hear a cause will not be issued until the petitioner has exhausted all other available means to obtain the enforcement of his rights. (Page 120.)
2. PLEADING—DUTY OF DEFENDANT TO INTERPOSE DEFENSE.—It is the duty of the defendant in an action at law to interpose all defenses that it has to the action, whether legal or equitable; and, if equitable, to ask that the cause be transferred to the equity court. (Page 121.)
3. MANDAMUS—COMPELLING COURT TO HEAR CAUSE.—A writ of mandamus will not be issued by this court to compel the circuit court to try a cause which was brought to that court and by it transferred to the court of equity, until the latter court refuses to take cognizance of the case. (Page 122.)

Original Petition for Mandamus; writ denied.

Shaver, 91 Ark. 231. A corporation having no authority to Petitioner is entitled to the writ requested. *Gilbert* v. *John H. Crawford,* for petitioner.

insure may be held liable on a contract by which it obligates itself to insure. 74 Ark. 377; 160 U. S. 515; 69 L. R. A. 856; 35 Miss. 618; 72 Am. Dec. 143. Equity follows the law, and will neither make a contract for the parties, nor permit one of them to violate a contract which they have freely and advisedly entered into. 14 Ark. 315; 56 Ark. 405; 57 Ark. 168; 73 Ark. 432; 83 Ark. 144; *Id.* 364; 87 Ark. 52; *Id.* 545; 40 Ore. 339; 56 L. R. A. 160.

McMillan & McMillan, for respondent.

If the order of the court is erroneous, it could be corrected on appeal. 74 Ark. 354; 88 Ark. 161. The judicial discretion of inferior courts can not be controlled by mandamus. 84 Ark. 159; 25 Ark. 614; 44 Ark. 320; High's Ex. Rem., § 173; 209 U. S. 436. The sum mentioned in the contract should be treated as a penalty, and not as liquidated damages. 57 Ark. 175; 73 Ark. 435; 38 Ark. 557. Fraud gives equity jurisdiction. 33 Ark. 425. The remedy at law must be plain, direct and complete in order to defeat the jurisdiction of equity. 4 Ark. 302; 8 Ark. 57; 1 Ark. 197; 76 Ark. 497.

FRAUENTHAL, J. This is an original action instituted in this court for a mandamus to the circuit court of Clark County, in the nature of a writ of procedendo, to compel that court to assume jurisdiction of a cause, which was brought in that court, and to try and determine the same. The Automatic Weighing Machine Company, the petitioner herein, instituted a suit in the Clark Circuit Court against the Arkadelphia Milling Company, and in its complaint it alleged that the defendant was indebted to it, under and by virtue of a written contract, for the value of two weighing machines; and it sought to recover judgment therefor. To said action the defendant filed an answer and cross complaint, in which it claimed to set forth certain equitable rights and defenses, and it incorporated in said pleading a motion to transfer said cause to the Clark Chancery Court. Upon a hearing of said motion the circuit court sustained the same, and entered an order transferring the cause to the chancery court, and thereafter refused to proceed with or to exercise further jurisdiction over said cause. Thereupon the plaintiff in said case filed its petition in this court against the Hon. Jacob M. Carter, as judge of the Clark Circuit Court, seeking the issuance of said mandamus. In said petition it has set forth the complaint, and answer, cross complaint and motion to transfer filed in said case of the Automatic Weighing Machine Company against Arkadelphia Milling Company, and claims that therefrom it clearly appears that the Clark Circuit Court has jurisdiction to hear and try said cause, and that the defendant has pleaded no right or defense that is exclusively cognizable in a court of chancery. It therefore contends that the circuit court had no power to transfer said case to the chancery court

and to thus divest it of the jurisdiction and duty to hear and determine same. In the answer to this petition the respondent contends that the said answer and cross complaint do set forth equitable rights and equitable defenses, and that the Clark Circuit Court made said order of transfer in the due exercise of its judicial discretion.

We do not deem it necessary to set forth the allegations of said answer and cross complaint, or to determine whether or not any equitable defense is therein set forth, or whether or not the circuit court erred in transferring the case to the chancery court, or whether or not in the present status of the case such order of the circuit court was an exercise of judicial discretion which could not be controlled by mandamus; because the petitioner has not shown that he has no other adequate remedy, and that he can not secure such remedy by following said case to the chancery court to which it has been transferred. The writ of mandamus is only employed in unusual cases, and where no other remedy is available.

The exercise of the jurisdiction to issue the writ rests within the sound discretion of the court. It has been uniformly held that it will be issued only on extraordinary occasions to meet emergencies and to prevent a failure of justice. On this account the discretion to issue the writ will not be exercised until the parties have used all other available means to obtain the enforcement of their rights. High's Extraordinary Remedies, § 9; Ex parte *Whitney,* 13 Pet. 404.

In the case of *Goings* v. *Mills,* 1 Ark. 11, it is said: "It is believed to be well settled that the writ of mandamus is not to be considered as a writ of right, but it is understood to be within the discretion of the court to grant it; and it is held to be a general rule that the party applying for this writ must show a specific legal right and the absence of any specific legal remedy to induce the court to grant it." In the case of *Fitch* v. *McDiarmid,* 26 Ark. 482, the court said: "Upon the strength of the foregoing authorities, emanating as they do from such eminent jurists, we have no hesitancy in announcing that before a person can obtain the writ of mandamus he must present such a case or show that he has a clear, legal right to the subject-matter of his petition; second, that he has no other adequate remedy." Mr. High, in his work on Extraordinary Remedies,

§ 188, says that a review of the authorities show "the doctrine to be too firmly established to be easily shaken that the existence of another adequate and specific remedy is a sufficient bar to the granting of relief by mandamus, and that the writ is never allowed when the grievance in question may be corrected on error or appeal. Closely allied to this doctrine, and founded upon the same reasoning, is the principle that mandamus will not be allowed to take the place or to usurp the functions of an appeal or writ of error. Ex parte *Trapnall,* 6 Ark. 9; *Underwood* v. *White,* 27 Ark. 382; *Barham* v. *Carroll,* 44 Ark. 284; 19 Am. & Eng. Enc. Law, 756; 26 Cyc. 168.

In the case at bar it appears that the Automatic Weighing Machine Company instituted an action at law against the Arkadelphia Milling Company in the circuit court. The defendant in that case set forth, as it claimed, an equitable defense to that action, and moved that the case be transferred to the chancery court. This the defendant had the right to do. It was the duty of the defendant to interpose all defenses that it had to the action, whether legal or equitable; and, if equitable, to ask that the cause be transferred to the chancery court. Kirby's Digest, § § 1282, 5995; *Reeve* v. *Jackson,* 46 Ark. 272; *Daniel* v. *Garner,* 71 Ark. 484.

The circuit court did not refuse to assume jurisdiction of the action, but proceeded to hear and pass upon the motion to transfer. This it had the right to do. In the exercise of its judicial discretion it determined that the answer set forth an equitable defense, and ordered the transfer of the case to the chancery court. Before the chancery court has taken any action relative to the case, the petitioner now seeks this extraordinary remedy of mandamus from this court. The chancery court may, within its judicial discretion, determine that it should entertain jurisdiction of this case. If it does so, and shall make an order or judgment therein which is appealable, then the petitioner has the remedy of appeal or writ of error, if it shall believe that it is aggrieved by such decision; and upon such appeal to have the order of transfer reviewed. It has now the right to proceed with said cause to the chancery court; and, until that court shall refuse to take cognizance of the case, it can not be said that the petitioner is without adequate remedy.

The petitioner relies upon the case of *Gilbert* v. *Shaver,* 91 Ark. 231, for his action herein. In that case the action was instituted in the circuit court, and the defendant filed thereto an answer and cross complaint in which he claimed to set forth an equitable defense; and upon his motion the case was transferred to the chancery court. The chancery court thereupon refused to take jurisdiction of the case and remanded it to the circuit court. After this action was taken by the chancery court a petition was filed in this court for a mandamus seeking to compel the chancery court to assume jurisdiction of the case and to try and determine same. In that case it was held that, inasmuch as an appeal could not be taken from an order of transfer (*Womack* v. *Connor,* 74 Ark. 352), the petitioner was without a remedy. In that case the circuit court had refused to assume jurisdiction of the action, and the chancery court had also refused to take jurisdiction thereof. The petitioner had used all available means to obtain an enforcement of his rights. An extraordinary occasion was presented where the lower courts, which by the statute and Constitution were invested with jurisdiction to hear and determine such rights as the petitioner presented, refused to assume jurisdiction thereof and refused to make a final order from which the petitioner could appeal. The writ was therefore awarded to meet the emergency presented and to prevent a failure of justice. But no such emergency is presented by the petitioner in the action at bar. It has not followed its cause to the chancery court and there prosecuted same. It has not sought that remedy which at present appears to be open to it, but rather seeks, by this proceeding for a mandamus, to review the alleged error of the circuit court in making the order of transfer. This it cannot do. Until the chancery court shall fail to take jurisdiction of the action, or until such court shall refuse to make some final order that will be appealable, it cannot be said that the petitioner has no available remedy.

The petition for a mandamus is therefore denied.

BROWN v. HARDY.

Opinion delivered May 16, 1910.

APPEAL AND ERROR—SUFFICIENCY OF ABSTRACT.—Unless there is something in appellant's abstract and brief which shows that an error was committed, and that the same was properly objected to, and that exceptions were saved, the judgment will be affirmed.

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

Gaughan & Sifford, for appellant.

Powell & Taylor, for appellee.

McCULLOCH, C. J. This is an action instituted by appellee against appellants to recover a balance claimed to be due on his salary as manager of a cotton oil mill at Camden, Arkansas, owned and operated by the appellants. Appellants answered, admitting the employment of appellee by them as such manager at the salary mentioned in the complaint, but they alleged that appellee, by virtue of his contract of employment, agreed to manage the business in a careful, capable and business-like manner, and had failed to do so. They seek to recoup damages alleged to have been sustained by reason of the negligence of appellee in his management of the mill, and set forth numerous specifications as to said acts of negligence and mismanagement. The case was tried before a jury, and seems to have resulted in a verdict and judgment in favor of appellee, though the amount of the verdict is not set forth in appellant's abstract. In fact, the abstract furnished by counsel is so incomplete that we are precluded, under the rules of this court announced in previous decisions, from considering the case on its merits. The only assignment of error referred to in the abstract and brief is the giving of an instruction at appellee's request. This instruction is quite a lengthy one, and contains numerous separate paragraphs. Whether this instruction was objected to or not, or, if so, what part was objected to, nowhere appears in the abstract or brief. In fact, the abstract and brief contains no reference to a motion for new trial or to an exception saved at the time of the trial. In order to determine whether or not error was committed, we would be compelled to thoroughly explore the record to ascertain what instructions were given, and whether or not exceptions were saved. This we are not

called on to do. On the contrary, unless there is something in the abstract and brief which shows that an error was committed, and that the same was properly objected to below and exceptions saved, nothing is left for us to do but to affirm the judgment. *Wallace* v. *St. Louis, I. M. & S. Ry. Co.*, 83 Ark. 359; *Files* v. *Law*, 88 Ark. 449; *Haglin* v. *Atkinson-Williams Hardware Co.*, 93 Ark. 85.

Appellant's abstract of the testimony shows that there was sufficient evidence to sustain the verdict in favor of appellee. The judgment is therefore affirmed.

WAIT v. MCKEE.

Opinion delivered May 16, 1910.

1. CORPORATIONS—STOCK SUBSCRIPTION—LIABILITY.—Where the directors of an insurance company issued paid-up stock to the stockholders upon payment of 50 per cent. thereof, the stockholders will be liable for the full amount of their stock subscriptions, notwithstanding the illegal credit, but the directors will be liable only to the extent that loss was suffered on account of their failure to enforce the liability of such stockholders. (Page 128.)
2. SAME—LIABILITY OF DIRECTORS.—Where a stock insurance company was organized for the purpose of taking over the business of a mutual insurance company, and assuming its liabilities, the directors of the stock insurance company will not be liable for the debts of the new company where they acted as reasonably prudent business men in taking over the business and assuming the debts of the old company. (Page 128.)
3. SAME—LIABILITY OF DIRECTORS.—The directors of an insurance company are not liable for having paid a valid debt of the company at a time when it was insolvent, since, if the payment was an unlawful preference, the remedy was against the preferred creditor. (Page 129.)
4. SAME—MISAPPROPRIATION OF FUNDS—LIABILITY OF DIRECTORS.—The directors of an insurance company are liable to its creditors for misappropriating its funds in purchasing the worthless stock subscription notes of its shareholders. (Page 129.)
5. SAME—DIRECTORS—DELEGATION OF AUTHORITY.—The directors of a corporation are responsible to the corporation, its stockholders and creditors, for the management of its affairs, and cannot shirk their duty by delegating it to another. (Page 129.)
6. BILLS AND NOTES—ACCOMMODATION PAPER—PAYMENT.—Where indorsed paper is paid or settled by the accommodated party, all liability of the accommodation party is extinguished, though the paper is subsequently indorsed by the latter without recourse. (Page 129.)

7. SAME—ACCOMMODATION INDORSER—DISCHARGE.—The purchase of notes indorsed for accommodation by the accommodated party is equivalent to a payment, so far as the accommodation indorser is concerned. (Page 130.)

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

Rose, Hemingway, Cantrell & Loughborough and *John T. Hicks,* for appellant.

The directors of a corporation cannot be charged with the consequences of an honest error of judgment or accidental mistake in the exercise of their discretionary powers. 1 Morawetz on Corp., § 553; 141 U. S. 132; 34 N. J. Eq. 383; 1 R. I. 312; 51 N. Y. 27; L. R. 5 Ch. 763; 10 Ch. D. 452.

J. H. Carmichael, for appellee.

The preference was illegal. Kirby's Dig., § 951; 67 Ark. 11; 81 Ark. 591. Officers of a corporation issuing false certificates are liable therefor to a *bona fide* purchaser of such certificates. 36 N. Y. 200. Directors are liable for putting property into a corporation for more than its fair value. 118 N. Y. 383; 151 Mass. 547. Directors must use ordinary care in transacting the business of the corporation. 3 Cook on Corp., § 703; 74 Ark. 585; 55 L. R. A. 751. Fraud of the president is the fraud of the company. 68 Ark. 299. A bank is bound by the knowledge of its cashier. 77 Ark. 172.

Rose, Hemingway, Cantrell & Loughborough and *John T. Hicks,* for appellant in reply.

An insolvent corporation may prefer its own directors. 59 Ark. 562; 157 U. S. 312.

J. H. Carmichael, for appellee in reply.

The officers are liable for the difference between the face value of the stock and what was really paid therefor. 151 Mass. 547; 156 Mass. 137; 138 Mass. 350; 61 N. Y. 237; 80 N. Y. 527.

MCCULLOCH, C. J. The Security Fire Insurance Company, a domestic fire insurance corporation domiciled at Little Rock, Arkansas, became insolvent, and a receiver was appointed by the chancery court of Pulaski County to wind up its affairs. The receiver, Charles McKee, instituted the present suit against the directors of the defunct corporation for losses which are

alleged to have resulted from negligence and mismanagement in the discharge of their duties. Counsel for plaintiff summarizes as follows, in his brief, four distinct controversies or points involved, on which he contends the directors should be held liable:

"Proposition 1. The directors should be held liable for watering the stock of the Security Fire Insurance Company.

"Proposition 2. The directors should be held liable for taking over the business of the Security Mutual Insurance Company without proper investigation.

"Proposition 3. They should be held liable for preferring the Citizens Investment & Security Company in the sum of $6,500 after they knew that the Security Fire Insurance Company was insolvent.

"Proposition 4. The directors should be held liable for using the funds of the corporation to purchase worthless notes."

The chancery court on final hearing of the cause rendered a decree against the defendants only on the fourth proposition, the amount decreed being $4,737.68 with interest, the whole aggregating the sum of $5,780.14. Two of the defendants, Robert E. Wait and H. P. Edmonson, appealed from the decree against them. Plaintiff appealed from the failure or refusal of the court to decree liability on the three other propositions.

There is little, if any, conflict in the testimony. The Security Fire Insurance Company was organized in November, 1903; Alex C. Hull being its chief promoter and president. For several years prior thereto a mutual insurance company, known as the Security Mutual Fire Insurance Company, had been engaged in business in Little Rock, and Mr. Hull was its president and manager. It had been doing a large business as a mutual company, and had an extensive system of local and traveling insurance agents throughout the State of Arkansas. Mr. Hull and others interested in the company conceived the idea of organizing a new insurance company on the stock basis as successor to the mutual company, and the Security Fire Insurance Company was organized to carry out that plan. It was understood in the beginning that the last-named company should be organized for that purpose, and that it would take over or purchase the assets of the old company, and assume its liabilities. The work of organizing the new company began in November, 1903, but

it was not complete, and the company was not ready for business until June, 1904.

The statutes of this State provide that "no insurance company shall be allowed to transact business of insurance in this State until it shall have a *bona fide* subscribed capital of not less than one hundred thousand dollars, with a paid-up capital of not less than fifty thousand dollars." Sec. 4335, Kirby's Digest.

The delay in perfecting the organization of this company was in getting the requisite amount of stock subscribed. The necessary amount of stock was finally subscribed, but not paid. Notes were executed for stock subscriptions, but credits of fifty per cent. were indorsed on said notes, leaving only the remaining fifty per cent. payable, so that the stock was in fact subscribed at fifty per cent. of its face or par value. The stock certificates issued were indorsed, "non-assessable and paid-up."

The company did not have $50,000 paid-up capital, as required by the statute in order to do business, and for the purpose of raising that amount it sold the Citizens Investment Company of Little Rock the stock subscription notes given by its subscribers to the amount of $40,000 (after the fifty per cent. had been credited thereon), and thus realized the requisite amount in order to get a certificate from the State Auditor to do business. The notes were sold absolutely, and were indorsed "without recourse" by the insurance company, but Hull and Neimeyer (another of the directors) indorsed them, and Neimeyer pledged his shares of stock in other corporations as security to the Citizens Investment Company for these notes. Hull and Neimeyer were the principal stockholders in and promoters of the insurance company, and indorsed the notes as a matter of accommodation in order to raise funds for the company on its notes so that it could proceed to transact business. The company sold the notes for the obvious purpose of parting with all interest in or liability on them, so that the sum realized would swell its paid-up capital to $50,000. Otherwise the stock for which the notes were executed could not have been certified as paid-up.

On March 25, 1905, the company repurchased from the Citizens Investment Company $7,797.68 of these stock notes;

$4,737.68 of them have never been paid, and are worthless, so far as the makers are concerned.

The new company took over the business and assets of the Security Mutual Fire Insurance Company, and assumed its liabilities. Among the other liabilities assumed was a debt to the Citizens Investment Company of $6,500, for which the old company had executed its note, and on December 5, 1905, it paid this amount with interest to the Citizens Investment Company, thus discharging the note.

The company did business through the years 1904 and 1905, and in November or December, 1905, it was found to be insolvent. The company was probably insolvent long before that time, but on account of concealment of its liabilities by the president the directors did not become aware of its true condition. After this condition was ascertained an effort was made to procure the certificate of the Auditor permitting the further operation of the business for the next year on accommodation notes executed to the company; but the Auditor withheld his approval, and the insolvency proceedings in the chancery court soon followed.

The chancellor declined to render a decree against the directors on the charge of watering the stock, that is to say, issuing paid-up stock with fifty per cent. of the stock notes credited back. The grounds of his refusal, stated in the decree, were that the stockholders were liable for the full unpaid price of the stock, notwithstanding the illegal credit, and that no decree should go against the directors until the remedy against the stockholders is exhausted, and then only to the extent of any loss developed, none being shown in the present case. We think that is the correct view of the matter. The stockholders are liable for the full amount of their several stock subscriptions, notwithstanding the wrongful credits on the notes. 1 Cook on Corporations, § 28. When the remedy against them is exhausted, the question of the directors' liability will then arise as to any loss on account of failure to enforce liability of the stockholders.

The chancellor was also correct in refusing to charge the directors with liability for taking over the assets and business of the Security Mutual Fire Insurance Company and assuming its liabilities. This was the purpose of the organization of the

new company, and in doing this the directors were but carrying out the will of the stockholders. No negligence on their part in this transaction is shown. They used all means reasonably available to ascertain the condition of the mutual company, and acted as reasonably prudent business men. The charge is entirely unfounded, as far as the proof shows, that two of the directors interested in the affairs of the Citizens Investment Company procured the assumption of the liabilities of the mutual company in order to get its debt paid. The debt was already well secured.

It is insisted that the directors should be held liable for the sum of $6,500 paid to the Citizens Investment Company on December 16, 1905. Why should they be held liable? It was a valid and subsisting debt of the Security Fire Insurance Company, and was paid out of available funds of the company. Conceding that the company was insolvent at the time of the payment, that fact does not render the directors responsible. If the payment was an unlawful preference to the Citizens Investment Company as a creditor, the remedy, if any, was against that company to recover the amount so paid. Upon no theory can the directors be held for the amount paid.

The only remaining question is as to the liability of the directors for the amount paid for the stock subscription notes repurchased from the Citizens Investment Company. Aside from the indorsement of Neimeyer, the notes were worthless. They did not constitute bankable paper, and it was not the part of good business judgment to purchase them. It is no excuse for the directors to say that they intrusted the selection of the notes to Hull, as president. They, as directors, were responsible to the corporation, its stockholders and creditors, for the management of its affairs, and they could not shirk the duty by delegating it to another. *Fletcher* v. *Eagle,* 74 Ark. 585; *Bailey* v. *O'Neal,* 92 Ark. 327.

It is insisted that the indorsement of Neimeyer and the pledge of his stock in other corporations made the notes good. Neimeyer's indorsement was made for the accommodation of the Security Fire Insurance Company, and did not inure to the benefit of the latter when it repurchased the notes. The question whether or not the company was bound to protect its accommodation indorser, Neimeyer, or whether the latter, in the

event he paid the notes, could have looked to the company for reimbursement, does not arise. He did not pay the notes, and was not called upon to do so. His pledged stock was not delivered to the company when it repurchased the notes, the same being retained by the Citizens Investment Company as security for debts still unpaid. Neimeyer was no longer responsible on the notes when they passed back into the hands of the company for whose accommodation the indorsement was made. It is well settled by the authorities that where indorsed paper is paid or settled by the accommodated party all liability of the accommodation party is extinguished. 1 Enc. L. & P. 539.

The facts of this case are peculiar in that the accommodated party (which was the Security Fire Insurance Company) indorsed the note without recourse. We can not see, however, that this affects the principles above stated. For, notwithstanding the indorsement without recourse, the accommodated party extinguished the liability of the indorser when payment was made to the holder of the indorsed note. The accommodated party cannot, under those circumstances, purchase the notes and thus keep alive the liability of the indorser. There is an implied liability on the part of the accommodated party to protect the indorser; and the purchase of the notes from the indorsee was equivalent to a payment, so far as the indorser was concerned. 1 Am. & Eng. Enc. Law, 504.

We can conceive of no principle which will permit one who has taken advantage of an indorsement of paper, made for his own benefit, to pay the note in the hands of the indorsee or purchase it and assert liability against the accommodation indorser.

We conclude, therefore, that the decree of the chancellor was correct as a whole, and the same is in all things affirmed.

BATTLE and WOOD, JJ., dissent on the ground that the directors should not be held liable on the repurchase of stock subscription notes. They agree with the majority on the other points.

DELANEY v. JACKSON.

Opinion delivered May 16, 1910.

1. INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.—An exception to several instructions as follows: "To the giving of each of said instructions numbered one, two and three the defendant at the proper time excepted and asked that his exception to the giving of each of said instructions be noted of record, which is accordingly done"—is sufficient to raise objections to the several instructions. (Page 135.)
2. LANDLORD AND TENANT—DUTY TO REPAIR.—Unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute, be compelled to do so. (Page 135.)
3. EVIDENCE—CONTRADICTING WRITING.—Parol evidence is inadmissible to vary, qualify or contradict, to add to or subtract from the absolute terms of a valid and unambiguous written contract. (Page 135.)
4. SAME—PAROL PROOF OF FRAUD.—An intentionally false and misleading representation which induces a written contract to another's injury is a tort outside the contract, and may be proved by parol. (Page 135.)
5. FRAUD—MATERIALITY OF MISREPRESENTATION.—In order to vitiate a contract on the ground of fraudulent misrepresentation, such misrepresentation must relate to a matter material to the contract and in regard to which the other party had a right to rely and did rely, to his injury. (Page 136.)
6. SAME—OPPORTUNITY OF INFORMATION.—If the means of information as to the subject of a representation is equally accessible to both parties, they will be presumed to have informed themselves; and if they have not done so, they must abide the consequence of their own carelessness. (Page 136.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

Wood & Henderson, for appellant.

Appellant was not required to keep the premises in repair, there being no covenants in the lease to that effect. 71 S. W. 903; 10 L. R. A. 147; 55 Am. Dec. 45; 60 Atl. 886; 72 Ark. 405; 51 Ark. 46; 63 Ark. 430.

Greaves & Martin, for appellee.

Objection must be made at the time improper evidence is given, otherwise it is waived. The same is true with regard to instructions. 72 Ark. 371. An objection to the court's refusal to give several instructions collectively is not sufficient if any one of them is bad. 75 Ark. 181; 80 Ark. 528; *Id.* 587; 70 Ark. 482; 85 Ark. 130; 60 Ark. 256; 86 Ark. 103; 60 Ark. 250; 140 U. S.

234; 4 S. Dak. 88; 89 Hun 75; 52 Am. St. 94; 87 Ark. 614; 80 Ark. 528; 79 Ark. 338; 13 Pet. 302; 12 L. R. A. 554; 8 *Id.* 608; 69 Ark. 143. The oral evidence was admissible. 96 Tenn. 148; 34 L. R. A. 824; 73 Ark. 542; 22 Ark. 463; 87 Ark. 62; 47 Ark. 148; 21 Ark. 284; 38 Ark. 334; 17 L. R. A. 270. Where the verdict in a new trial must be the same, the case will not be reversed. 43 Ark. 296; 44 Ark. 556; 46 Ark. 542; 57 Ark. 242; 60 Ark. 508.

BATTLE, J. P. J. Delaney and J. B. Johnson entered into a written contract of lease, which is in part as follows: "This agreement, between P. J. Delaney and J. B. Johnson, as lessee, entered into at Hot Springs, Arkansas, this 15th day of September, 1908, witnesseth:

"That said lessor hereby leases and demises to said lessee the following described house and premises, namely, a certain two-story frame building house, known as the Marion Hotel, situated on Whittington Avenue and on lot 7, in block 132, of the city of Hot Springs, county of Garland and State of Arkansas, from the 15th day of September, 1908, to the 15th day of September, 1909, for the consideration of the monthly rent of one hundred ($100) dollars to be paid in advance on the first day of each and every month of said term, and for other valuable considerations hereinafter mentioned and described in the premises and covenants of said lessee hereinafter set forth.

"The said lessee hereby agrees and promises to pay to the lessor the sum of one hundred ($100) dollars on the first day of each and every month during the continuance hereof as rent for said premises. That is to say, said lessee is to pay one hundred ($100) dollars upon the execution and delivery of this lease and one hundred ($100) dollars on the 15th day of each succeeding month during the term of this lease; and, as security for the payment of said rent and the faithful performance of his covenants as lessee herein, he has agreed, and does hereby agree, to pay to said lessor, upon the execution of this lease, the sum of three hundred ($300) dollars in lawful money of the United States, which said sum is to be held by said lessor to secure him against all loss from the nonpayment of rent on the part of said lessee, and for all damage done, suffered or

permitted by said lessee to the property herein leased during the term of this lease."

The contract was signed by both parties. It contained no stipulation or warranty that the roof of the house was in good repair, or that it would not leak, or to keep the same or house in repair.

Johnson instituted an action against Delaney on this contract, in the Garland Circuit Court, to recover the $300. He alleged in his complaint that he and defendant entered into the foregoing contract; that pursuant to the terms thereof he deposited with the defendant the $300 as security for the payment of rent; that the house at the time he rented it was untenantable; that its roof, in rainy weather, leaked to such an extent as to make the rooms of the house untenantable; that this defect was not known to him at the time he executed the lease; that defendant warranted the roof to be in good condition, and that it would be kept in good repair during the term of the lease; that plaintiff, on account of the condition of the roof, was compelled to surrender the house on the 15th day of January, 1909; that he demanded the return of the $300, and the defendant refused to pay it. He therefore asked for judgment for the $300 and interest.

Defendant answered and denied all the material allegations of the complaint.

In a trial before a jury plaintiff, Johnson, testified that he entered into the foregoing contract of lease with the defendant; that while he and defendant were looking at the house, before executing the contract, he asked the defendant if the house leaked, and he replied it had, but it did not then. He testified, over the objection of the defendant, that the defendant further replied that he would guaranty that the house did not leak, and that the roof was in good condition. He also testified that he deposited the $300 with the defendant, who still had it; that when the first rain fell after he took possession of the house he discovered that it leaked to such an extent as to be untenantable; that he notified defendant that it leaked and requested him to repair it, and he failed to do so; that he gave up the house on the 15th of January, 1909, on account of the leaking roof, and paid the rent up to that time but no more; that he demanded the $300, and the defendant refused to pay

it, saying he would do so if plaintiff would comply with his contract.

Delaney, the defendant, testified that he told plaintiff, before renting the house to him, that it did not leak, and it did not at that time; that "it was in good shape at the time he took it; that he had no knowledge of any leaks until after plaintiff had given the house up." "That he never agreed to make any repairs or changes in the house at all; it was to be turned over to plaintiff just as it was. After plaintiff left he had the roof repaired and leaks closed for three dollars and fifty cents or four dollars."

Much other evidence, unnecessary to set out, was adduced by both parties.

The court at the request of plaintiff gave to the jury, over the objections of the defendant, three instructions, among which is the following:

3. "You are instructed that it is the duty of the landlord to keep the roof of a demised building in reasonably good condition to prevent leaking, and, if the roof became leaky, it is his duty to make the repairs within a reasonable time after notice thereof, failing in which the tenant may terminate the lease and recover any sum deposited by him as security for the rent."

And the defendant asked for six, and the court gave two and refused the other four. It is unnecessary to copy the other instructions given or those refused. It is sufficient to state the law by which the court should have been governed when acting upon them.

The jury returned a verdict in favor of the plaintiff for $300, for which the court rendered judgment in his favor. The defendant appealed.

Appellee says that appellant excepted *en masse* to the three instructions given by the court at his request, and that, if any one of the three should have been given, his objection should not have been sustained; and that he excepted in the same manner to the refusal of the instructions asked by himself, and that, if any one of them should have been refused, his objections was properly overruled. But appellee's contention is not tenable. The following is the exception to instructions given as noted of record: "To the giving of each of said instructions

numbered one, two and three the defendant at the proper time excepted and asked that his exception to the giving of each of said instructions be noted of record, which was accordingly done." His exception to the refusal of instructions is noted as follows: "The court gave instructions numbered three and four as asked by the defendant, but refused to give instructions numbered one and two, asked by the defendant, to which refusal to give said instructions one and two and each of them, the defendant at the time excepted and asked that his exceptions to the refusal to give each of said instructions be noted of record, which was accordingly done. That the court refused to give instructions numbered five and six as asked by the defendant, to which refusal of the court to give said instructions and each of them respectively as asked by the defendant, the defendant at the time excepted, and asked that his exceptions to the refusal of the court to give each of said instructions respectively be noted of record, which was accordingly done." From these notes on record it appears that the word used to designate the instructions excepted to was "each," which means that every instruction to which it refers was excepted to separately, and not collectively. It is not an appropriate word to designate several collectively and independently of each other, without considering them severally, but is sufficient to raise objections to instructions severally when designated by it as excepted to. *Geary* v. *Parker,* 65 Ark. 521, 525. Defendant's exceptions were properly reserved.

Unless a landlord agrees with his tenant to repair leased premises, he cannot, in the absence of a statute, be compelled to do so, and cannot be held liable for repairs. 1 Taylor's Landlord and Tenant (9th ed.), § § 327, 328; *Jones* v. *Felker,* 72 Ark. 405; *Gocio* v. *Day,* 51 Ark. 46; *Haizlip* v. *Rosenberg,* 63 Ark. 430.

The court erred in giving instruction numbered 3 and copied in this opinion.

As to other questions in the case, it is sufficient to say: Parol evidence is inadmissible to vary, qualify or contradict, to add to or subtract from, the absolute terms of a valid written contract containing no ambiguity. (*Richie* v. *Frazer,* 50 Ark. 393). But "an intentionally false and misleading representation, which induces a written contract, to another's injury, is a tort

outside the contract, and provable by parol." (*Hanger* v. *Evins,* 38 Ark. 334). "In order to vitiate a contract on the ground of fraudulent misrepresentation, the misrepresentation must relate to a matter material to the contract and in regard to which the other party had a right to rely, and did rely, to his injury." If the means of information as to the matters represented is equally accessible to both parties, they will be presumed to have informed themselves; "and, if they have not done so, they must abide the consequences of their own carelessness." *Righter* v. *Roller,* 31 Ark. 170; *Cooper* v. *Merritt,* 30 Ark. 686; *Yeates* v. *Pryor,* 11 Ark. 58; *Wilson* v. *Strayhorn,* 26 Ark. 28; *Hill* v. *Bush,* 19 Ark. 522; *Grider* v. *Clopton,* 27 Ark. 244; *Dugan* v. *Cureton,* 1 Ark. 31; *Hughes* v. *Sloan,* 8 Ark. 146.

Reverse and remand for a new trial.

BEAR STATE LUMBER COMPANY *v.* KNIGHT.

Opinion delivered May 16, 1910.

MASTER AND SERVANT—ASSUMED RISK.—Where a servant knew of the unsafe condition of the machinery with which and of the place where he was employed to work, and made no complaint or request that such condition be remedied, he will be held to have assumed the risk of injury therefrom.

Appeal from Montgomery Circuit Court; *Jeff T. Cowling,* Special Judge; reversed.

STATEMENT BY THE COURT.

Appellee was an engineer, employed by appellant in operating a planer at Womble, in Montgomery County, Arkansas. Appellee in his complaint describes the manner of his injury as follows: "On the 17th day of June, 1908, while he was engaged in operating the engine of said plant, the inside bearing of the line shaft situated in the engine room became so heated that it required the plaintiff's immediate attention; that prior to said date above last mentioned the defendant had placed, in the natural and more easy way of access to the point where the said line shaft required plaintiff's attention, an oil tank which completely barred the passage way to the point so affected, and while he was compelled to take a more devious route, and

while pursuing the only route left to him to the point affected, and to which attention was necessary, he had to pass between the main belt and underneath the main belt tightener frame and the shaft, which said shaft extended within six inches of the wall of the room, and that in attempting to pass underneath said shaft plaintiff's clothing was caught by a defective screw in a collar upon said line shaft, and he was violently thrown to the floor and against the frame work supporting the line shaft to which plaintiff, in the extreme emergency of the conditions and his helplessness to otherwise protect himself, caught for support.

Appellee alleges that he was injured through the negligence of appellant in this: 1st. That on the belt tightener shaft there was a defective improvised gas pipe coupler, which had been placed on said pipe for collar, or in place of a collar, and into which said coupler two set screws had been placed on opposite sides of the said coupler, the defect in said coupler being that it contained no countersinks or sinks into which said set screws could be fixed, thereby causing said set screws to stand out over and above the said coupler for the space of an inch, which greatly increased the risk and danger of operating said machinery or repairing or adjusting any defects or irregularities that might occur in the operation of said machinery, by placing an oil tank in such position as to cut off and preclude a passage way for the plaintiff to pass from any point to and about the machinery in said building to the overheated line shaft where his duties naturally were, and forcing him to take a more circuitous route to the said line shaft, as above set forth.

The answer denied the material allegations of the complaint and set up the defenses of contributory negligence and assumed risk. Among other things the appellee testified as follows: "I was foreman, and had charge of the job. I put all the machinery in place. Mr. Trumbull was the boss. He claimed to be a machinist. He told me what to do. I was the machinist that did it. I set the engine up, and put it in operation and ran it. I was the only man that ran it up to the time I was hurt. I knew that these set screws were in there, and that the points projected out there. I put them there. I knew they were there when I backed up against them. I stated a while ago that this

cuff where I got hurt was not an up-to-date cuff and set screw. I knew that when I put it on. I had occasion to pass under that shaft a number of times. The oil tank had been in that place a big portion of the time. Something like ten days before the injury Mr. Trumbull said he would make a place for the can."

He further testified: "Mr. Trumbull, the boss, did not caution me about going in there. I did not stop the machinery because I could not afford to. It would have taken me a few minutes to stop the machinery. The bucket I had held ten quarts. The belt is 20 inches across, and about 6 inches from the floor. I could have turned around in here. I have turned in there. There was a little space between the oil tank and the post. The oil tank had been in there a long time. I did not help put it there. Trumbull and Collier put it there. I knew all the time that it was there. I could not go between the oil tank and the wall. The tank was about one-half full of oil. I had no right to move it. It had too much oil in it for me to lift. I did not try to lift it. It was between 6 and 10 inches from the end of the belt tightener shaft to the walls." Appellee was injured, and described the manner of his injury and its extent.

The appellant asked the court to grant the following prayer: "You are instructed to return a verdict for the defendant, Bear State Lumber Company."

The court refused this. The jury returned a verdict in favor of appellee for $250. From a judgment in favor of appellee for that sum this appeal has been duly prosecuted.

J. I. Alley and *Hal L. Norwood,* for appellant.

Appellee was guilty of contributory negligence. 90 Ark. 387. When the evidence fails to show any negligence on the part of the master, the plaintiff cannot recover. 76 Ark. 437. It was the duty of the court to declare that there was no cause of action. 76 Ark. 10; 61 Ark. 555; 69 Ark. 568. Appellee assumed the risks incident to the employment in which he engaged. 35 Ark. 605; 36 Ark. 371; 41 Ark. 542; 48 Ark. 333; 54 Ark. 389; 56 Ark. 206; *Id.* 232; 57 Ark. 76; *Id.* 503; 58 Ark. 324; 63 Ark. 437; 65 Ark. 98; 66 Ark. 237; 76 Ark. 436; 82 Ark. 98; *Id.* 534; 85 Ark. 460; 89 Ark. 50; 77 Ark. 367;

Id. 458; 82 Ark. 11; 90 Ark. 407. It is error to submit to the jury issues upon which there is no evidence to base a verdict. 63 Ark. 177; 77 Ark. 20; 67 Ark. 147; 69 Ark. 489. The jury should have been instructed that plaintiff might have known the danger to which he was exposed. 77 Ark. 548. Abstract instructions should not be given. 56 Ark. 457; 63 Ark. 563; 70 Ark. 136; 74 Ark. 19; 77 Ark. 20; 26 Ark. 513; 33 Ark. 350; 36 Ark. 641; 41 Ark. 282; 42 Ark. 57. It is error to tell the jury that they may believe or disbelieve any witness. 59 Ark. 122; 68 Ark. 337; 72 Ark. 436.

Gibson Witt and *Pole McPhetrige,* for appellee.

Plaintiff was justified in remaining in the service. 54 Ark. 289. An employee is not required to look for or expect danger. 90 Ark. 228. The test as to whether the case should be submitted to the jury is not whether the court, if sitting as a jury, would have rendered a verdict in favor of plaintiff. 80 N. Y. 622; 48 Wis. 520; 83 N. Y. 574; 26 Vt. 608; 109 U. S. 478. It is the master's duty to repair defects in appliances when he knows of them. 87 Ark. 321; 83 Ark. 318; 90 Ark. 227.

WOOD, J., (after stating the facts). The court erred in not granting the prayer of appellant. Appellee, according to his own evidence, knew of the unsafe condition of the machinery and of the place where he had to work. He entered upon and continued in the service of appellant, knowing the condition of the collar and set screws. He made these, and he continued to work for a long time knowing the location of the oil tank. As stated by counsel for appellant: "Appellee was the architect of his own misfortune." The dangers were obvious, and he assumed the risks of them. *St. Louis, I. M. & S. Ry. Co.* v. *Goins,* 90 Ark. 387, and cases there cited. The evidence shows that something like ten days before the injury the manager said "that he would make a place for the oil tank." But this evidence is hardly sufficient to show that appellee continued in the service of appellant upon the latter's promise to repair. For the evidence shows that appellee had worked there for a long time with the oil tank in the same location it was at the time he received his injuries. It does not appear that he ever protested against the location of the oil tank, or that he had

ever requested appellant to change it. For aught that the evidence shows to the contrary, appellee was perfectly willing to continue in the service of appellant with the oil tank in the situation it was at the time the injury occurred.

For the error in refusing appellant's prayer the judgment is reversed, and the cause is remanded for a new trial.

NEW AMSTERDAM CASUALTY COMPANY v. UNION SAWMILL COMPANY.

Opinion delivered May 16, 1910.

INSURANCE—EMPLOYERS' INDEMNITY POLICY—EVIDENCE.—Where an indemnity policy insured an employer against liability on certain classes of employees, it was admissible to prove by parol evidence who were on the assured's payrolls in the classes named.

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

STATEMENT BY THE COURT.

The plaintiff, appellant, sued the defendant, appellee, for $254.62. The basis of the suit is a claim on the part of appellant that the appellee did not pay the full amount of premium on a certain policy of insurance known as "employers' liability," issued April 14, 1904, expiring one year thereafter.

This policy of insurance protects against liability on account of accident to certain employees. The protection is limited to $5,000 for one person and $10,000 for one accident. The rate of insurance was fifty-five cents per $100, based on the payroll of the employees protected. When the policy was taken out, the payroll was estimated at $125,000, and the premium, $687.50, was paid.

On March 21, 1905, the payroll was made up covering the time the policy was in force, and it showed $135,749.20. This was a little more than $10,000 in excess of the estimated payroll. The appellee accordingly sent to appellant the sum of $59.12 to cover the amount of the additional premium due appellant as shown by the actual amount of the payroll. This additional amount of premium was accepted by appellant at the time it was sent. Later an agent of appellant examined the books of appellee and also the books of the Little Rock

& Monroe Railway Company, and found that the payroll of the railway company amounted to the sum of $27,203.46, and that the books showed the payroll for the appellee to amount to the sum of $146,507.57, and that the salaries of the executive officers and doctors amounted to the sum of $8,334.20. The appellant accordingly demanded an additional premium for the increased amount of the payroll, as ascertained through its agent by and through the sources mentioned. The amount of the additional premium claimed was the sum in controversy here, $254.62.

The schedule or application which was a part of the policy showed that the policy covered liability on "all persons on payrolls of assured engaged as follows: sawmill, planing mill, lumber yard, including dry kiln, shop and machine men, stackers, truckers, teamsters, drivers' helpers, carpenters, water boys, construction and repair work, logging operations, section work, including wrecking and tearing down of trestles, construction and extension work, logging railroad."

On October 13, 1904, the appellant and appellee entered into an agreement, which was attached to and made part of the policy. The agreement was as follows:

"New York City, N. Y., October 13, 1904.

"It is understood and agreed that from noon this date this insurance shall cover only the Union Sawmill Company, a corporation, and ceases to cover Little Rock & Monroe Railway Company, and it is further understood and agreed that said Union Sawmill Company does not operate a logging railroad, and that this insurance will not cover accidents caused by or occurring in connection with the operation of any logging railroad whatsoever, nor the construction nor repair work on any such railroad, nor section work, nor wrecking and tearing down of trestles, nor construction, nor extension work of such railroad nor any branch thereof; subject otherwise, however, to all the conditions, agreements and limitations of the policy as written."

There was testimony on behalf of appellant tending to show that on May 15, 1905, its auditor audited the books of the appellee, and obtained a statement showing that the amount of wages from April 4, 1904, to March 5, 1905, was $182,045.17. The testimony of the auditor who obtained this statement was

not before the court, but a witness on behalf of appellee, who was present when the statement was made up, shows that the above amount embraced the payroll of the Little Rock & Monroe Railroad Company, amounting to $27,203.46, and the payroll of the appellee, amounting to $146,507, and that included in this latter amount were the wages paid the employees of two hotels that were run by appellee during the time. A further sum, included to make up the total of $182,045.17, was the salary paid the executive officers of the appellee, amounting to $8,334.20. The witness (Fish) who testified to the above further testified that he helped to make the statement sent by the Union Sawmill Company (appellee) to plaintiff (appellant) on which the last additional premium of $59.60 was paid, and that it showed all the employees covered by the policy. There was also testimony on behalf of appellee tending to prove that the Little Rock & Monroe Railroad was not a logging road, had nothing to do with the logging, that the employees engaged in building spur tracks for the logging operations were included in the report made by appellee, that the logging account for building logging railroad was carried by appellee on its books. The appellant presented the following prayer:

"Parol evidence is not admissible to contradict, vary or change the terms of a written contract, nor can a contract rest partly in parol and partly in writing. Parol evidence is inadmissible to contradict the provisions of a policy of insurance; and if the testimony in this case shows that the defendant entered into a written contract with the plaintiff whereby plaintiff agreed to indemnify defendant against the loss for its common-law or statutory liability for damages on account of bodily injury, fatal or non-fatal, accidentally suffered within one year from the date thereof by any employee or employees of the defendant, the Union Sawmill Company and the Little Rock & Monroe Railway Company, while on duty at the places and in the occupations mentioned in the schedule thereto attached, and that the defendant agreed to pay to the plaintiff therefor the sum of fifty-five cents for each one hundred dollars of wages paid by defendant to its employees as aforesaid during the life of said policy of indemnity, said amounts to be determined by payrolls afterwards made by defendant and fur-

nished to plaintiff, and that the payrolls so furnished by defendant to plaintiff show that during the life of said policy of indemnity the same amounted to $1,001.24, and that the same has not been paid, then that judgment should be given for the plaintiff for this amount, less any amounts the proof may show has been paid thereon."

The court refused the prayer, and rendered judgment in favor of appellee against appellant for costs. This appeal has been duly prosecuted.

R. G. Harper, for appellant.

Gaughan & Sifford, for appellee.

WOOD, J., (after stating the facts). The court did not err in refusing the prayer and in rendering judgment in favor of appellee for costs. The parol testimony did not contradict or alter the terms of the written contract. It only tended to prove who were on the payrolls of the assured engaged in the special work or occupation named in the schedule. Those engaged in these special occupations enumerated in the schedule were covered by the policy. None others were. The amount of the premiums to be paid had to be determined by the amount of the payrolls to employees engaged in the special occupations named in the schedule. The evidence showed that during the time the policy insured both appellee and the Little Rock & Monroe Railway Company appellee carried all the accounts for "logging operations," and "logging railroad" on its own payroll, and that the Little Rock & Monroe Railway Company was not a "logging railroad" or engaged in "logging operations." Nor is it anywhere shown that the employees of the Little Rock & Monroe Railway Company, during the time it was insured, were engaged in any of the special occupations named in the schedule. Therefore the payroll of the Little Rock & Monroe Railway Company could not be included in ascertaining the amount of the premium to be paid. Nor could the amounts paid the employees of appellee in their hotel business nor the amounts paid by appellee in salaries to its executive officers. For none of these are named in the schedule, and they are therefore not covered by the policy.

The proof shows that the statement rendered by appellee to appellant showing the amount of its payroll, upon which

the amount of premium was based, included every employee engaged in the particular work or occupation specified in the schedule and covered by the policy. The amount of this payroll was $135,749.20, and the payment of premium was made according to this amount. No other amount is due. See *Fidelity & Casualty Company of New York* v. *Fayetteville Wagon Wood & Lumber Company,* 94 Ark. 90.

Affirm.

MILLER v. JENKINS.

Opinion delivered May 16, 1910.

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE.—Under a lease for 99 years which reserves in the lessor the right to sell and convey any portion or all of the land, provided he shall remunerate the lessee "in a reasonable amount for all damages he may sustain from sale of said land," where the lessor exercises his right to terminate the lease by a sale, there is no unexpired term, and the lessor will not be liable to pay the lessee for the valuation thereof. (Page 147.)
2. SAME—REPUGNANCY.—A provision in a lease for years to the effect that the lessor may terminate the lease by a sale of the property is not void as being repugnant to the habendum of the lease. (Page 147.)
3. SAME—TERMINATION OF LEASE—TENDER OF DAMAGES.—Where a lessor reserved the right to terminate the lease upon remunerating the lessee for all damages sustained by a sale of the land, it was not error to permit a re-entry by the lessor's grantee though no tender of the lessee's damages was made before suit, if there was a dispute as to the amount of such damages, and the court required the amount found by the jury to be due the lessee to be paid before judgment was rendered against him for possession of the land. (Page 147.)
4. EVIDENCE—SUFFICIENCY.—The jury were justified in disregarding the testimony of an interested party where his testimony in other respects was evasive and was contradicted by other witnesses. (Page 148.)

Appeal from Clay Circuit Court, Western District; *Frank Smith,* Judge; affirmed.

STATEMENT BY THE COURT.

On the 8th day of September, 1888, the following agreement was entered into between Samuel McAfee and John H. Miller, both of Moark, in Clay County, Arkansas:

"Agreement of Lease between Samuel McAfee of Moark, Ark., and John H. Miller of Moark, Clay County, Ark.

"Witnesseth, that I, Samuel McAfee, of county and State aforesaid, have this day leased unto John H. Miller, aforesaid, the S. ½ of the N. W. ¼ of sec. 10, township 21 north, range 5 east, of Clay County, Arkansas, for the term of ninety-nine years from date hereof, on the conditions that he shall clear, fence and put in cultivation the said tract of land and keep all taxes paid on said land, and keep all buildings and improvements in good repair. And be it further understood that this lease shall not alienate the right of the said Samuel McAfee to sell and convey any portion or all of the above described tract of land, provided he shall remunerate the aforesaid John H. Miller in a reasonable amount for all damages he may sustain from sale of said land. And be it understood that this lease is not transferable except by the written consent of the aforesaid Samuel McAfee.

"Witness our hands this 8th day of September, 1888.

"Witness: Henry E. Everts.

"Samuel McAfee.

"John H. Miller."

Miller at once went into possession of the land, and has remained in possession ever since. He cleared, fenced and put into cultivation about 40 acres of the land, and built a dwelling house thereon. He also kept the taxes paid on the land. On the 6th day of July, 1908, Samuel McAfee, by his deed, conveyed the land to Mrs. C. Jenkins and David W. Hill, who brought this suit to recover possession of it.

On the trial both parties introduced evidence as to the rental value of the land, and the evidence was conflicting. Miller adduced evidence tending to show the extent and value of the improvements placed on the land by him. He also introduced evidence tending to prove that a part of the consideration for the lease was the sum of $400 owed him by McAfee. This claim was denied by the plaintiffs. The court instructed the jury, in effect, to find the value of all the permanent improvements placed by the defendants on the land and also the amount of taxes paid by them, and to give them credit therefor; and to find the rental value of the lands for the years the defendants had been in possession of them, and to charge them therewith.

The court further instructed the jury to answer certain questions propounded to them. The jury returned the following verdict:

"We, the jury, find as follows: We find the defendant should be charged $1,241. We find that defendant should be credited in the sum of $1,265.35. [Signed] W. R. McCracken, Foreman.

"Do you find that defendant paid $400 in consideration of the lease? No. Do you find that defendant's damages have been compensated at the time of the institution of this suit? No. W. D. McCracken, Foreman."

The court rendered judgment upon the verdict as follows:

"And it appearing to the court that this is an action in ejectment for the possession of the south half of the northwest quarter of section ten, township twenty-one north, range five east, in the Western District of Clay County, Arkansas, and it further appearing to the court that plaintiffs had paid into court the sum of $24.35 for the use of John H. Miller and Sarah J. Miller.

"It is therefore by the court considered, ordered and adjudged that the plaintiffs, Mrs. C. Jenkins and David W. Hill, are the owners in fee simple of the said land, and are entitled to the possession thereof, and that a writ of possession may issue after January 1, 1910.

"It is further considered, ordered and adjudged that John H. Miller and Sarah J. Miller do have and recover of and from Mrs. C. Jenkins and David W. Hill and J. N. Moore, their surety on bond for costs filed herein, all their proper costs in this suit expended, for which execution may issue."

The defendants have appealed to this court.

C. L. Daniel and *G. B. Oliver,* for appellants.

McAfee had no right to convey the land without first paying Miller's damages. Bish. Contracts, § 1422; Wash. on Real Prop., vol. 2, pp. 26-27; 76 Ark. 102. Damages means loss of what is a man's own, occasioned by the act of another. 14 S. W. 295; 26 S. E. 354; 62 Ark. 469.

David W. Hill, C. T. Bloodworth and *J. N. Moore,* for appellees.

The condition to compensate is not a condition but a mere covenant. 30 S. E. 462; 1 L. R. A. 380; 34 Mo. 102; 84 Am. Dec. 74; Taylor, Land. & T., § 525. No payment was necessary to the passing of title to appellees. 76 Ark. 102. Right to sell land may be reserved in a lease thereof. 35 N. E. 372.

HART, J., (after stating the facts). Appellants admit that the lease gave the lessor the right to sell the land, and that a sale terminated the lease; but they claim that they were entitled as damages to the payment of a reasonable valuation for the unexpired term. This they claim under the clause of the lease which provides that upon a sale of the land the lessor "shall remunerate the aforesaid John H. Miller in a reasonable amount for all damages he may sustain from sale of said land." Their contention is inconsistent. If the lessor has the right to terminate the lease by a sale of the land, there can be no unexpired term; and it is evident then that the remuneration for damages sustained by the sale relates to compensation for amounts expended by the lessee for permanent improvements and for taxes paid by him which were in excess of the usable value of the land. In no other way can the provisions of the lease be reconciled.

"Such a provision is not void as being repugnant to the habendum of the lease. Any provision stipulating that during the term a lessor may enter or may terminate the lease is in a sense repugnant to words demising land for a fixed term, but such stipulations are found in most leases, and are not held void because repugnant to the words of the demise. If it is clear that the contract means that the lessee should take his estate subject to a defeasance by a sale of the demised property by the lessor, to hold the clause defining the reserved right of the lessor void because repugnant to the demise would be unwarrantable to defeat an intention which the parties have clearly expressed." Jones on Landlord and Tenant, § 388, and cases cited.

It is next contended by the appellants that the suit was premature because it was brought before payment or tender was made. It was the contention of appellees that appellants had already been compensated for the damages sustained by them. It is true that the verdict of the jury was against their contention, but the court required the amount found by he

jury to be due appellants to be paid into court for their use before judgment was rendered in favor of appellees for the possession of the land, and also rendered judgment in favor of appellants for the costs of suit. In this respect this case is different from that of *Bunch* v. *Williams,* 76 Ark. 102. In that case the court held that a tender was not necessary, and an absolute judgment was rendered in favor of the plaintiffs. Here there was a dispute, not as to whether a tender should have been made, but as to whether anything was due, and, the court having required that the amount found due should be paid before appellants were required to give up possession of the land, they are not prejudiced, and it is the settled rule of this court that a judgment will only be reversed for errors prejudicial to the rights of the appellant.

It is next insisted by appellants that there is no evidence to support the verdict of the jury that the appellants did not pay $400 in consideration of the lease. They contend that appellant John H. Miller testified positively that at the time the lease was executed McAfee owed him $400, and the payment of this debt was a part of the consideration of the lease; and that this testimony stands uncontradicted. It is true that the testimony of John H. Miller is all there is on this point; but it must be remembered that he is a party to the suit, that no contention of this sort was made by him when his answer was first filed, but was interposed afterwards by way of amendment. Then, too, he testified about other matters in the case, and his testimony in that regard was flatly contradicted by other witnesses. These facts and some evasive answers made by him in regard to the alleged $400 debt bring the case within the rule announced in *Skillern* v. *Baker,* 82 Ark. 86, and we hold that there was evidence to support the verdict.

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

SPEED v. FRY.

Opinion delivered May 16, 1910.

COURTS—APPEAL FROM PROBATE COURT.—An order of the probate court granting an appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and cannot be waived.

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

Samuel M. Casey, for appellant.

If a guardian in good faith secures the services of an attorney, the court will allow him such sums as he has paid to such attorney. 30 Ark. 520; *Id.* 512. If a minor, after coming of age, gives her guardian a receipt showing that he has paid her all that he was due her, it will, in the absence of fraud, be binding upon the minor. 83 Ark. 226.

Ernest Neill, for appellee.

A guardian must have an order of court before he spends his ward's money. Kirby's Dig., § 3792; 63 Ark. 450. The law casts upon the guardian the burden of proving every item of his account which is challenged. 76 Ark. 219.

HART, J. In the year 1901 J. C. Speed was appointed the guardian of his minor child, Effie Speed, who had inherited an estate of the value of $150 from a deceased relative. No further steps were taken in the guardianship until 1908, when J. C. Speed filed his final settlement. Effie Speed, who had become of full age, filed exceptions to the settlement.

At its May term, 1909, the probate court, after hearing the evidence adduced by both parties, found that the guardian was indebted to his ward in the sum of $95.25, and rendered judgment accordingly. On the 18th day of June, 1909, J. C. Speed filed an affidavit for appeal to the circuit court.

Effie Speed married and became Effie Fry, and the case was docketed and tried in the circuit court under her married name. The circuit court rendered judgment in her favor for $126, and J. C. Speed has appealed to this court.

The record shows that J. C. Speed filed an affidavit and prayer for appeal in the usual form to the circuit court, but it does not show that the probate court made an order granting the appeal. This was necessary in order to give the circuit court jurisdiction. Kirby's Digest, § 1348; *Matthews* v. *Lane,* 65 Ark. 420 and cases cited; *Walker* v. *Noll,* 92 Ark. 148.

This court has held that the appellee may waive the want of an affidavit for appeal in the circuit court by failing to move to dismiss. *James* v. *Dyer,* 31 Ark. 489. The reason is that the affidavit and prayer for appeal is a regulation for the sole

benefit of the appellee. But the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason can not be waived. It follows, therefore, that the circuit court should have dismissed the appeal because no order of the probate court granting it was made, and for this error the judgment will be reversed and the cause remanded with directions to the circuit court to dismiss the appeal for want of jurisdiction.

JOSEPH v. BAKER.

Opinion delivered May 16, 1910.

1. FRAUD—EVIDENCE.—In actions founded upon fraud, parol evidence is admissible to show fraud, or the lack thereof, in the making of a contract, notwithstanding the contract is in writing. (Page 152.)
2. DEEDS—AMOUNT OF LAND—COVENANT.—The mention of quantity of acres after a definite and certain description of the land by metes and bounds does not amount to a covenant in a deed unless so expressly declared, nor afford a cause of action though the quantity of acres should fall short of the amount named. (Page 153.)
3. FRAUD—NOTICE.—A vendee cannot complain of a fraudulent misrepresentation made by the vendor as to the number of acres sold to him if, before the sale was made and the deed accepted, the vendee was informed as to the actual number of acres in the tract sold, and with that knowledge consummated the contract of sale. (Page 154.)

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

Rice & Dickson, for appellant.

The words "more or less" in a deed can only be considered as intended to cover inconsiderable differences. 19 Ark. 109. And when the quantity is misrepresented, though innocently, the purchaser should recover the shortage. 61 Ark. 120; 19 Ark. 109. Parol evidence is not admissible to explain, modify or alter the deed. 21 W. Va. 632; *Id.* 326; 67 N. Y. 338. Small shortages only are covered by the words "more or less." 67 Am. Dec. 120; 51 *Id.* 244; 24 Tex. 245; 76 Am. Dec. 109; 38 *Id.* 514; 69 Tex. 293; 52 S. W. 1074; 103 Tenn. 358; 47 L. R. A. 267; 87 N. Y. 327.

FRAUENTHAL, J. This was an action of deceit brought by A. H. Joseph, the plaintiff below, against J. W. Baker to recover

damages for fraud inducing him to make a contract for the purchase of certain land from the defendant. The defendant sold to the plaintiff certain land in Benton County, Arkansas, in consideration of a stock of goods owned by the plaintiff at Carbondale, Ill. The land was sold in gross, and the deed of conveyance executed by the defendant gave a particular description of the land by metes and bounds, with the words added: "containing in all 198 acres, more or less." In his complaint the plaintiff alleged that before the purchase the defendant showed him the land, and "pointed out to him a portion of other lands not described in this deed, and claimed that he owned them, and that they were a part of the tract he was selling to plaintiff, upon which he relied at the time without knowledge of the falsity of the same; that said statements were false and known by defendant to be false;" that defendant falsely represented to him that the tract so sold and conveyed by him contained 198 acres when as a matter of fact it contained only 171 acres; and he sought to recover damages by reason of said false representation. Upon the trial of the case the plaintiff introduced evidence tending to sustain the allegations of his complaint. The defendant in his answer denied the allegations of the complaint relative to his making any misrepresentation as to the quantity of the land; and upon the trial of the case he introduced testimony tending to prove that he was familiar with the boundaries of the land, but did not know the number of acres in the tract; that there was a dispute as to whether the tract contained 198 acres or a less number; that he showed the land to plaintiff and pointed out the boundaries exactly as they are described in the deed, and pointed out to him no other land than that included within those boundaries and covered by the deed; and that he did not represent to plaintiff that the tract contained 198 acres; that before the deed was executed and before the sale and purchase was consummated the plaintiff was told and fully informed that the tract contained only 165 acres; and that the plaintiff said that it made no difference, that he was satisfied, but to write the deed stating that the tract contained 198 acres more or less, which was done. The evidence tended to prove that the tract of land conveyed contained 171 acres.

The court in effect instructed the jury that if the defendant falsely represented to plaintiff that the tract of land contained

198 acres, and that, relying upon such representation, the plaintiff paid therefor, when in fact there were only 171 acres in the tract of land conveyed, then the plaintiff was entitled to recover as damages the price of the deficiency in the number of acres so represented.

Over the objection of the plaintiff the court gave the following instruction:

"6. The court instructs the jury that, although you may find that defendant misrepresented to the plaintiff the number of acres in the tract of land in question at the time the land was shown to plaintiff by defendant, still, if you further find that, before the deed was executed and delivered to plaintiff, the defendant or his brother, Harry Baker, informed plaintiff that there was a less number of acres in the tract than had first been represented to be, and plaintiff had knowledge of this fact, and then accepted the deed for 198 acres, more or less, he could not recover from defendant, and your verdict should be for the defendant."

The jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff appealed to this court.

It is urged by counsel for plaintiff that the court erred in permitting, over plaintiff's objection, the introduction of testimony on the part of the defendant that the plaintiff was informed at the time of the execution of the deed and before the final consummation of the sale that the tract of land only contained 165 acres, for the reason that this would contradict the terms of the written contract and deed which stated that the land contained "198 acres more or less." But we do not think that this contention is correct. The action that was instituted by plaintiff is not based upon the contract, but it is founded upon the alleged tort committed by the defendant in making false representations by which the contract was fraudulently obtained and the plaintiff wrongfully damaged. It is not an action to enforce the contract, but it is based upon fraud in the procurement of it. It is well established that in actions founded upon fraud parol evidence is admissible to show such fraud in the making of the contract, notwithstanding the contract is in writing; and likewise parol evidence is admissible to show the lack of such fraud.

In the case of *Harrell* v. *Hill,* 19 Ark. 102, the charge was made that the defendant had misrepresented the quantity of the land sold to complainant. In that case the court said: "The charge, then, is fraud. * * * No rule or principle of law is violated by the admission of parol evidence to establish fraud going to the consideration or execution of deeds." *Wolfe* v. *Arrott,* 109 Pa. St. Rep. 473.

In the case at bar the land that is actually conveyed by the deed is the area that is described by metes and bounds; the quantity named will not prevail against the particular description. The mention of quantity of acres after a definite and certain description of the land by metes and bounds does not amount to a covenant in a deed unless so expressly declared, and does not afford a cause of action founded upon a breach of a covenant, although the quantity of acres should fall short of the amount named. If the amount thus named is inconsistent with the actual area of the land as shown by the particular specification and designation thereof, it will be considered descriptive merely, and not a covenant to convey the precise number of acres thus named. Ordinarily, when the land is described by definite boundaries in a deed followed by a statement of so many acres, more or less, without any express covenant as to the quantity, the statement of the quantity is not controlling nor is it of the essence of the contract. In such event, should there be a deficiency in the number of acres, the right to relief for such deficiency would be founded upon fraud, misrepresentation or mistake. *Harrell* v. *Hill,* 19 Ark. 102; *Goodwin* v. *Robinson,* 30 Ark. 535; *Neeley* v. *Rembert,* 71 Ark. 91; 3 Washburn on Real Property, § 2322; 1 Sugden on Vendors, 490; *Wilson* v. *Randall,* 67 N. Y. 338; *Belknap* v. *Sealey,* 67 Am. Dec. 120; *Wheeler* v. *Boyd,* 69 Tex. 293; *Anderson* v. *Snyder,* 21 W. Va. 632. The action in the case at bar to recover the alleged deficiency of the land claimed to have been sold is founded upon the alleged fraud in the procurement of the contract of sale; and any evidence, direct or circumstantial, which would tend to prove or disprove the alleged fraud would be competent; and therefore parol evidence would be admissible, though the contract thus procured was in writing. The fraud alleged in the complaint was the misrepresentation made by the defendant as to the number of acres contained in the tract of

land, and that plaintiff was misled thereby to his injury. The court did not err in permitting the introduction of testimony showing that plaintiff was informed of the actual number of acres of the land before the trade was consummated.

And for the same reason the court did not err in giving said above instruction number 6. In order for the plaintiff to recover in this action of deceit, it was essential that he was ignorant of the matter represented to him; for, if he had knowledge of the actual number of acres that were in the tract, and knew that any other statement made by defendant was false before the trade for the land was finally consummated, then he could not have been deceived by such representation. In the case of *McDonough* v. *Williams,* 77 Ark. 261, the court said: "We hold that no action can be maintained for the damages where the contract is executed after the discovery of the fraud." And in the same case the court quotes the following with approval from *Thompson* v. *Libby,* 36 Minn. 287: "To allow a purchaser who has discovered the fraud while the contract is still wholly executory to go on and execute it, and then sue for fraud looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries. The fraud is really consummated and the damages incurred by the acceptance of the property and paying for it. And, if this is done after the fraud is discovered, the purchaser can not say that he sustained damage by reason of the fraud." And so in the case at bar the plaintiff could not have been deceived to his injury by any misrepresentation of the number of acres in the tract if, before the trade was finally made and the deed accepted, he was informed as to the actual number of acres that were in the tract, and then with such knowledge accepted the deed and consummated the contract of sale. See also *Winter* v. *Bandel,* 30 Ark. 362; *Goodwin* v. *Robinson,* 30 Ark. 535; *Matlock* v. *Reppy,* 47 Ark. 148; 14 Am. & Eng. Enc. Law, 106.

Finding no prejudicial error committed in the trial of this case, the judgment is affirmed.

BERCHER v. GUNTER.

Opinion delivered May 16, 1910.

1. CONTRACTS—MUTUALITY.—To constitute a contract upon which to base a liability, both parties must agree thereto. (Page 156.)
2. EVIDENCE—OPINIONS.—As a general rule, a witness should state facts only, and not the conclusions deduced by him from such facts. (Page 157.)
3. APPEAL AND ERROR—HARMLESS EVIDENCE.—The introduction of incompetent evidence to prove an undisputed fact was not prejudicial. (Page 158.)
4. SAME—HARMLESS ERROR.—The admission or exclusion of immaterial testimony does not constitute prejudicial error. (Page 158.)

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

Appellant, *pro se.*

There was a complete novation of contract between appellant and appellee. 28 Ark. 196; 21 Am. and Eng. Enc. Law, 660. The refusal of either party to abide by his part of the contract will justify the other party in treating it as at an end. 22 Ark. 260; 53 Ark. 488. A party to a contract is not justified in putting it beyond his power to perform it. 67 Ark. 156. Plaintiff is entitled to recover the whole amount of the contract price, diminished by the amount necessary to finish it. 33 Ark. 751; 79 Ia. 40; 77 Ind. 203; 38 Mo. App. 177; 6 Wis. 363; 80 Tex. 23; 46 Kan. 54; 34 Neb. 63; 36 Me. 92; 95 Ala. 348; 10 So. 422. Where the evidence is insufficient to sustain the verdict, the case will be reversed. 79 Ark. 608. "Legal sufficiency" of the testimony means more evidence than is necessary to raise a suspicion. 132 N. C. 904; 44 S. E. 666. By sufficient evidence is meant that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. 36 S. W. 909; 81 Tex. 42; 16 S. W. 638; 106 Mo. 55; 16 S. W. 886; 94 Me. 127; 46 Atl. 812; 53 Fed. 196.

T. S. Osborne, for appellee.

Where there is a conflict in the evidence, the jury are the judges. 19 Ark. 684; 57 Ark. 577; 73 Ark. 377; 75 Ark. 111; 76 Ark. 326. And if the verdict is sustained by any evidence, it will not be disturbed. 25 Ark. 474; 31 Ark. 163; 40 Ark. 168; 126 S. W. 392. A case will not be reversed for harmless error. 44 Ark. 556; 71 Ark. 31.

FRAUENTHAL, J. The appellant instituted this action to recover the sum of $51 upon an account for work done and material furnished in building a foundation on a lot owned by appellee. The suit was brought in the court of a justice of the peace from whose judgment an appeal was taken to the circuit court. The case was there tried by a jury, who returned a verdict in favor of appellee. It appears from the evidence that appellee made a written contract with certain contractors to build a house for him on this lot according to certain plans and specifications and for an entire price. The contractors employed or entered into a contract with appellant to build the foundation. While the foundation was being built, a controversy arose between appellee and the principal contractors relative to the material that was being used therein. The principal contractors then refused to proceed further with the work and abandoned their contract to build the house. The testimony on the part of the appellant tended to prove that thereupon the appellee told him to proceed with the construction of the foundation, which he did. On the other hand, the testimony on the part of the appellee tended to prove that he directed that the material be removed from the lot, and that no further work be done on the foundation, and that he made no contract, either expressly or impliedly, with appellant for the construction of any portion of the foundation. The testimony tended further to prove that the appellee did not accept and did not use any part of the foundation, but on the contrary that a portion of the foundation was torn out and the material removed by appellant. The court gave instructions that were rather favorable to appellant, and he makes no complaint as to any of them; nor did he request any declaration of law which the court refused.

In effect, the court instructed the jury that if appellee told the appellant to proceed with the construction of the foundation after the principal contractors had abandoned the contract, or if thereafter the appellant proceeded with the work with the full knowledge of appellee, and the appellee did not object thereto, then in either event the appellant was entitled to a recovery. One cannot be forced to pay for something he did not contract for, either expressly or impliedly. To constitute a contract upon which to base a liability, both parties must agree thereto. One cannot be held liable for services rendered with-

out his request or knowledge or against his express direction. *Blake* v. *Scott,* 92 Ark. 46; 9 Cyc. 252.

The question involved in this case was therefore one of fact; and that question was one within the peculiar province of the jury to decide. The jury decided the question of fact in favor of appellee. There is some substantial evidence to sustain the verdict, and therefore, under the repeated rulings of this court, it should not be disturbed.

Counsel for appellant urge that the lower court erred in refusing to permit the appellant and the witness, Langford, one of the principal contractors, to testify whether they understood from what took place between the parties that the appellee assumed the same contractual relation with appellant that had been borne by the principal contractors with him, and that appellant had released the principal contractors. When these questions were asked, the court told the witnesses not to give their conclusions, but to state the facts as to what occurred. In this ruling we think the court was correct. It has been repeatedly held by this court that as a general rule the witness must state only facts, and must not state the conclusions at which he has arrived from some state of facts. *Dickerson* v. *Johnson,* 24 Ark. 251; *Walker* v. *Fuller,* 29 Ark. 448; *Blevins* v. *Case,* 66 Ark. 416; *Little Rock T. & Elec. Co.* v. *Nelson,* 66 Ark. 494; *Benson* v. *Files,* 70 Ark. 423.

It is also urged that the lower court erred in permitting the witness, McAfee, to testify to a conversation had by him with appellee in the absence of appellant. The conversation related to an inquiry made by appellee of the witness as to whether he would buy some of the stone used by appellant in the construction of the foundation. The witness testified that the appellee made such an inquiry of him, and he told him he did not wish to purchase the stone. We do not think that there was any prejudicial error in permitting the witness to give this testimony. The testimony related to an undisputed fact, and was not material to the issue involved in the case. The appellant testified that when the principal contractors abandoned their contract the appellee told him that he would help him dispose of the stone, to which appellant assented. So that the reason for the attempt to dispose of the material was in effect undisputed. If the testimony was incompetent, it was a harmless

error to permit its introduction, because it related to an undisputed matter. *Triplett* v. *Rugby Distilling Co.*, 66 Ark. 219; *Standard Life & Accident Ins. Co.* v. *Schmaltz*, 66 Ark. 588; *Pace* v. *Crandell*, 74 Ark. 417; *Waters-Pierce Oil Co.* v. *Burrows*, 77 Ark. 74.

Furthermore, the testimony did not tend to corroborate the appellee on any material issue in the case, and was itself immaterial. The admission or exclusion of immaterial testimony will not constitute a prejudicial error. *Kelly* v. *Matthews*, 5 Ark. 223; *Merritt* v. *Hinton*, 55 Ark. 12; *Railway Company* v. *Fair Assoc.*, 55 Ark. 163.

The true issue upon which was based the right of the appellant to recover against the appellee was submitted to the jury upon competent testimony and proper instructions. The jury found upon that issue against the appellant.

The judgment must be affirmed.

HUFFAKER v. BEERS.

Opinion delivered May 16, 1910.

WILLS—CONTEST—TEST OF TESTAMENTARY CAPACITY.—It was error, in a will contest, to instruct the jury that a testator, to be capable of making a will, must have "a full knowledge of the property he possesses;" the true test with respect to his property being not whether he knew, but whether he was mentally capable of knowing, what property he possessed.

Appeal from Conway Circuit Court; *Hugh Basham*, Judge; reversed.

STATEMENT BY THE COURT.

Appellants were proponents of the last will of William Moore. Appellees contested the will upon the sole ground that the testator "did not have sufficient mental capacity to make a valid will at time he executed the will offered for probate."

The court granted the following prayers of appellants for instructions:

"1. The contestants admits that the paper read in evidence as the will of William Moore was executed by him as his will; that it is in due form, and was properly executed and witnessed, and should be sustained by you, unless the proof

shows that at the time of its execution he was mentally incapable of making a valid will.

"2. The law presumes that William Moore had sufficient mental capacity to make a valid will. And you should sustain the will, unless you find from the evidence that at the time he executed it he was incapable from mental weakness of appreciating and understanding the nature and character of the act.

"3. One who has sufficient mental capacity to understand the nature of the act has a right to will his property to whom he pleases. With the motives of William Moore, or with the justice or injustice of his acts, you have nothing to do. The sole question for you to determine is whether he had sufficient mental capacity to make a will. And, unless the proof shows that he did not have such capacity, you should sustain the will; the burden of proof being upon the contestants to show that he did not have sufficient mental capacity to make a will.

"4. Old age, physical infirmities and even partial eclipse of the mind would not prevent him from making a valid will; if, at the time he signed the will, he knew and understood what he was doing, if he could retain in his memory, without prompting, the nature and extent of his property, and comprehend to whom he was giving it, and be capable of appreciating the deserts and relations to him of those whom he excluded from participating in his estate, he had the capacity to make a will."

And the court also granted the following prayers of appellees:

"1. Gentlemen of the jury, a paper has been offered for probate in this case which purports to be the last will and testament of William Moore, deceased. It is contended that this will is not valid because Mr. Moore at the time of its execution did not possess sufficient mental capacity to make a will. His mental capacity is a question of fact for you to determine from the evidence in this case."

To the giving of which instruction the proponents at the time excepted.

"2. The law provides that only persons of sound and disposing mind and memory can make a valid will. * * * What is meant by this is not that the testator shall at the time be actually insane. Weakness of intellect, whether it arises from extreme

old age, from disease, from great bodily infirmities or suffering, or from all these combined or from other causes, when sufficient in degree, may render a person incapable of making a will.

"3. A person of sound mind, within the meaning of the law in this case, is one who has a reasonable knowledge of the act he is engaged in, a full knowledge of the property he possesses and its extent, and a reasonable perception and understanding of the disposition he desires to make of it and of the persons he desires to be the recipients of his bounty and a capacity to recollect and comprehend the nature of the claims and legal rights in his estate of those who are the natural objects of his bounty, of their relationship to him and his obligations to them. Unless the testator in this case possessed this capacity, then in law he is not capable of making a will, and you should so find."

To the giving of which instruction the proponents at the time excepted.

"4. You are further instructed that the burden of proof is on the contestants in this case to show by a preponderance of the evidence that at the time of the making of the will the testator was of unsound mind and incapable of making a valid will, a bare preponderance however being sufficient."

To the giving of which instruction the proponents at the time excepted.

After hearing the evidence and the above instructions the jury returned a verdict in favor of appellees. Judgment was entered according to the verdict, and this appeal has been duly prosecuted.

Sellers & Sellers, for appellant.

The test of testamentary capacity is that the testator shall have capacity to retain in memory without prompting the extent and condition of his property, and comprehend to whom he is giving it. 87 Ark. 273; 49 Ark. 367; 5 S. W. 590; 64 Ark. 349; 42 S. W. 536. The opinion of the witness was sought upon the identical mental states and processes given as the test of testamentary capacity. 49 Ark. 367; 64 Ark. 349; 1 Whar. & Stille, Med. Juris., § 67; 1 Clevenger, Med. Jur., § 287; 54 Ark. 588; 66 Ark. 629. It is for the jury to say whether the testator had the requisite capacity. 3 L. R. A. (N. S.) 172.

It is error to give contradictory instructions. 72 Ark. 440; 55 Ark. 393; 59 Ark. 105. Failure to recognize friends in old age is no proof of incapacity to make a will. 49 Ark. 367; 66 Ark. 623.

W. P. Strait, for appellee.

The question of the testator's capacity has been settled by the jury, and should not be disturbed. 57 Ark. 574; 23 Ark. 208; *Id.* 32; 13 Ark. 474; *Id.* 285; 25 Ark. 482; 27 Ark. 517; 46 Ark. 511; 51 Ark. 324. Even though a preponderance of the evidence is against it. 13 Ark. 306; 26 Ark. 360; 19 Ark. 121; 23 Ark. 50; 10 Ark. 138; 25 Ark. 11. A new trial will not be had unless there is a total want of evidence to sustain the verdict. 24 Ark. 251; 21 Ark. 306; 51 Ark. 334. It is not error to exclude evidence of facts already proved. 14 Ark. 505; 5 Ark. 680. Appellee's instruction No. 3 was correct. 87 Ark. 273. The instructions are to be construed as a whole. 28 Ark. 63; 19 Ark. 96; 17 Ark. 292. If upon the whole record the verdict is right, it will not be disturbed. 44 Ark. 556; 19 Ark. 677; 43 Ark. 296; 46 Ark. 552; 10 Ark. 9.

WOOD, J., (after stating the facts). Instruction number 3 given at the request of appellees did not give the jury the correct guide for determining testamentary capacity. It made actual knowledge, rather than capacity to know, the test. There is a wide difference between the two, and one necessary to be observed in order to correctly declare the law where testamentary capacity is the issue. A testator might not have "full knowledge of the property he possessed and its extent," and yet, if he has the mental capacity to know about it, his will in the absence of fraud would nevertheless be valid. One might not know the natural objects of his bounty and their relation to him, and yet, if he had the capacity to know or to be informed about them and to comprehend his relation to them when so informed, his will would not be invalid because he did not have actual knowledge or "a reasonable perception and understanding of the persons he desired to be the recipients of his bounty." We endeavored to make clear the distinction of which we are speaking in the recent case of *Taylor* v. *McClintock,* 87 Ark. 273. In that case we had under consideration insane delusion as an alleged ground of incapacity. Here the alleged ground is

senile dementia, or general insanity from that cause. But, as we said in *Taylor* v. *McClintock, supra*: "The test of testamentary capacity is necessarily the same, whether the insanity be attributable to dementia or insane delusion—paranoia."

In the above case we approved an instruction which prescribed the following as a test of testamentary capacity: "By soundness of mind in this connection is meant the capacity of the testator to comprehend the nature of the transactions in which he is engaged at the time; to recollect the property to be disposed of, and the persons who would naturally be supposed to have claims upon him, their deserts and relation to him; and to comprehend the manner in which the instrument would distribute the property among the objects of his bounty; if one who, at the very time he undertakes to make a will, is possessed of sufficient intelligence and memory to fairly and rationally know and comprehend the effect of what he is doing, the nature and condition of his property, who are or would be natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute his estate among or withhold it from them, and the scope and bearing of the will he is making, * * * he has capacity to make a will."

The Supreme Court of Connecticut in *Havens* v. *Mason*, 78 Conn. 410, 3 L. R. A. (N. S.) 172, passed on an instruction similar to the above except that it had also the following: "It is for the jury to say whether or not at the time of the execution of the will Mrs. Stevens knew that she was making a will, knew what property she possessed, and knew the natural objects of her bounty; and if you find that these essentials she knew and understood at the time of the execution of this will, then the will should be sustained."

The court approved the instruction as sanctioned by us above, but condemned as error and reversed the cause on account of the added language last above quoted. The court said: "The first of these sentences states a sound legal proposition. But, while one possessing the intelligence and memory which it describes has, as matter of law, sufficient testamentary capacity, it does not follow that one without actual knowledge of all the various matters specified may not have it also. Persons of large means rarely know precisely what property they

own, or even the nature and present condition of every considerable item of it."

"If by the class described as those who were or should be the natural objects of her bounty was meant her heirs at law, as seems probable by the reference to their relations to her, a test of capacity was imposed which was too severe. She had fourteen nephews and nieces living, who were her next of kin. She might have had sufficient testamentary capacity, without knowing whether all were alive, or whether any other who might have died previously had left issue that then represented them." See also note in 3 L. R. A. (N. S.) to the above case.

It will be noted that in the instruction approved by this court in *Taylor* v. *McClintock, supra,* and other cases there cited, the test is capacity to know, and not actual knowledge, whereas the instruction under consideration in the instant case makes actual knowledge, and not capacity to know, the test. To be sure, if one knows and understands what he is doing when he executes his will, and can retain in his memory, without prompting, the nature and extent of his property, etc., then he has the testamentary capacity. But one may not actually know and understand, and yet have the capacity to do so. Therefore instruction number four given at the instance of appellants does not cure the error of instruction number three given at appellee's request. Nor is this error cured by other instructions in the case. The error of instruction number three is not one of mere verbiage that could and should have been corrected by specific request of appellants. The instruction is an erroneous statement of a fundamental rule of the law applicable to the issue being tried and essential to its correct determination. The error is one of substance, and not of mere form. A general objection is sufficient.

Other assignments of error are argued in the briefs, and have been considered, but the above is the only prejudicial error we find in the record. For this the judgment is reversed, and the cause is remanded for new trial.

McCULLOCH, C. J., (dissenting). This case seems to have been submitted to the jury upon exceptionally clear instructions, save number three, and they were correct. The record is entirely free from error in other respects, and the verdict is well supported by the testimony. Instruction number three contains

some language which submits an incorrect test of testamentary capacity, but, considering this instruction as a whole and in connection with the other instructions given at the request of each party, I do not see how the jury could have been misled by it. The instruction is not one that is inherently wrong, though it is to some extent ambiguous and calculated to mislead. It should, therefore, have been met by a specific objection to the particular language which was objectionable. It is manifest from all the instructions that the court intended to make capacity, and not actual knowledge, the test, and the jury must have so understood. If a specific objection had been made to the objectionable language in the instruction, so as to call attention directly to it, the court would no doubt have modified it so as to harmonize it with the other instructions. I do not think the verdict should be disturbed.

Mr. Justice HART agrees with me.

McKINNEY v. McCULLAR.

Opinion delivered April 18, 1910.

1. GUARDIAN AND WARD—EXCHANGE OF WARD'S LAND.—The probate court has no power to order the lands of a minor to be exchanged for other lands. (Page 166.)
2. SAME—ESTOPPEL OF WARD.—A ward is not estopped to deny the authority of the guardian to exchange his land for other land where he was never placed in possession of the exchanged land nor received any benefits therefrom. (Page 166.)
3. INFANCY—LIABILITY FOR IMPROVEMENTS ON HOMESTEAD.—While minors are not liable for permanent and valuable improvements placed on their homestead by one to whom it had been exchanged for other land, the latter will be entitled to setoff against his liability for rent a reasonable compensation for necessary repairs thereon made by him. (Page 168.)
4. SAME—EXCHANGE OF MINOR'S LAND—RETURN OF CONSIDERATION.—Where a minor never received a sum paid to his guardian as consideration for an exchange of his homestead for other land, he will not be bound to restore such consideration before recovering his homestead. (Page 168.)

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

Pitt Holmes and *Woodson Mosley,* for appellant.

The sale being for the maintenance of the minors, the probate court had exclusive jurisdiction, and its judgment in approving the sale is final and cannot be set aside except for fraud. 11 Ark. 519; 13 Ark. 177; 31 Ark. 74; 33 Ark. 575; 44 Ark. 267; 57 Ark. 190; 66 Ark. 416; 73 Ark. 612. The probate court may order the sale of the homestead of minors for their benefit. 65 Ark. 355. Appellees should have returned the money before commencing this suit, or at least offered to do so. 39 Ark. 293; 47 Ark. 427; 65 Ark. 298; 74 Ark. 241; 71 Ark. 605.

Irving Reinberger, for appellee.

The probate court has no authority to order a minor's lands exchanged for other lands. 47 Ark. 460. Even if the transaction be held to be a sale for reinvestment, the sale is void because the guardian failed to give a special bond 38 Me. 47; 28 Mich. 251; 90 Pa. 350; 71 Ind. 398; 81 Ky. 127; 59 Ia. 533; 52 Miss. 533. The sale is void also because there was no appraisement of the ward's property. 86 Ark. 368. The failure to give notice to those interested renders the sale void. 43 Ia. 11; 52 Miss. 625; 85 Ill. 374. Appellees having received no part of the proceeds of the sale, they are not required to return it. 47 Ark. 460.

HART, J. In the year 1898 Mrs. M. C. McCaskill, wife of J. M. McCaskill, died seized and possessed of lots seven and eight in block thirty in the town of Rison, Cleveland County, Arkansas, which was her homestead. She left surviving her, Elva E. McCaskill, now Elva E. McCullar, Hugh G. McCaskill and Mary B. McCaskill, minors, as her sole heirs at law. J. M. McCaskill, the father of said minors, was duly appointed as their guardian. On the 17th day of December, 1904, said J. M. McCaskill as such guardian, applied to the Cleveland Probate Court for an order to exchange said lots for certain other lots in said town of Rison, belonging to N. A. McKinney. On the same day the order was made, and said J. M. McCaskill as said guardian executed a deed to said lots to said McKinney as such guardian, and the exchange was made. The proceedings were approved by said probate court, and N. A. McKinney entered into possession of the lots so conveyed to him.

The present suit was brought by Elva E. McCullar, Hugh G. McCaskill and Mary B. McCaskill by her next friend, Hugh G. McCaskill, against said J. M. McCaskill and N. A. McKinney to cancel and set aside said deed.

The defendant J. M. McCaskill failed to answer, but made default. The defendant N. A. McKinney answered and admitted that the exchange was made pursuant to the order of the probate court upon the application of the guardian of the plaintiffs herein; but averred that the exchange was made in good faith, and that said guardian received the full value of said lots, and used the same for the benefit of said minors.

The chancellor, after hearing the evidence introduced, found in favor of the plaintiffs, and a decree was accordingly entered, cancelling the deed of said guardian to said McKinney, and that the possession of said premises be restored to said plaintiffs. The defendant McKinney has duly prosecuted an appeal to this court.

In the case of *Meyer* v. *Rousseau,* 47 Ark. 460, the court held that the probate court has no power to order the lands of a minor to be exchanged for other lands. The decision has never been overruled, and settles the present case. That case decided that an exchange of a minor's lands by a guardian under an order of the probate court was not a sale of them and said: "Under no state of facts is the probate court authorized by the statute, so far as we have been able to discover, to order the lands of a minor to be exchanged for other lands. The order of the Lincoln Probate Court directing an exchange of appellee's lands for other lands is void."

There is no evidence that the plaintiffs were ever in possession of the exchanged lands, or that they received any benefits therefrom; consequently, as was said in the case of *Meyer* v. *Rousseau, supra,* they are not estopped from disputing the validity of the exchange.

It is true that $150 was paid to the guardian of the plaintiff in the exchange, but this was paid to him before the order of court authorizing the exchange was made, and personal security therefor was required and given. Besides, the guardian says that only a small part of it was used for the benefit of the minors, and the amount so used is not shown.

Therefore the decree will be affirmed.

ON REHEARING.

HART, J. The chancellor found that the rental value of the property exchanged by the guardian of appellees was $7 per month, and rents were allowed by him from December 17, 1904, the date of the exchange. He found the amount to be $478, and the decree provided for the payment of that sum by appellant to appellees. This was a clerical mistake. A calculation will show that the amount due, figured on the same basis as that adopted by the chancellor, will show the amount to be $378.

When appellant went into possession of the property, the barn and garden fence had entirely rotted away. The dwelling house itself was badly out of repair, and portions of it decayed. The roof and floors of the porch had rotted away. The roof of the house itself was in a bad state of repair. The steps and one of the sills had rotted away. Altogether the premises were in such dilapidated condition that they were unfit for habitation. Appellant weatherboarded and ceiled the house. He re-covered the porch and repaired the floors and the roof of the house, and dug a well, and repaired the fences. These repairs, he says, were worth at least $300.

The rental value of the place from the time appellant went into possession of it until the date of the commencement of the suit amounted to $182. Appellant is entitled to setoff the repairs made by him against these rents, and appellees will be only allowed to recover rents from the date of their demand for possession, which was the date of the commencement of the suit. The value of the rents will be fixed at the rate allowed by the chancellor, that is to say, at $7 per month. This is done in application of the maxim that he who seeks equity must do equity. It must be remembered that appellees, and not the aplant, are the actors in the present suit, and that they have come into a court of equity to establish their rights to the property itself. The repairs made by appellant were necessary in order to render the premises inhabitable, and they were made under a *bona fide* belief that he was the owner thereof. Hence he should, upon principles of justice and equity, be allowed to set them off against the rents up to the date of demand of possession by appellees, which as we have already seen was the date of the commencement of the action.

"Minors are not liable for permanent and valuable improvements placed on their homestead. They can not be improved out of their homesteads; nor can the occupants be lawfully charged an increased rent on account of their improvements. In the absence of a contract, the occupants should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements." *Sparkman* v. *Roberts,* 51 Ark. at p. 32, and cases cited. To the same effect see *Gatlin* v. *Lafon, post* p. 256; 3 Pomeroy's Equity Jurisprudence (3 ed.), § 1241, and cases cited; *McDonald* v. *Rankin,* 92 Ark. 173, where this principle of equity is recognized.

The minors never received the $150 paid their guardian in exchange for their property, and of course are not now in possession of it. Therefore they are not bound to restore it. *Meyer* v. *Rousseau,* 47 Ark. at p. 464; *Stull* v. *Harris,* 51 Ark. 294.

Under the opinion on rehearing, appellees were only entitled to recover rents to the amount of $192.50, and to that extent the rehearing is granted, and the former decree modified. In all other respects the motion for a rehearing will be denied.

LYNCH v. STATE.

Opinion delivered May 9, 1910.

1. LARCENY—EVIDENCE—POSSESSION OF STOLEN GOODS.—In a prosecution for stealing a ring proof was admissible that defendant had in her possession other articles which were stolen at the same time that the ring was stolen, as tending to prove that she stole the ring. (Page 171.)
2. CRIMINAL LAW—SUFFICIENCY OF VERDICT.—Under an indictment containing two counts, one for grand larceny and another for receiving stolen goods, a general verdict finding defendant guilty as charged and fixing her punishment at one year in the penitentiary is valid, though it fails to designate on which count the jury found her guilty, if no objection was made as to the form of the verdict. (Page 172.)

Appeal from Pulaski Circuit Court, First Division; *Robert J. Lea,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was convicted on an indictment which charged her in the first count of grand larceny, towit: that she "unlawfully and feloniously did steal, take and carry away one diamond ring, of the value of fifty dollars, the property of Mrs. G. Street," and in the second count that she unlawfully and feloniously did receive and have with the intent to deprive the true owner thereof one diamond ring of the value of fifty dollars, the property of Mrs. Street, then lately before stolen, taken and carried away, well knowing that the property had been so feloniously taken, stolen and carried away as aforesaid.

The evidence tended to prove that appellant was employed by Mrs. George M. Street as chambermaid, that appellant had free access to Mrs. Street's house, that Mrs. Street kept her jewelry, including the diamond ring, wrapped up in a chamois bag and locked in a tin box, that the key to the box with other keys were usually left on her dresser, that appellant had access to the keys, that the box was opened, the jewels taken out, and the box relocked. The jewels were worth fifteen hundred dollars. The smallest ring taken was worth one hundred dollars. The last time appellant was at Mrs. Street's house she had an opportunity to get the keys. Mrs. Street was called to the back door to see a solicitor, and left the girl cleaning up her room. When Mrs. Street returned, the girl was not in the room. She did not see her any more for months. Mrs. Street was surprised to find her gone, for she had not had time to finish cleaning up the room. She did not collect her salary when she left, and did not afterwards call for it. The jewels that were stolen were four diamond rings, a diamond stud, a diamond brooch, three turquoises and an Eastern Star pin. Mrs. Street afterwards found the diamond stud in Hot Springs in the possession of one Bohl, a pawnbroker. One Will Keating left the stud with him, and one Lena James afterwards redeemed it, with Keating's permission, claiming it as her own. The testimony shows that appellant told the constable at Hot Springs that the particular ring in question was hers. She once lived with Lena James.

Appellant is shown to have had in her possession a brooch which the testimony of Mrs. Street tended to prove was hers,

and that it was stolen at the same time the other jewelry and the diamond ring were stolen. The testimony also tended to prove that appellant had in her possession a pin that resembled an Eastern Star pin. Mrs. Street lost an Eastern Star pin. When a witness at the instance of Mrs. Street visited appellant to see if she had an Eastern Star pin, appellant put her hand up to hide the pin, as soon as the witness cast her eye upon it.

Sam Speight testified as follows: "I have been on the detective force in Little Rock twenty-seven years. I went over to Hot Springs, and saw Keating, and got information that Henderson had fixed the ring. I asked Henderson if he had mounted such a ring, describing the ring, and he said no, he had not. A few days later, on the corner of Eighth and Broadway, I was talking to Will Miller, and Henderson came up; and I asked him if he remembered anything more about fixing that ring, and he said no, he did not remember anything about it. Some time after that I met him on Second and Main, and he told me that he remembered about the ring now; that he had seen it, and that it was work he did, but that he did not know what I was after when he was first talking with me. I think he said he had seen Will Keating in the meantime. I kept after him, because I wanted the truth about it."

The testimony on behalf of appellant and her own evidence tended to prove that the ring claimed by Mrs. Street as her ring, and which had been deposited by Keating with the pawnbroker, was a ring that belonged to Lena James, and that appellant never had possession of the ring. Appellant in her testimony contradicted the testimony of Mrs. Street, and her testimony tended to prove that she was innocent.

The court charged the jury orally, and no objection was made to the instructions.

The jury returned the following verdict: "We, the jury, find the defendant guilty as charged, and fix her punishment at one year in the penitentiary."

The motion for new trial makes the following assignments of error:

1. That the court erred in overruling defendant's motion to quash the indictment.

2, 3 and 4. That the verdict is contrary to both the law and the evidence.

5. That the court erred in permitting the State to prove, over the objection of the defendant, conversations had with Will Keating, Lena James and John Henderson, in the absence of the defendant.

6. That the court erred in permitting the State to introduce proof tending to prove that the defendant stole property not mentioned in the indictment.

7. That the court erred in permitting the prosecuting attorney, in his closing argument, to argue to the jury that M. G. Street was a widow; that the defendant had stolen fifteen hundred dollars' worth of property from her, and that was all the property she had, that all the witnesses for the defendant were negroes, and that they would swear to anything Scipio Jones, attorney for defendant, told them to swear.

8. That there is a fatal variance between the proof and the allegation in the indictment.

9. That the court erred in allowing the prosecuting attorney to argue to the jury that they could leave the diamond ring out of the case, and still there would be sufficient evidence to justify a conviction.

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

The verdict is sufficient. 76 Ark. 550. Where more than one felony composes one transaction, it is admissible, upon the trial for the commission of either felony, to prove the commission of the other. 4 Ark. 61; 37 Ark. 261; 77 Ark. 586; 75 Ark. 427; 84 Ark. 119; 87 Ark. 17. It is always competent to prove that witnesses have made contradictory statements. 72 Ark. 582; 67 Ark. 594; 73 Ark. 484.

WOOD, J., (after stating the facts). We are not favored with a brief on behalf of appellant, but have considered the various assignments of error. The indictment is valid. There are no exceptions to the instructions of the court. The evidence is sufficient to sustain the verdict. No objection was made to the testimony of Sam Speight as to the conversation he had with Will Keating and John Henderson. There is no showing in the record that he had any conversation with Lena James. We do not find the alleged remarks of the prosecuting attorney in the record which are set forth as the seventh and

ninth grounds of the motion for new trial. There is no variance between the allegations and the proof.

The testimony showed that the ring alleged to have been stolen was taken together with other articles of jewelry that were in the same bag. All the articles in the bag were taken at the same time. It was competent to show that appellant had possession of any of these articles. This testimony tended to prove that she took, not only these articles, but also the ring that was in the same bag, and that was stolen at the same time. The taking of the various articles of jewelry in the bag at the same time was a single act of larceny. It was but one transaction. The evidence was sufficient to support a verdict of guilty on the first count of the indictment, and that was the count on which the State relied, and on which the cause was submitted. No objection was made as to the form of the verdict. The verdict was not invalid, and is a basis for the judgment. *Cargill* v. *State*, 76 Ark. 550.

Appellant cannot complain because the jury did not return a verdict designating on which count they found her guilty.

The judgment is correct. Affirm.

POE v. STATE.

Opinion delivered May 9, 1910.

1. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDINGS.—A jury's findings of fact are conclusive on appeal if sustained by sufficient evidence. (Page 175.)
2. RAPE—SUFFICIENCY OF PENETRATION.—Under Kirby's Digest, § 2006, providing that "proof of actual penetration into the body shall be sufficient to sustain an indictment for rape," the carnal knowledge that is necessary to constitute rape does not require penetration for any particular depth. (Page 175.)
3. EVIDENCE—FORMER TESTIMONY OF ABSENT WITNESS.—Where an absent witness in a felony case is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found, what such witness had previously testified upon the examining trial of the defendant may be proved at the trial of the case, provided the defendant was present at the examining trial, and had the opportunity of cross examination. (Page 176.)
4. SAME—SUFFICIENCY OF PROOF OF FORMER TESTIMONY.—The former testimony of an absent witness, taken at an examining trial, may be

proved by any one who was present and can remember the testimoney, and it need not have been reduced to writing and signed by the witness. (Page 177.)

5. SAME—FORMER TESTIMONY.—To render the former testimony of an absent witness, given at an examining trial, competent in a felony case, it is not necessary that the defendant should have been represented by counsel at the examining trial. (Page 177.)

6. SAME—FORMER TESTIMONY OF ABSENT WITNESS.—Proof that an absent witness was a witness at the examining trial and gave testimony therein justifies the inference that such witness was duly sworn as such. (Page 177.)

7. TRIAL—IMPROPER ARGUMENT.—It was not error to permit the prosecuting attorney, in a prosecution for rape, to state, in his argument to the jury, that "the defendant had been proved guilty beyond a question, and ought to be hanged for the protection of women and girls and for the good of the public." (Page 177.)

8. SAME—IMPROPER ARGUMENT.—A misstatement of the testimony by the prosecuting attorney in a criminal case will not be ground for new trial where the jury could not have been misled thereby. (Page 178.)

Error to Garland Circuit Court; *W. H. Evans,* Judge; affirmed.

Appellant, *pro se.*

Where the verdict is so clearly against the weight of the evidence as to shock the sense of justice of a reasonable person, a new trial will be granted. 70 Ark. 385; 21 Ark. 468; 65 Ark. 278; 24 Ark. 224; 13 Ark. 70; 8 Ark. 155; 10 Ark. 309; 2 Ark. 360; 5 Ark. 407; 6 Ark. 86; 10 Ark. 138; 28 Ark. 309; 39 Ark. 491; 34 Ark. 640; 57 Ark. 468. If improper statements made by counsel in their argument are not corrected by the court, a new trial will be granted. 77 Ark. 73; 119 Ia. 671.

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

An infant under twelve years of age cannot consent to sexual intercourse. 50 Ark. 336. An attorney has the right to express his opinion as to the weight of the evidence. 76 Ark. 39; *Id.* 276; 67 Ark. 365; 77 Ark. 62; *Id.* 64. The record must show that objection was made to an erroneous ruling of the trial court. 72 Ark. 238. The testimony of the official stenographer that he was at the examining trial and took down the testimony and afterwards transcribed it on the typewriter was properly admitted. 40 Ark. 454; 47 Ark. 180; 60 Ark.

400; 68 Ark. 353; 58 Ark. 353; 76 Ark. 515; 83 Ark. 272; 90 Ark. 515. The manner and extent of the examination of witnesses rests in the discretion of the trial court. 75 Ark. 142; 66 Ark. 545; 63 Ark. 108; 75 Ark. 548.

FRAUENTHAL, J. The defendant, Harry Poe, was indicted by the grand jury of Garland County, charged with the crime of rape; and upon his trial he was convicted by a petit jury of that crime. He has appealed to this court to obtain a reversal of the judgment of conviction. He urges that there was not sufficient evidence to warrant the finding that he was the person who committed the act or that the deed of rape was accomplished. The testimony on behalf of the State established the following facts: Lena Adams, the female who was assaulted, was a little white girl ten years of age. She lived in the southern suburbs of the city of Hot Springs, and was attending school at what is known as Oaklawn School, which was situated about one-half mile from her home. Between her home and the school there was a stretch of woodland which she passed through in going to and from the school. About a week prior to the day upon which the assault is alleged to have been committed the defendant, who is a negro boy 17 years old, met her on the way, and spoke to her, and asked her if she did not want some red thread. She told him that her grandmother had thread, and she wanted none from him. On January 25, 1910, the defendant again met her, and near the strip of woods where no one lived and where the place was deserted. It was about 4 o'clock of the afternoon of that day, and the little girl was going to her home from the school. He told her that he had a rooster in the woods he would show her, and quickly grasped her around the waist, and as she began to scream threatened to cut her throat. He carried her into the woods, and there forcibly and against her will made the assault upon her. As he was rising from the ground two white women, Emma Grinstead and Ella Karinger, who were returning to their home from the city, passed through the timber and near enough to him so that they saw him and could identify him. The defendant fled from the place. One of these women had seen the defendant before that day; and at the examining trial which was held on the 31st day of January, 1910, both of them testified that they could and did identify

the defendant as the party who had made the assault upon the girl. The defendant was arrested a few days after the alleged assault, and was taken before the girl. Prior to that the girl had described the clothes he wore and his general appearance. Four or five negro boys had been shown to her for identification, and she claimed that none of them was the assailant. But she immediately identified the defendant as the person who had assaulted her, when he was brought before her. A short time after the assault a physician examined the girl, and found that she was infected with a venereal disease as a result of the assault; and the testimony further proved that the defendant had been and was on the day of the assault infected with this loathsome disease.

The defendant introduced a number of witnesses who testified that he lived about one mile from the home of the girl, and that he was at his home on January 25, 1910, and at the time the assault is alleged to have been made. But the jury were the exclusive judges of the credibility of these witnesses. It was peculiarly the province of the jury to determine the questions of fact involved in this case; and if their finding of the facts is sustained by sufficient evidence, then, according to the repeated decisions of this court, that finding is conclusive. *Hubbard* v. *State,* 10 Ark. 378; *Floyd* v. *State,* 12 Ark. 43; *Chitwood* v. *State,* 18 Ark. 453; *Dixon* v. *State,* 22 Ark. 213; *Harris* v. *State,* 31 Ark. 196; *McCoy* v. *State,* 46 Ark. 141; *Holt* v. *State,* 47 Ark. 196; *Williams* v. *State,* 50 Ark. 511; *Ferguson* v. *State,* 92 Ark. 120. We are of the opinion that there was sufficient evidence adduced upon the trial of this case to warrant the jury in finding that the defendant was the party who committed the assault. The little girl had seen the defendant upon two different occasions, and she had ample opportunity to observe him on each occasion, and she had sufficient intelligence to know him, and to recognize him afterwards. This she did; and she testified without any equivocation that he was her assailant. The two women had ample opportunity to see the defendant just after the assault and to observe him sufficiently to know him. They unhesitatingly identified the defendant as the girl's assailant. This testimony, together with the other circumstances proved in the case, is, we think, sufficient

to sustain the verdict of the jury upon this question of fact. And we are also of the opinion that there was sufficient testimony to sustain the finding of the jury that the deed of rape was accomplished. "The carnal knowledge that is required to constitute rape must be a *res in re,* but to no particular depth," and the hymen need not be ruptured nor the body torn. Under our statute (Kirby's Digest, § 2006) "proof of actual penetration into the body shall be sufficient to sustain an indictment for rape." In the case of *Reg.* v. *Lines,* 1 Car. & K. 393, Parke, B., said: "I shall leave it to the jury to say whether at any time any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for, if it was, no matter how little, that will be sufficient to constitute penetration." 2 Bishop, Crim. Law, § 1132; 33 Cyc. 1422; *Morris* v. *State,* 54 Ga. 440; *State* v. *Hargrave,* 65 N. C. 466; *People* v. *Crowley,* 102 N. Y. 234.

The testimony of the girl who was assaulted and of the physician who examined her was sufficient to establish the fact that there was penetration into the body, and that there had been an entrance made through the labia and to the hymen.

Upon the trial of this case in the circuit court, the court permitted R. B. Cotham, the court stenographer, to testify, over defendant's objection, to the evidence that was given by the two women, Emma Grinstead and Ella Kariger, at the examining trial of the defendant before a justice of the peace. At the examining trial the witness, Cotham, was present and heard the testimony there given by these two women, and as court stenographer took stenographic notes of their evidence and afterwards transcribed the same. Upon the trial in the circuit court he testified that this evidence was given by these two witnesses at the examining trial; there was no written statement thereof signed by them. The defendant was present at the examining trial, but without counsel. He was given the opportunity to cross examine these two witnesses, and did propound to one of them some questions. It was shown by testimony which the trial court found sufficient, and which we find to be sufficient, that these two witnesses were beyond the jurisdiction of the court at the time of the trial of the case in the circuit court. It was competent to prove what these two witnesses testified upon the examining trial. "The settled law

of this State is that where the adverse witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found, what such witness testified on a former occasion on the same issue and between the same parties may be given in evidence, provided the accused was present, having the right of cross examination." *Vaughan* v. *State,* 58 Ark. 353; *Hurley* v. *State,* 29 Ark. 17; *Shackleford* v. *State,* 33 Ark. 539; *Dolan* v. *State,* 40 Ark. 454; *Sneed* v. *State,* 47 Ark. 180; *McNamara* v. *State,* 60 Ark. 400; *Wilkins* v. *State,* 68 Ark. 441; *Wimberly* v. *State,* 90 Ark. 515. It is not necessary that the testimony given by such witness shall be reduced to writing and signed by the witness, before evidence of such testimony is admissible. The statute of this State does not require that in examining trials the testimony of the witness shall be reduced to writing and signed by him. The statute only provides that the magistrate in such trial shall state the name and place of residence of the witness and make a general statement of the substance of what was proved. Kirby's Digest, § 2148. The testimony of the absent witness can be proved by any one who heard him testify and can remember the testimony. *Petty* v. *State,* 76 Ark. 515; *Shackleford* v. *State, supra; McNamara* v. *State, supra.*

Nor was it necessary, in order to render this testimony competent, that the defendant should have been represented by counsel at the examining trial. *Butler* v. *State,* 83 Ark. 272. And it sufficiently appears from the evidence that these two women were sworn as witnesses in the examining trial. The witness Cotham testified that they were witnesses in said trial and gave their testimony therein. A "witness" is one who has been sworn according to law and deposes as to his knowledge of the facts in issue upon the trial of a case; and "testimony" means the statement made by the witness under oath in a legal proceeding. Web. Dict.; 1 Bouv. Law Dict. 658. We are therefore of the opinion that the court did not err in permitting the introduction in evidence of what the absent witnesses testified in the examining trial.

It is urged that the State's attorney made improper remarks in his argument to the jury. The remarks complained of are that the attorney said that "the defendant had by the evidence been proved guilty beyond a question and ought to be hanged for the protection of women and girls and for the good of the

public." He also said that Lena Adams had been corroborated by the testimony of the two women in a statement made by her that the defendant had a dog with him on the occasion of the assault. We do not think that any error was committed which was prejudicial to the rights of the defendant by these remarks of the attorney for the State. All prosecutions are made for the good of the public as well for the punishment of the guilty; and the statement of the attorney as to the effect of the testimony was but an expression of his opinion relative thereto which it was not error for him to make. *Puckett* v. *State,* 71 Ark. 62; *Reese* v. *State,* 76 Ark. 39; *Maxey* v. *State,* 76 Ark. 276; *Miller* v. *Nuckolls,* 77 Ark. 64.

The statement of the attorney that the two women had in their testimony made any reference to a dog accompanying defendant at the time of the alleged assault was erroneous as a matter of fact; but it was made only as a result of a deficiency in memory as to what these witnesses actually testified. The jury heard their evidence, and could not have been misled by any misstatement thereof.

The attorney for the defendant has not urged in this court that any error was committed by the lower court in any of its rulings upon the instructions. We have examined these instructions, and we are of the opinion that they fully and properly presented to the jury the law that was applicable to every phase of the case.

We have carefully examined each step that was taken in this case, and we are of opinion that the defendant has had a full and fair trial. A jury has declared upon that trial that he is guilty of the crime with which he is charged, and we find that the evidence is sufficient to sustain that verdict of the jury.

The judgment is accordingly affirmed.

SEGERS v. AYERS.

Opinion delivered May 23, 1910.

1. JUDGMENTS—FRAUD AS DEFENSE.—The fact that a valid defense existed to a claim against an estate in the probate court will not be ground for equity to set aside the allowance of such claim, as the fraud which will vitiate a judgment must have been practiced in its procurement, not fraud in the original cause of action. (Page 180.)

2. SAME—SUIT TO VACATE—LACHES.—One cannot be heard to complain of a judgment as fraudulent where, with full knowledge of the alleged fraud, she has waited five years after rendition of the judgment, and until her adversary's principal witness has died, before suing to vacate the judgment. (Page 181.)

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

W. J. Driver, for appellant.

An administrator is not bound to plead the statute of limitations under ordinary circumstances. 68 Ark. 492. But there are extraordinary circumstances in the case at bar. The fraud which would vitiate a judgment must have been in the procurement thereof. 73 Ark. 440. Equity may refuse relief where it is sought after an undue and unexplained delay. 81 Ark. 284; 86 Ark. 591. Although appellant brought her suit in the wrong forum, it shows that she was vigorously contesting her claim.

J. T. Coston, for appellee.

In order to overturn a judgment of the probate court by a proceeding in chancery, it must appear that fraud was used in procuring the judgment. 104 S. W. 548. The administrator had the right to refuse to take an appeal to the circuit court. 119 S. W. 272. All parties are bound by the judgment of allowance unless fraud be shown in the procurement thereof. 84 S. W. 486. The authority of Mrs. Ayers' husband to look after her business generally did not authorize him to collect rents on her lands. 126 S. W. 832; 122 S. W. 992; 66 Ark. 336. Appellant is barred by laches. 121 S. W. 357; 137 U. S. 566; 127 U. S. 347; 143 U. S. 274. Appellant was too late in asking to be made a party in order that she might appeal. 28 Ark. 479. A party who asks that a judgment obtained by fraud be set aside must proceed promptly upon discovering the fraud. 15 N. E. 224; 148 U. S. 369. A delay of eleven months is not excused. 9 N. W. 634. 30 Pa. 42; 42 Atl. 707.

McCULLOCH, C. J. Margaret Cox, a resident of Mississippi County, Arkansas, died in October, 1903, leaving surviving appellant, Maggie Lee Segers, her sole heir at law. She left an estate consisting of a tract of land in that county, and in July, 1904, E. M. Ayers, the husband of appellee, Sarah J. Ayers,

was appointed administrator of the estate of said decedent. Mrs. Ayers then probated a claim against said estate for the sum of $400, alleged to be due for the rent of land for the years 1893, 1894, 1895 and 1896. The claim was duly authenticated and presented to the administrator, who allowed it, and it was then presented to the probate court, and that court rendered a judgment allowing and classifying the claim. The judgment of the probate court was rendered at the October term, 1904. During that term of the probate court, appellant ascertained that the claim had been allowed by the court, and she employed an attorney to represent her in getting the judgment of allowance set aside. Her attorney requested the administrator to take an appeal to the circuit court, but the latter refused to do so. An appeal was prayed by appellant at the July term, 1905, of the probate court, and a transcript of the proceedings was lodged in the circuit court. Nothing was done in the case until May 3, 1909, when the circuit court dismissed the appeal on the ground that appellant had no right to prosecute an appeal from the judgment of the probate court. Appellant then commenced the present action in the chancery court to set aside the judgment of allowance, on the ground of fraud in its procurement, alleging that the debt claimed against said estate had been paid during the lifetime of Mrs. Cox to said E. M. Ayers, as husband and agent of appellee, and that, if the same had not been paid as aforesaid, it was barred by the statute of limitations long before it was presented to the administrator. Appellee answered the complaint, and on final hearing of the case the chancellor dismissed the complaint for want of equity.

Appellant introduced a witness who testified that the rents for the years 1895 and 1896 were paid to E. M. Ayers. E. M. Ayers died before the commencement of this action, and appellee testified that she had no recollection of ever having received the rent for the years claimed. Fraud in the procurement of the judgment can not be predicated on the fact that the debt was barred by the statute of limitations, for this was apparent from the face of the claim presented to the court, and there was no evidence that the facts were misrepresented to the court, or that the facts on that point were concealed from the court. The fact alone that there was a valid defense to the claim will not defeat the judgment, for fraud which will vitiate a judg-

ment is that practiced in its procurement, not fraud in the original cause of action. *Scott* v. *Penn,* 68 Ark. 492; *James* v. *Gibson,* 74 Ark. 440.

It is insisted, however, that the failure of E. M. Ayers to disclose to the court the fact that he had collected a part of the amount for which the claim was being asserted constituted a fraudulent concealment from the court of material facts, and amounted to a fraudulent procurement of the judgment of allowance. We do not deem it necessary to pass on that question, for we are of the opinion that appellant is barred by laches from attempting at this time to set aside the judgment on the alleged ground that the debt had been paid to appellee's husband. Appellant, with full knowledge of the rendition of the judgment, waited about five years before commencing the action. In the meantime, appellee's husband, E. M. Ayers, to whom payments on the debt are claimed to have been made, and who is alleged to have practiced fraud in procuring the judgment, died. Appellee had no means of rebutting the testimony adduced by appellant as to said payments, and by this delay she was deprived of the opportunity to present her side of the question. It is no excuse to say that during the period of delay the appeal from the judgment was pending in the circuit court. She is not excused by the time frittered away attempting to prosecute an unauthorized appeal. No reason is given why the case was permitted to lie undisposed of in the circuit court for four years.

Chief Justice ENGLISH, speaking for the court in *Wilson* v. *Anthony,* 19 Ark. 16, said: "Where the statute is not relied on as a defense, or where there is no statute of limitation, a court of equity will not aid in enforcing stale demands, where the party had been guilty of negligence, and slept upon his rights. The chancellor refuses to interfere after an unreasonable lapse of time from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time, and the evidence may be lost. (Citing authorities). No precise rule, applicable to all cases, as to what lapse of time will constitute a demand a stale one, in the sense above indicated, can be declared. Each case must, to some extent, depend on its own circumstances, and will be

construed or modified by them, and by analogy to other known and settled rules of law."

The Supreme Court of the United States announces the same rule in language which is entirely pertinent to the question now before us: "The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscure by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence." *Mackall* v. *Casilear,* 137 U. S. 556. See also as illustrative of this doctrine *Stuckey* v. *Lockard,* 87 Ark. 232; *Jackson* v. *Becktold Ptg. Co.,* 86 Ark. 591.

We are clearly of the opinion that the unreasonable delay in bringing the suit, coupled with appellee's loss of evidence by reason of the death of E. M. Ayers during the period of delay, is sufficient to warrant a court of equity in refusing to set aside the judgment for alleged fraud in the procurement thereof. For this reason the decree is affirmed.

HINKLE v. POWELL.

Opinion delivered May 23, 1910.

JUSTICE OF THE PEACE—JURISDICTION—LIEN.—A justice of the peace has no jurisdiction of a suit by the covenantee in a deed to recover from his covenantor under his covenant against incumbrances a sum less than one hundred dollars which he was required to expend in order to remove a lien from the land.

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

Lyman F. Reeder, for appellant.

The justice of the peace had jurisdiction, because no lien on land was involved in this case. 54 Ark. 16; 47 Ark. 241. A lien can be waived or contracted against. 25 Cyc. 673.

Moore, Smith & Moore and *H. M. Trieber,* for appellee.

The demurrer was properly sustained. 65 Ark. 498. Jurisdiction can not be conferred by consent or agreement. 33 Ark. 31; 34 Ark. 399; 70 Ark. 346; 90 Ark. 195.

McCULLOCH, C. J. The circuit court on appeal from a justice of the peace sustained a plea, in the nature of a demurrer, to the jurisdiction of the court to hear and determine the cause of action set forth in the following complaint:

"That on the 4th day of December, 1908, plaintiff bought and purchased of and from the defendant certain lands lying in the county of Independence and State of Arkansas, and the defendant made and executed his deed therefor. That it was expressly understood and agreed that the defendant, R. H. Powell, would pay all taxes due upon said lands for the year 1908 by a contract and understanding then and there had and entered into, and that but for such contract and understanding plaintiffs would not have purchased said lands at said time. That defendant failed and refused, and still fails and refuses, to pay said taxes for the year 1908, and that said lands forfeited for taxes, and the penalty in such case made and provided has attached; that the taxes, penalty and costs due on said lands as aforesaid amounted to the sum of $51.79; that plaintiffs have paid said sum of $51.79 in full, and here attach said tax receipts as exhibits hereto. Wherefore plaintiffs pray judgment against defendant for said sum of $51.79, for their costs and for all proper relief."

The court sustained the objection to its jurisdiction, and dismissed the action, on the authority, we presume, of the decision of this court in *Sanders* v. *Brown,* 65 Ark. 498, and *Naylor* v. *McNair,* 92 Ark. 345. The first of the above cited cases was an action instituted in the circuit court by Brown against his vendor, Sanders, to recover on broken covenants of warranty the sum of $61, the amount paid by plaintiff to remove the incumbrance of a lien for special improvement assessment. This court held that, the question in the case being whether or not the amount claimed was a lien on the land, a justice of the peace had no jurisdiction, and that the circuit court had jurisdiction regardless of the amount in controversy. In the other case cited above this court held that the circuit court had jurisdiction in an action for alleged breach of a covenant of warranty, notwithstanding the amount sought to be recovered

was less than $100, where the decision involved the question whether the amount sued for constituted a mortgage lien on land.

Does the principle announced in those cases control in the present one? We see no well-founded distinction, and think that those cases are decisive of the present case. It is not stated specifically in the complaint whether the contract was a verbal one, or whether it was in writing and embraced in the deed. But, as it is alleged that a deed was executed, and as that evidenced the consummated trade between the parties, the statement as to the contract is referable to the written instrument. Be that, however, as it may, the allegation is that appellee had agreed to pay the taxes on the land for the year 1908 and failed to do so, and that "said land forfeited for taxes," and that appellant paid the taxes, penalty and costs, amounting to $51.79. Now, this contract was, it seems to us, no more nor less than a covenant of warranty against incumbrance for the taxes of 1908, which had not then accrued but which were to accrue in a few days. Appellant was not interested in the payment of the taxes further than the fact that the same constituted a lien on the land which he was then purchasing, and, in order to recover for breach of the alleged contract, it devolved on him to show that he sustained injury by being compelled to remove the lien. The first inquiry in the case, then, was whether or not there was a lien on the land which appellant was compelled to remove; and the justice had no jurisdiction to hear and determine that question.

The jurisdiction of the justice of the peace cannot, as insisted by counsel, be sustained on the ground that only a contract to pay money is involved, and that the question of a lien on the land is not involved in the case. There was no agreement to pay any specific sum of money—only to pay the taxes of 1908—and, as we have already said, appellant was not interested further than in the removal of the lien on his land, and had no cause of action for breach of the contract unless he showed that there was a lien on the land which he was compelled to remove.

We are therefore of the opinion that the ruling of the circuit court was correct, and the judgment is affirmed.

BATTLE, J., dissenting.

APPLING v. STATE.

Opinion delivered May 23, 1910.

1. WRIT AND PROCESS—WHEN OFFICER PROTECTED.—A ministerial officer is justified in executing a search warrant regular on its face and issued by a court or magistrate having jurisdiction of the subject-matter, although it was issued without an affidavit being filed as required by law. (Page 186.)
2. VENUE—PRESUMPTION.—Where, in a prosecution for resisting a town marshal while endeavoring to serve a warrant, the evidence establishes that the officer was resisted, but it does not affirmatively appear that the resistance was committed within the town limits, it will be presumed that the officer was acting within his authority, namely, within the town limits. (Page 188.)
3. RESISTING OFFICER—SUFFICIENCY OF EVIDENCE.—One who stands on the threshold of her home and refuses to permit an officer to execute a search warrant is guilty of obstructing the officer, without any further overt act. (Page 190.)

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

C. T. Wetherby, for appellant.

It is no offense to resist an officer unless in the performance of an official duty. 29 Cyc. 1333-4. The warrant being void, they were not officers, but trespassers. Art 2, § 15, Const. 1874; Kirby's Dig., § 5145. The search and seizure law is void, because in conflict with sec. 15 of the bill of rights. 70 Ark. 94.

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

Failure to overrule a demurrer to a defective affidavit is no ground for reversal. 86 Ark. 436; Kirby's Dig., § 2506. Where the warrant has been issued by a court having jurisdiction of the subject-matter and is regular on its face, it is a sufficient protection to the officer. 21 N. H. 262; 21 Am. Dec. 181; 106 Mass. 296; Fed. Cas. No. 16,484; 17 Wis. 668; 44 Tex. Crim. 468. This is a proceeding *in rem,* is civil. 72 Ark. 171; 72 Ark. 439. The statute is constitutional. 70 Ark. 94.

McCULLOCH, C. J. Appellant was prosecuted before a justice of the peace of Sebastian County, on information filed by the deputy prosecuting attorney, for the offense of obstructing

or resisting an officer in the service of process. She was convicted, and appealed to the circuit court, where she was tried and again convicted, her punishment being fixed at a fine of $50, which is the minimum prescribed by the statute.

The form of the writ which the officer was executing when resisted is not set forth in the bill of exceptions, but the witnesses testified, without objection, that it was a writ issued by the mayor of the incorporated town of Hartford, Arkansas, to the marshal directing him to search the house of Lem Appling appellant's husband, for intoxicating liquors and to seize the liquors. The witnesses did not testify very clearly about the form of the writ, but speak of it as a search warrant or a seizure warrant; but it is fairly inferable from the testimony that it was an order issued by the mayor directing the officer to search the house for liquor, and to seize the liquor when found. No question was raised on this point, but it is insisted that, as the evidence shows that the writ was issued without an affidavit being filed, the writ was therefore void, and no offense was committed in resisting or obstructing the officer in serving it.

This question has given us no little concern, but after careful consideration we have reached the conclusion that, in the absence of an affidavit, a writ of the kind, regular on its face, is sufficient to protect the officer to whom it is directed, and an individual can not bid defiance to the writ and obstruct its execution without subjecting himself to criminal prosecution under the statute. In reaching this conclusion we are greatly aided by a very satisfactory opinion of the Supreme Court of New Hampshire. *State* v. *Weed,* 21 N. H. 262. The authorities are fully collected in that opinion, and the subject is exhaustively treated. The court in that case said: "The general principle, however, we hold to be quite clear: that where the process or warrant is regular and legal in its frame, bearing upon its face all the legal requisites to make it perfect in form, and, so far as can be discovered from its inspection, in substance also, and it appears to have been issued by a court or magistrate having jurisdiction of the subject-matter, and of the person of the respondent, the officer is to be protected in the service, notwithstanding any error or irregularity in the previous issuing of the same, or any imposition practiced upon the court in obtaining it; and that the party resisting the officer

is liable;" citing the following cases: *Savacool* v. *Boughton,* 5 Wend. 170; *Rogers* v. *Mulliner,* 6 Wend. 597; *Horton* v. *Hendershot,* 1 Hill (N. Y.) 118; *Fox* v. *Wood,* 1 Rawle 143; *Jones* v. *Hughes,* 5 Serg. & Rawle, 299; *Paul* v. *Van Kirk,* 6 Binn. 103; *Sturbridge* v. *Winslow,* 21 Pick. 83; *Wright* v. *Gould,* 1 Wright 709; *Brother* v. *Cannon,* 1 Scam. 200; *Robinson* v. *Harlan,* 1 Scam. 237; *State* v. *Curtis,* 1 Hayw. (N. C.) 471; *Foster* v. *Gault,* 2 McMullan (S. C.) 335.

In *Sandford* v. *Nichols,* 13 Mass. 286, Chief Justice Parker of the Supreme Judicial Court of Massachusetts, said: "We think that the defendants could have justified the acts complained of by showing a regular warrant from a magistrate having jurisdiction over the subject, without showing that it was founded upon a complaint under oath. It will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process, as officers so situated would be necessarily obliged to judge for themselves, and would often judge wrong as to the lawfulness of the authority under which they are required to act. It is a general and known principle that executive officers, obliged by law to serve legal writs and process, are protected in the rightful discharge of their duty if those precepts are sufficient in point of form and issue from a court or magistrate having jurisdiction of the subject-matter."

In *People* v. *Warren,* 5 Hill (N. Y.) 440, it was held that "a ministerial officer is protected in the execution of process regular and legal upon its face, though he has knowledge of facts rendering it void for want of jurisdiction."

It is also insisted that the judgment should be reversed because the evidence fails to show that the officer, when resisted, was serving process within the corporate limits of the town of Hartford, neither the mayor who issued the writ nor the marshal who executed it having jurisdiction beyond those limits. It is true that nowhere in the testimony is it directly stated by a witness that the house of Lem Appling was situated in the town. The witnesses all relate the circumstances of the marshal and posse going to Appling's house to search for and

seize contraband liquors. They all lived at Hartford, and speak of going "around to Appling's house," or "down to Appling's house" to serve the writ. The marshal testified in the case, and told about standing on the street corner near a certain brick building talking to the mayor, when a man came along and told them that a dray-load of liquor was then being unloaded "down to Appling's house," whereupon the mayor went upstairs and issued the warrant, and he (witness) summoned two others, a deputy sheriff and a constable, to go with him, and they "went down to Appling's residence" to search for the liquor. The evidence showed that appellant's acts of obstructing the officers occurred at Appling's residence. Another witness testified as to the occurrence at Appling's house, and spoke of "coming along the street" when he heard what Mrs. Appling said to the officers. Numerous other witnesses introduced by each party testified about living in Hartford and being present when the officers raided Appling's house. Appellant testified herself about what occurred there at the house, but said nothing about the situation of the premises. She claimed that she did not resist the officers, but that on the contrary she told them where the liquor could be found in the house. It seems to have been taken for granted by all the parties that the Appling house was in the town, though the prosecuting attorney took pains to show directly by witnesses that the town of Hartford was in the Greenwood District of Sebastian County. No instructions were asked on that point.

We think the judgment should not be reversed on this ground. The authorities seem to agree that a presumption should be indulged as to the regularity and validity of official acts. Wharton, Crim. Ev., § § 833, 835; *Putman* v. *State,* 49 Ark. 449; *State* v. *Freeman,* 8 Ia. 428.

This presumption is not to be extended so as to cover substantive, independent facts essential to establish an issue. "The true principle intended to be asserted by this rule seems to be," says Mr. Best in his work on Evidence, § 300, "that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative; and, with this view, where there is general evidence of facts having been legally and regularly done, to dispense with proof of circum-

stances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest on grounds of public policy." Now, when the rule stated by Mr. Best is applied to the facts proved in this case, we think the evidence is sufficient. The witnesses testified in general terms as to the form and substance of the writ, and the writ itself was not introduced, no objection being made to proving it in this way. It must be taken as established that the writ was regular in form, and commanded the officers to search for liquors in Appling's house in the town of Hartford, and to seize the same when found. The witnesses, including appellant herself, testified about the marshal serving the writ in the regular way, the only dispute being whether appellant resisted its execution. No violence is done to the presumption of innocence in favor of the accused by holding that under these circumstances the jury were warranted in finding that the officer was not attempting to serve a warrant beyond the limits of his territorial jurisdiction. The only evidence offered by appellant was to the effect that she did not obstruct the execution of the writ, but on the contrary yielded to it. There is a sharp conflict as to whether or not appellant obstructed the officers in executing the writ, and there is also a sharp conflict as to whether the alleged acts of resistance on the part of appellant occurred before or after the liquor was found by the officers and seized. The court submitted the question to the jury, and instructed them to find appellant not guilty of the charge if they believed from the evidence "that the search had been completed at the time the altercation happened between the officers and defendant." We conclude that there was evidence sufficient to warrant a finding that while the officers were executing the writ appellant resisted them and obstructed their efforts to serve it.

One of the officers testified that when the marshal informed her of the writ and told her he had come to seize the liquors, she said to them that they could not go in the house, and that she swore at them, called them vile names and threatened to get a gun and kill all of them. Afterwards, while the marshal had gone to get a dray to haul off the liquors, she insisted on her son being allowed to go in the house, and assaulted one

of the officers who attempted to prevent the boy from entering the house.

Error of the court is assigned in refusing to give the following instruction at appellant's request: "4. The mere stating by defendant that the officers could not search the house, unaccompanied by any overt act or threat by her, would not be a violation of the law; and if you should find that this was all that she did, you will acquit."

This instruction is incorrect, and was properly refused. It would not do to hold that one who stands in the way and refuses to permit an officer to execute process is guiltless of obstructing the officer. Such refusal is of itself an obstruction, for the officer may desist in order to avoid violence or bloodshed and the service of process would be thus hindered. It is the purpose of the statute to prevent this. The statute is broad, and covers any resistance or obstruction to an officer in the execution of process. If appellant stood on the threshold of the house and refused to permit the officer to enter for the purpose of executing the writ, her attitude was of itself an obstruction and resistance, and no further overt act was necessary to complete the offense. *Williams* v. *State*, 70 Ark. 393.

We are of the opinion that there is no error in the record. So the judgment is affirmed.

WOOD and HART, JJ., dissenting.

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

Opinion delivered May 23, 1910.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—No railway company nor any other person can be held liable in an action at law for an injury caused by negligence when the plaintiff in such action by his own negligence has contributed to the injury, unless it was a willful injury or one resulting from the want of ordinary care on the part of such company or person to avert it after plaintiff's negligence had been discovered. (Page 192.)

2. RAILROADS—LOOKOUT STATUTE—CONTRIBUTORY NEGLIGENCE.—The "lookout statute" of April 8, 1891, making it the duty of all persons operating trains to keep a constant lookout for persons and property upon the track, does not relieve any one of the duty to exercise

care to avoid danger, nor deprive persons operating trains of the defense of contributory negligence. (Page 192.)

3. SAME—LICENSE TO USE TRACK AS PATHWAY.—The fact that deceased any many others had for many years used the part of the railway track upon which he was killed as a pathway did not confer upon him any greater rights than those of a mere licensee, nor exonerate him from the duty to exercise due care. (Page 194.)

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

Lovick P. Miles and *Thomas B. Pryor,* for appellant.

The deceased had no right to thus interfere with the use of the railway track by the company. 63 Ark. 65. To bare licensees railway companies owe no affirmative duty or care. 90 Ark. 285. Deceased was guilty of negligence in not using care to avoid danger. 100 Tex. 63; 72 Ill. 222; 115 S. W. 1163; 20 L. R. A. (U. S.) 432; 83 Ark. 301; 95 U. S. 695; 82 Ark. 525. Failure of the trainmen to discover the peril of the footman does not make the railway company liable if the footman was also guilty of negligence contributing to the injury. 77 Ark. 404. It is error to submit to the jury questions upon which there is no evidence. 88 Ark. 26; 88 Ark. 458.

Robert A. Rowe and *Rowe & Rowe,* for appellee.

The jury was not bound, in face of the great weight of the testimony against him, to accept the conductor's statement that he did not discover deceased in time to have avoided injuring him. 74 Ark. 483. On approaching a crossing the trainmen should give a signal. Kirby's Dig., § 6595; 53 Ark. 231. They are liable for all damages caused by their failure to do so. 65 Ga. 631; 35 A. & E. R. Cas. 447; 66 Ill. 494; 55 Mo. 33; 5 Heisk. 262; 9 Heisk. 860. The killing having been proved, the presumption of negligence arises on the part of trainmen. 33 Ark. 816; 36 Ark. 87; *Id.* 451; 30 Ark. 413; 78 Mo. 578; 82 Mo. 90; 58 Mo. 503; 33 Ill. 304; 20 Kan. 9; 42 Ark. 122; 37 Ark. 593; 19 A. & Eng. R. Cas. 506; 13 *Id.* 499. A verdict will not be disturbed if there is any evidence to sustain it. 25 Ark. 474; 31 Ark. 163; 22 Ark. 213; 17 Ark. 498; 17 Ark. 385; 14 Ark. 21; 74 Ark. 478; 76 Ark. 115. If there is any evidence tending to establish an issue, it is error to take it from the jury. 63 Ark. 84; 77 Ark. 556. Railway

companies are charged with a high degree of care for the safety of travelers. 73 Ark. 413. Where a railway licenses the public to use its track as a footway, it cannot afterwards treat a person thus using it as a trespasser. 112 Ind. 250; 14 N. E. 70; 9 Kan. 620; 88 N. Y. 620; 79 Pa. 33; 91 Ky. 434; 84 Ia. 71; 50 N. W. 673. It is the duty of the company to keep a lookout when its engine is in motion. 105 N. C. 180; 10 So. 988; 67 Tex. 473; 3 S. W. 705; 74 Wis. 239; 42 N. W. 237; 46 Ill. App. 255.

BATTLE, J. During the night of July 12, 1908, the dead body of Frank Tucka was discovered on the railway track of the St. Louis, Iron Mountain & Southern Railway Company. Further than stated, the cause of his death is unknown. Mary Tucka, as his administratrix, brought this action against the railway company, and recovered judgment and the defendant appealed.

He was upon the track at the time he was killed. The distance he was at this time on the track in advance of the train killing him before it struck him, or when or how he came upon the track, is not shown. He was a strong, healthy man, in full possession of his hearing and sight, at the time he was killed. He was evidently guilty of contributory negligence in being so situated at that time.

It has often been held by this court "that no railway company nor any other person can be held liable in an action at law for an injury caused by negligence when the plaintiff in such action by his own negligence has contributed to the injury, unless it was a wilful injury, or one resulting from the want of ordinary care on the part of such company or person to avert it after the negligence of the plaintiff had been discovered." *St. Louis, I. M. & S. Ry. Co.* v. *Freeman*, 36 Ark. 46; *Little Rock & Fort Smith Ry. Co.* v. *Pankhurst*, 36 Ark. 371; *St. Louis, I. M. & S. Ry. Co.* v. *Ledbetter*, 45 Ark. 250; *Little Rock, M. R. & T. Ry. Co.* v. *Haynes*, 47 Ark. 497; *St. Louis, I. M. & S. Ry. Co.* v. *Monday*, 49 Ark. 257; *Barry* v. *Kansas City, F. S. & M. Rd. Co.*, 77 Ark. 401, 404; *Chicago, R. I. & P. Ry. Co.* v. *Bunch*, 82 Ark. 522, 525.

The act of April 8, 1891, "makes it the duty of all persons operating trains to keep a constant lookout for persons and property upon the track, and makes the company liable for all

damages resulting from the neglect to keep such lookout;" yet it does not relieve any one of the duty to exercise care to avoid danger, and the failure by one injured by a train to exercise it will defeat the recovery of consequent damages. *St. Louis, I. M. & S. Ry. Co.* v. *Leathers,* 62 Ark. 235; *St. Louis S. W. Ry. Co.* v. *Dingman,* 62 Ark. 245; *Burns* v. *St. Louis S. W. Ry. Co.,* 76 Ark. 10.

In *St. Louis & San Francisco Railway Co.* v. *Townsend,* 69 Ark. 380, 382, it is said: "The burden of proving the facts necessary to show that the deceased was killed on account of the negligence of the appellant and the damages suffered by them rested upon the appellees. When it was shown that he was killed by a train of appellant upon its track, the presumption was that his death was the result of the negligence of the railroad company. *Little Rock & Fort Smith Railway Co.* v. *Blewett,* 65 Ark. 253. While this fact was proved, the effect of it was avoided by showing that the deceased was lying upon the track of the railroad at the time of his death. *St. Louis, Iron Mountain & Southern Railway Company* v. *Leathers,* 62 Ark. 235. He was thereby shown to have been instrumental in causing his own death, and he would not have been killed if he had not been guilty of negligence. It was not incumbent upon the appellant to show that it did not discover his presence upon its track in time to avoid injuring him. By proving that the deceased was guilty of contributory negligence, it established a sufficient defense to bar recovery by the appellees, unless other facts were shown. [*Chicago, R. I. & P. Ry. Co.* v. *Smith,* 94 Ark. 524.] It was not necessary for it to prove additional facts to exonerate itself from liability until the effect of the contributory negligence was overcome. This being true, it is clear that the burden was upon the appellees to show that the appellant discovered the deceased upon the track in time to avoid injuring him, and wilfully and recklessly killed him, unless it was already shown by the evidence adduced by the appellant."

"To hold a railroad company liable for the killing of a person by the running of its trains, who was guilty of contributory negligence, it must appear, not merely that the trainmen might, by the use of ordinary care, have discovered his peril, but that they actually observed his peril in time to avoid the injury."

Barry v. *Kansas City, Ft. S. & M. Rd. Co.*, 77 Ark. 401; *Chicago, R. I. & P. Ry. Co.* v. *Bunch*, 82 Ark. 522, 525.

Appellee says it was proved that the deceased and many others had for many years used the part of the railway track upon which he was killed as a pathway, and had thereby acquired the rights of licensees thereon. But this did not exonerate him from the perils of his situation while upon the track. The railroad company owed him no affirmative duty of care. *Arkansas & Louisiana Ry. Co.* v. *Sain*, 90 Ark. 278, 285. His privileges upon the railway track were not as great as those of the public upon the crossing by a railway of a public highway. In that case the railway company has the right to operate its trains over its tracks, and the public has the right to the use of the crossing as a highway, and neither has the right to interfere with the proper use of it by the other. Any one upon it at the time a train has the right to pass over it is a wrongdoer; and if he fails to use the proper precaution to protect himself and is injured, he is guilty of contributory negligence. *Sherman* v. *Chicago, R. I. & P. Ry. Co.*, 93 Ark. 24. So in this case the deceased had no right to interfere with the trains of the appellant upon its own track. He was there without invitation and at his own peril, and was guilty of contributory negligence. There was no evidence that the appellant discovered him in time to protect him against injury, and his administratrix has no right to recover damages.

Reversed and remanded for a new trial.

CARROLL COUNTY BANK *v.* STATE USE CARROLL COUNTY.

Opinion delivered May 23, 1910.

1. COUNTY COURT—JURISDICTION.—Const. 1874, art. 7, § 28, providing that "the county courts shall have exclusive original jurisdiction in all matters relating to county taxes," does not confer jurisdiction upon that court to compel a depositary of county funds to refund same with interest. (Page 198.)
2. CIRCUIT COURT—JURISDICTION.—Two causes of action upon two separate bonds, each for sums less than $100, but aggregating more than that amount, cannot be united to give the circuit court jurisdiction. (Page 198.)

Appeal from Carroll Circuit Court; *J. S. Maples,* Judge; reversed.

Crump, Mitchell & Trimble, for appellant.

The allegations of a contract and breach thereof were admitted by the demurrer. 2 Ark. 260; 11 Pet. 257; 6 Enc. Pldg. & Pr. 336. And facts thus admitted must be taken as true against the pleader as well as in his favor. 78 Ind. 245. The amount being less than $100, the justice of the peace had no jurisdiction. Art 7, § 40, Const.; 90 Ark. 198. The amount of each contract determines the question of jurisdiction. 85 Ark. 313; 3 Ark. 494. In determining the question of jurisdiction, interest must be excluded. 83 Ark. 313; Const., art, 7. § 40.

F. O. Butt, for appellee.

Although the total account consists of different transactions, they were between the same parties, and constituted but one cause of action. 24 Ark. 177; 74 Ark. 618. The circuit court alone had jurisdiction. The jurisdiction is not dependent upon the amount involved. The county court had no jurisdiction of the matter. 90 Ark. 706.

BATTLE, J. An act entitled "An act to provide a depository for the county funds of Carroll, Benton and White counties," which became a law on 28th of March, 1905, among other things, provides: That it shall be the duty of the county judges of Carroll, Benton and White counties, at the April, 1905, term of the county courts of such counties, and every two years thereafter, to receive propositions from any bank, banker, or trust company, in said counties, that may desire to be the depository of the public funds of such counties, and that notice of the intention to receive such propositions or bids shall be published by the clerks of such counties in the manner prescribed by the act. That any such bank, banker, or trust company desiring to become such depository shall, on or before the first day of said term of court, file with the clerk a sealed bid, stating the rate of interest offered to be paid by such bidder, for the two years next ensuing, upon the county funds that may be deposited in pursuance to such bids. That at noon on the first day of April, 1905, and every two years thereafter, the court shall publicly open each of said bids so pre-

sented, and shall select from such bids, as the depository of the public funds of the county, including school funds, the bidder offering the highest rate of interest per annum on said funds. That it shall be the duty of the successful bidder, within twenty days after his selection, to execute and file with the clerk a bond for an amount not less than the total revenue of the county for the years for which the bond shall be given, with security as required by the act, conditioned for the due and proper performance of all the duties and obligations devolving by law upon the depository, and for the prompt payment upon presentation of all checks drawn upon him by the county treasurer of such county, so long as such funds shall be in the depository to the credit of said counties. That upon the approval of the bond the county court shall make an order designating the successful bidder as the depository of all the funds of the county for a period ending thirty days after the time fixed for another selection of a county depository, and that it shall be the duty of the county treasurer immediately to transfer to the depository all funds belonging to the county; and thereafter immediately upon receipt of county funds to deposit same therewith to the credit of the county. That it shall be the duty of the depository to provide for the prompt payment at the county sites of Carroll, Benton and White of all checks drawn by the county treasurer upon such funds of the county in said depository, and to file with the county treasurer a statement designating the places at such county sites where such payments shall be made. That interest shall be computed upon the daily balances to the credit of said county with said depository, and the same shall be payable to the county treasurer monthly, and shall be immediately placed by said treasurer to the credit of the common school funds of his said county.

On the 15th day of May, 1909, the State of Arkansas, for the use of Carroll County, brought an action against the Carroll County Bank, in the Carroll Circuit Court, in the Eastern District, to recover $169.80 due the county. Plaintiff alleged in its complaint that Carroll County, in pursuance of the terms of the act of March 28, 1905, let the contract for using and keeping its funds to the defendant on the .. day of ...., 190.., for a period of two years, the defendant agreeing to pay to the county interest on the money of the county, monthly, at

the rate of four and a half per cent. per annum; said interest to be paid on the balances remaining in the hands or possession of the defendant each day during the period of the contract. That, in pursuance of the terms of the contract, the county, by its county treasurer, did, on the 23d day of September, 1905, deposit the funds of the county with the defendant, and did thereafter, from day to day, deposit with the defendant all public moneys of the county coming into the hands of the county treasurer during the period of contract up to and including the .. day of ...., 1907; that interest accrued on the funds during the two years of the contract to the amount of $903.51, of which the defendant paid $840.25, leaving due $63.26. That the defendant failed to pay the interest promptly according to the contract, and the sum of six dollars and fourteen cents had accrued on such interest, and was due the county. For these two amounts plaintiff asked for judgment for $69.40 in the first paragraph of its complaint.

In a second paragraph of its complaint plaintiff alleged that the county of Carroll, in pursuance of the terms of the act created the defendant, on the .. day of ...., 1909, the depository of its funds for the period of two years ending on the .. day of ...., 1909; the bank agreeing to pay interest upon such funds, monthly, at the rate of four and a half per cent. per annum, the same to be paid on the daily balance in the depository during the continuance of the contract. That, in pursuance of the terms of the contract, the treasurer of Carroll County, on the .. day of ...., 1907, and on divers and sundry days during the term of the contract and up to and including the 21st day of March, 1909, deposited divers amounts of money with the defendant; that interest accrued on the funds deposited under the latter contract during the time it continued, to the amount of $1,917.11, of which the defendant paid $1,836, leaving a balance due of $81.11; that the interest on the latter contract was not paid monthly as stipulated, but from three to five months apart, by reason of which the county was deprived of interest on such interest in the sum of $18.14. For the last two amounts, $81.11 and $18.14, the plaintiff asked for judgment in the last paragraph of his complaint.

The defendant demurred to each paragraph of the complaint (1) because they do not state facts sufficient to constitute

a cause of action, and (2) because the county court of Carroll County had exclusive jurisdiction.

The court overruled the demurrer, and, the defendant refusing to plead further, rendered judgment in favor of the plaintiff; and the defendant appealed.

The Constitution of the State provides: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county paupers, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties." Art. 7, § 28, Const. 1874. The subject-matter of this action is not embraced in the jurisdiction of county courts as thus defined by the Constitution. The sum sued for is not taxes; nor is the action brought to enforce a settlement by a revenue officer of the taxes in his hands, as in *Christian* v. *Ashley County,* 24 Ark. 142, and *Pettigrew* v. *Washington County,* 43 Ark. 33. If the sum sued for had ever been county taxes, it ceased to be such when it was paid into the county treasury, as a debt would cease to be a debt when it is paid. It is a sum due for money loaned, accrued interest, is a demand in favor of the county, and is not due for taxes. *Price* v. *Madison County,* 90 Ark. 195.

This action is based upon two separate bonds, for $69.40 on one and for $99.25 on the other. The first was for the use and care of the county funds of Carroll County for the year 1906, and parts of the years 1905 and 1907, and the latter for the use and care of such funds for a term commencing when the first ended and extending two years. Both were given under the act of March 28, 1905, by the defendant to discharge the duties of a depository. The amounts due on each were for separate and distinct considerations, and were under the sum of one hundred dollars, and come within the exclusive jurisdiction of a justice of the peace, and cannot be united to give the circuit court jurisdiction. *Winer* v. *Bank of Blytheville,* 89 Ark. 435, 440, and cases cited. See also *Walker* v. *Byrd,* 15 Ark. 33; *Hunton* v. *Luce,* 60 Ark. 146; Constitution, art. 7, § 40.

The circuit court did not have jurisdiction.

Judgment reversed and action dismissed.

MURRAY v. GALBRAITH.

Opinion delivered May 23, 1910.

1. LIBEL AND SLANDER—DAMAGES.—One who publishes a false article calling in question the character of another for probity will not be liable for exemplary damages, but only for compensatory damages, unless there was ill will toward the person assailed or the publication indicated a wicked and abandoned disposition on the publisher's part. (Page 206.)
2. SAME—COMPENSATORY DAMAGES—MITIGATION.—One who publishes a false article impeaching another's integrity may not prove the circumstances for the purpose of mitigating or reducing the amount of compensatory damages, as the law implies malice from the publication of a libel and gives the party injured redress in compensatory damages. (Page 207.)
3. APPEAL AND ERROR—HARMLESS ERROR.—A verdict for the plaintiff in an action for libel awarding only compensatory damages cures any errors in rulings against the defendant in instructions as to exemplary damages. (Page 207.)
4. LIBEL AND SLANDER—INSTRUCTIONS.—It was not error in a libel case to refuse to instruct that defendant was not liable for damages to plaintiff by virtue of any current rumor or report to the same effect as the printed charges complained of if the court instructed the jury that defendant was liable only for such damages as were caused by his publication. (Page 208.)
5. SAME—WHEN ERROR CURED BY INSTRUCTIONS.—If it was error under the issues in an action for libel to admit testimony tending to prove an injury to the plaintiff's business, such error was cured by an instruction that plaintiff was not entitled to recover such damages. (Page 208.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal from a judgment of the Jefferson Circuit Court wherein appellee, on May 19, 1909, recovered a verdict for damages in the sum of $1,000 in a suit for libel on a second trial thereof. On the first trial there was also a verdict for plaintiff, which was reversed on appeal to this court. *Galbraith* v. *Murray*, 86 Ark. 50.

The complaint alleged that Murray was the editor and proprietor of *The Press Eagle*, a weekly newspaper published in Pine Bluff, having a general and large circulation in the State, more particularly in Jefferson County, also in divers other States:

that plaintiff and one J. B. York and C. Voss were commissioners of Graveling District No. 1, for paving Fifth Avenue in the city of Pine Bluff, and as such had charge of the work, and were still handling the funds of the district; that on the 19th of June, 1906, Arthur Murray falsely and maliciously composed and published in *The Pine Bluff Weekly Press-Eagle* of and concerning the plaintiff the following:

"There can no longer be any doubt of the fact that there is 'something rotten in Denmark' so far as the affairs of Graveling District No. 1 are concerned. Despite the tenderfootedness of two members of the committee appointed by the interested and defrauded property owners to make an investigation, facts have developed that clearly prove that the commissioners have charged their neighbors and fellow property owners of Fifth Avenue $10,477.85 for gravel, for which they paid the St. Louis Southwestern Railway Company only $3,431.80, leaving a 'net profit' in this transaction alone of over $7,000. If the commissioners profited in this transaction, it is not unreasonable to suppose that they profited in the employment of labor and other items of expense necessary to the completion of this graveling district. which is conceded to be the most wretched botch of street paving ever perpetrated in this or any other community.

"*The Press-Eagle* is not addicted to publishing facts and figures involving the character of public or private citizens without being thoroughly advised as to the authenticity of these facts and figures. Therefore, when we stated last week that an apparent 'overcharge' of $7,000 had been made for gravel by the commissioners of Graveling District No. 1, we were very careful to be within the bounds of truth, and to express the matter in language as mild as possible so as to avoid giving offense or doing injustice to those responsible for the shortage, pending a thorough investigation by those most interested. This investigation has now been made so far as it is possible for the committee to proceed, and the facts in every way confirm the statement first made in this paper last week that the commissioners had overcharged the district for about $7,000 for gravel alone. The cost of excavating, hauling dirt, curbing, etc., has not as yet been investigated, nor are we advised that it will be. But, if the investigation should be made, we should not be surprised if 'overcharges' were found in these items, as

well as that disclosed by the investigation as to the cost of the gravel.

"There are three men who, by virtue of the trust imposed in them by their fellow citizens, should be able to explain why their records show that this overcharge of over $7,000 was made in the purchase of gravel from the St. Louis Southwestern Railway Company. These men are J. B. York, president; Carl Voss, secretary, and R. M. Galbraith, treasurer, of Graveling District No. 1. The two first named have been before the committee and interested property owners, and admitted their inability to explain the manifest overcharge. This leaves the burden of the explanation upon R. M. Galbraith, treasurer, who has been at Jacksonville, Ill., attending the funeral of a friend, for the past week or ten days.

"Meantime another meeting of the property owners of Graveling District No. 1 has been called at the Board of Trade for Thursday night of this week. By that time it is hoped that the obsequies at Jacksonville, Ill., will have been concluded so as to enable Treasurer Galbraith to return to the city and produce his vouchers and checks for $7,000, good and lawful money of the realm, that both his records and those of Secretary Voss show was paid to the St. Louis Southwestern Railway Company, and which the officers of that corporation assert over their official signature never came into their possession.

"In the classic language of the far-famed Sir Lucius O'Trigger, 'tis a pretty quarrel as it stands."

That on the same date these paragraphs appeared in the said *Press-Eagle*:

"Graveling District No. 1 is not the only paving district formed in Pine Bluff that was boodled. There are others."

"Still we see no very good reason why the check book can not be produced, even if the vouchers are missing."

Thereby seeking and intending to charge the plaintiff with the crime of embezzling the funds of the district, or fraudulently converting the funds of the district to his own use, and defrauding said district of said funds, thereby seeking and intending to falsely impeach the honesty, integrity, veracity and reputation of this plaintiff, and thereby exposing him to public hatred, contempt and ridicule.

Among other defenses set up in the answer were the following:

"5. Defendant states that at the time of publication of the matter complained of by plaintiff he, the defendant, was reliably informed and honestly believed that same was true, and that same was a fair criticism upon the official conduct, as public officers, of the commissioners and officers of Graveling District No. 1 of the city of Pine Bluff.

"6. Defendant says that he was induced to publish the matter alleged by plaintiff as libelous with the belief that same was true, and that same was a fair criticism upon the conduct of the officers of Graveling District No. 1 of the city of Pine Bluff, as public officers, by reason of the conduct of the plaintiff, whereby he made it to appear that such criticism was fair, and, so believing, defendant published the same in good faith, and without malice against plaintiff, and for the sole purpose of advising the property owners of said graveling district and the public interested of the true condition of affairs of said graveling district, which was at the time of said publication of great public concern and interest to said property owners and the public in said city of Pine Bluff, where said paper was published.

"7. Defendant states that the published matter set forth in the complaint, and now complained of by the plaintiff, was commonly and generally reported and believed prior to the time of said publication in the neighborhood where plaintiff resided, and where said publication was made; that defendant heard the reports relative to such matters, and believed same to be true, and published same with such belief, without malice toward plaintiff or the intent charged in the complaint, and without intention to injure plaintiff.

"8. Defendant states that, since the publication complained of, towit: on June 26, 1906, he published in said *Pine Bluff Press-Eagle* an article entitled 'Are Satisfied,' wherein it was stated that plaintiff, R. M. Galbraith, had explained satisfactorily to the property owners present at a meeting of the property owners of said Graveling District No. 1, held at the Board of Trade in the city of Pine Bluff, his conduct as commissioner and treasurer of said graveling district, about which so much has been said, etc., and on the same day he also published

therein an article entitled 'R. M. Galbraith Makes Statement,' setting forth in full a statement publicly made by plaintiff, Galbraith, explanatory of matters concerning said Graveling District No. 1, which had been the subject of investigation and his official conduct, as a public officer, with reference thereto."

The testimony on the second trial was the same as on the first except that on the last trial Chester Flournoy testified that he was in the employ of appellant as foreman in the office and assisted in printing the *Press-Eagle* on June 19, 1906. On that day it was much after four o'clock in the afternoon when the paper went to press. The paper was not printed and not put in circulation that day until after four o'clock, P. M.

Appellee testified in part as follows: "About the 10th of June I went away to Jacksonville, Ill., on account of the sickness of my brother-in-law. This was on Sunday. On the following Tuesday he died. He was buried on Thursday, and I stayed there until the following Monday, when I left for home at Pine Bluff, and returned here on Tuesday afternoon about 3 o'clock. (This was June 19.) I first heard of the publication of the articles in the *Press-Eagle* as soon as I reached home. I had not heard of it before."

Appellee also testified over the objection of appellant in part as follows: "When I came to the bank, I found all of our people, that is the employees of the bank, and the directors that I met, all in a great state of excitement. The first thing they said, "We are awful glad you got back. We didn't know but what this thing would go under, this bank." They insisted that I had to vindicate myself. In fact, it was a trial such as I never want to go through again; the effect was far-reaching. I was trying to have my sons do business in Jacksonville in the furniture and carpet business. From some means or other it was whispered around there that things were not quite straight."

Appellee was asked the following question: "Did the publication of that article affect your reputation and credit as a business man?" and, over the objection of appellant, appellee was permitted to answer as follows: "Why, certainly it did; it came near breaking me."

Among other instructions the court gave the following:

"11. That the article published by the defendant and set out in the complaint is libelous *per se*, that it was not privileged, and that plaintiff is entitled to recover.

"12. That, no special damages being proved or claimed in the complaint, plaintiff is not entitled to recover anything for such special damages.

"13. That you should award to plaintiff such sum as compensatory damages as in your judgment the evidence shows that he is entitled to recover on account of such publication, as is explained in the sixth paragraph of these instructions.

"14. If you find from a preponderance of the evidence that the libelous article in question was published by defendant with actual malice towards the plaintiff, then you should award such further sum in the nature of punitive damages as in your judgment the evidence would justify. But, unless you so find that such express or actual malice existed in the mind of defendant at the time of the publication, you should not award anything by way of punitive damages."

The sixth paragraph referred to was as follows:

"6. Compensatory damages are such sums of money as will compensate the plaintiff for the mental pain and anguish suffered by him, and for the shame, disgrace and humiliation endured, and the injury to his character and reputation caused by the publication of false and defamatory matter concerning him."

The court also gave the following:

"5. Unless the jury believe from the evidence that the published matter complained of was actuated by ill will, bad intent or malevolence towards the plaintiff, they can award to plaintiff only actual or compensatory damages; and such ill will, bad intent or malevolence is not to be inferred from the fact alone that the words complained of are false and are injurious to the plaintiff."

The court, among others, refused the following prayers of appellant:

"4. The jury may consider, for the purpose of lessening or mitigating the damages claimed in this action, any evidence tending to show that he, the defendant, did not originate the defamatory charge complained of, and that same was a matter of common rumor or report prior to and at the time of the publication;

that at the time he published the comments or criticisms complained of he had good cause for believing and did believe that same were true; or that the conduct of plaintiff was such as to make it appear to defendant as a reasonable man that such comments and criticisms complained of were fair, and, so believing, defendant published same in good faith and without malice against plaintiff. The jury may also consider, for the purpose of lessening or mitigating damages, any evidence tending to show that, since the publication of the matter complained of, defendant published in the same newspaper in which the matter complained of was first published an article or articles correcting or tending to correct the defamatory matter complained of or of negativing such defamatory charge or charges.

"4½. The jury may consider, for the purpose of lessening or mitigating the damages complained of in this action, any evidence tending to show that he, the defendant, did not originate the defamatory charge complained of, and that same was a matter of common rumor or report prior to and at the time of the publication; that at the time he published the comments or criticisms complained of he had good cause for believing, and did believe, that same were true; or that the conduct of plaintiff was such as to make it appear to defendant as a reasonable man that such comments and criticisms complained of were fair, and, so believing, defendant published same in good faith and without malice against plaintiff.

"7. The defendant is not liable for any damages that may have been done plaintiff by virtue of any rumor or report that may have been current to the same effect as the charges complained of as published by defendant, except in so far as the publications complained of gave additional circulation or repetition to such charges, and such damage should be occasioned by reason of such additional, repeated or more extended circulation."

The jury returned the following verdict: "We, the jury find for plaintiff in the sum of $1,000 as compensatory damages."

Judgment was entered in favor of appellee for that sum, and this appeal has been duly prosecuted.

W. F. Coleman and *E. J. Kerwin,* for appellant.

One who utters a slander is not responsible for its voluntary and unjustifiable repetition by others over whom he has no con-

trol. 126 Mass. 329. In cases of slander the defendant is only liable for such damages as result directly from his own utterances. 13 Am. & Eng. Ency. of Law (1 Ed.) 442. On the question of damages to business at Jacksonville, Ill., see 80 S. W. 730. In considering the amount of damages in such cases it is proper to consider the circumstances under which the libel was committed. 72 Ark. 426. General rumors of guilt may be given in evidence to mitigate damages. 13 A. & E. Ency. Law, 440.

N. T. White and *Ben J. Altheimer,* for appellee.

The words spoken are actionable *per se.* 55 Ark. 501; 86 Ark. 50. The damages awarded by the jury are not excessive. 56 Ark. 103; 57 C. C. A. 45. Malice is presumed from the unprivileged publication of a false charge. 36 C. C. A. 475; 48 Mo. 161; 122 Mo. 355; 26 S. W. 1020; 10 N. Y. 120; 55 Mo. 352. If a libelous statement is false, good faith in the defendant will not absolve him from liability. 47 C. C. A. 384; 71 *Id.* 309; 81 N. Y. 126. But the absence of malice may have a material effect in reducing the damages. 52 S. W. 934.

WOOD, J., (after stating the facts). 1. We held on the former appeal that the article whose publication was the foundation of the present action was libelous *per se. Murray* v. *Galbraith,* 86 Ark. 50. That being true, really the only issue on the second trial was the amount of the damages. This issue was submitted on instructions that were full, accurate, and fair to appellant. One who publishes a false article calling in question the character of another for probity is liable to the person whose character is assailed in an action for damages. If the publication of the article is without express malice, *i. e.,* without any ill will or animosity on the part of the publisher toward the person whom he assails, and if the publication is made under circumstances that do not indicate any wicked and abandoned disposition or any evil motive on the part of the publisher in making the publication, then the damages to the party whose character is impeached can only be compensatory. But, on the other hand, if the publication is through express malice, or under circumstances that indicate a wicked and abandoned motive in making it, then the person libeled may recover not only compensatory but punitive damages.

There can not be in law any justification or excuse for libel. "The purest treasure mortal times afford is spotless reputation." "A good name is rather to be chosen than great riches." Prov. 22-1; Eccl. 7-1. The law, recognizing this, makes libel a crime (section 1850, Kirby's Dig.), and also requires one who libels another to respond in damages to the party aggrieved, no matter what may be the circumstances under which the libel was evoked or provoked. The absence of personal animosity or ill will, or of evil motive, in committing the libel may be proved for the purpose of showing that the party libeled is not entitled to vindictive or punitive damages.

But the publication of a false article calling in question the integrity of another, *ipso facto,* implies malice, and the law will not permit one who makes such publication to show the circumstances under which it was done for the purpose of depriving the party libeled of compensatory damages. Nor will the law permit the circumstances to be shown for the purpose of mitigating or reducing the amount of such damages. Our own court and the authorities generally sustain the doctrine here announced. *Stallings* v. *Whittaker,* 55 Ark. 501; *Gaines* v. *Belding,* 56 Ark. 103; *Times Pub. Co.* v. *Carlisle,* 36 C. C. A. 475; *Palmer* v. *Mahin,* 57 C. C. A. at p. 45, 48; *Kansas City Star Co.* v. *Carlisle,* 47 C. C. A. 384, 397; *Park Pub. Co.* v. *Butler,* 71 C. C. A. 309; *Hamilton* v. *Eno,* 81 N. Y. 126; *Nicholson* v. *Rust,* 52 S. W. (Ky.) 934.

The case of *Patton* v. *Cruce,* 72 Ark. 426, is not in conflict with this. There the court through Judge RIDDICK said: "It is proper to take into consideration the circumstances under which the libel was committed." But the court had under consideration and was discussing undisputed facts showing express malice, which would entitle the party libeled to punitive damages

It follows that the court did not err in refusing appellant's prayers numbered 4 and 4½. So far as these were applicable to the issue of punitive damages, they had been fully covered by the court in other instructions. Besides, the verdict of the jury finding in favor of appellee for only compensatory damages cured any error that might have been in the rulings of the court on the issue of exemplary damages. But there were no errors.

2. The court did not err in refusing appellant's prayer number 7. The instructions given by the court confined the jury to the "compensatory damages caused by the publication" and to "such compensatory damages as the evidence showed he was entitled to recover on account of such publication." The court correctly defined compensatory damages. Under the instructions of the court, the jury could not have found appellant liable for current rumors and reports derogatory to the character of appellee which were put in circulation by others. Appellant under the instructions could only be found liable in damages for the injury produced by his own publication.

3. We find no prejudicial error in the rulings of the court pertaining to the admission of the testimony of appellee and other witnesses. The testimony of appellee was germane to the issue as to whether the publication had the effect to "impeach the honesty, integrity, veracity and reputation" of appellee, as was alleged in the complaint, and, if so, to what extent. But if the testimony tending to prove injury to appellant's business and tending to impeach his reputation as a business man was incompetent, then the error of the court in admitting it was cured, and any prejudicial effect it might otherwise have had was taken away by the instruction of the court which expressly told the jury "that, no special damages being proved or claimed in the complaint, plaintiff is not entitled to recover anything for such special damages." And by the further instruction that "actual or special damages represent a pecuniary loss shown to have been sustained by the plaintiff as the direct result of the publication of the false and defamatory matter complained of."

There is no contention that the amount of the verdict for compensatory damages is excessive. The evidence in the record on behalf of appellant, and from his viewpoint, entirely exonerates him from the charge of express malice, and shows that in making the publication he was actuated only by the desire to serve the public in exposing what he honestly believed, from the information then at hand, to be a piece of outrageous "graft" on the part of public officials. It turned out, however, that appellant was mistaken in the facts, and, not waiting for accurate knowledge, published an article which proved to be untrue, and which was a defamation of the character of appellee. The publisher in such case, although inspired by the laudable purpose of

denouncing dishonesty in public officials, is nevertheless guilty of libel if his publication impeaches the integrity of particular individuals; and if the facts he states are false, he acts at his peril. Although there may be no express malice, the law, as we have seen, implies the malice essential to constitute libel from the publication of a defamatory article, and gives the party injured redress in compensatory damages. 25 Cyc. pp. 491e, 492h.

The judgment must be affirmed.

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

Opinion delivered May 23, 1910.

1. INSTRUCTIONS—CONSTRUCTION.—The instructions given by the court in a case should be read and considered as a whole. (Page 212.)
2. SAME—GENERAL OBJECTION.—Ambiguity in a particular instruction is insufficiently pointed out by a general objection. (Page 213.)
3. CARRIERS—SPECIAL DAMAGE—NOTICE.—Where a carrier was put upon notice that teams and grading implements were being shipped to fulfill a grading contract, it will be held liable for the net earning capacity of such teams and implements during the time the carrier unreasonably delayed the shipment. (Page 213.)
4. INSTRUCTIONS—INVITED ERROR.—Appellant cannot complain of an error in an instruction given at his adversary's instance if the same error was repeated in an instruction asked by himself. (Page 213.)
5. APPEAL AND ERROR—HARMLESS ERROR.—The error of admitting improper evidence tending to enlarge the appellee's damages was not prejudicial to appellant where the verdict of the jury was for an amount which was supported by undisputed testimony, and it appears that the improper testimony had no influence upon the jury. (Page 214.)

Appeal from Chicot Circuit Court; *Henry W. Wells,* Judge; affirmed.

STATEMENT BY THE COURT.

J. I. Lamb brought this suit against the St. Louis, Iron Mountain & Southern Railway Company in the Chicot Circuit Court to recover damages for the alleged negligence of the defendant in the shipment of a car of grading implements from Memphis, Tennessee, to Luna, Arkansas. Lamb was a contractor, and was possessed of an outfit, consisting of a car of mules and a car of grading implements. These he shipped from Cor-

inth, Mississippi, to Memphis, Tennessee, and the laborers necessary to operate the same were brought along with them. When the cars reached Memphis, Lamb applied to defendant to ship over its line of railroad said two cars, containing his mules and grading implements, from Memphis, Tennessee, to Luna, Ark. He informed defendant's agents that he was carrying the outfit to Luna to fulfill a grading contract, and that his laborers were also being carried along with him, and their wages would begin as soon as they arrived at Luna. That it would be necessary for the car containing the mules and the one containing the grading implements to go forward together, in order that he might commence work at once on their arrival. That the agent of defendant promised him this would be done, and on the 24th day of January, 1907, issued to him a bill of lading for said two cars, consigned to himself at Luna, Ark. That he paid the freight thereon at the time he received the bill of lading. The car containing the mules reached Luna on the morning of the 27th inst., and in the meantime preparations had been made to commence work, the laborers having previously arrived on a passenger train. The car containing the grading implements did not arrive until six days later.

Lamb testified that each team could move 43 yards of dirt per day, and that he would receive therefor 20 cents per yard, making the gross earning of each team per day $8.60. That he paid his drivers $1.75 each, and that it costs 60 cents per day to feed a team. This left him a net earning of $6.25 for each team per day. That he had six teams, and that the delay in the shipments was 5½ days. That, figured on this basis of net earnings, his loss was $206.25. No other testimony on this point was introduced in evidence.

The railroad company adduced evidence tending to show that, under conditions existing at the time of shipment, the delay was not unreasonable.

The following instructions were given to the jury:

"1. The jury are instructed that if they believe from the evidence that plaintiff contracted with the defendant for the shipment over the railroad of the defendant of the grading outfit of plaintiff from the city of Memphis, Tenn., to Luna, in Chicot County, Arkansas, where plaintiff had a contract to do grading

work with said outfit, and if the jury further believe from the evidence that before or at the time of entering into said contract of shipment the plaintiff notified the defendant of the uses and purposes for which said outfit was being shipped, and that plaintiff would be at the said point of destination of said shipment with labor employed to operate the same, and that a failure on the part of defendant to deliver said shipment promptly would cause damage to the plaintiff consisting of the hire of said labor and earnings of said outfit, and if they further believe from the evidence that from the unreasonable delay in delivery of said shipment at its destination, or any part thereof, by reason of which plaintiff sustained damage, the jury will find for the plaintiff, and assess his damages at such sum as they find from the evidence resulted to plaintiff, including net earning capacity of said outfit and the hire paid by him to such labor during the time he may have been deprived of the use of said outfit by reason of the delay in shipment, and the legal rate of 6 per cent. interest upon said sum from the time such injury or damage was sustained.

"3. The court instructs the jury that, before the plaintiff can recover the special damages claimed, he must be satisfied by a fair preponderance of the testimony that at the time the bill of lading was issued in Memphis, Tenn., the plaintiff gave to the agent of the railway company notice of the special use the grading outfit was to be put to, and unless both cars arrived promptly that he would be forced to feed his mules, pay his labor, and lose the profits he could earn by the work of the outfit, and these special circumstances and damages must have been known by the railroad company at the time of the shipment before it can be liable therefor.

"2. The court instructs the jury that under the contract of shipment the defendant undertook and agreed to ship the outfit within a reasonable time, and under the contract defendant was not bound to ship plaintiff's horses and plaintiff's outfit on the same train nor on any special train, nor in any given time, nor in the speediest manner; the only obligation as to the time of forwarding this car load of scrapers was that it should be done in a reasonable time, and this means when they could have been transported, taking into consideration the conditions that actually

existed in the yards at Memphis and other places along the line of shipment as to congested condition of freight.

"4. The court instructs the jury that under the proof if they believe a delay of six days from Memphis to Luna would not be an unreasonable delay, your verdict will be for the defendant."

There was a trial before a jury, and a verdict for the plaintiff in the sum of $206.25. From the judgment rendered in favor of the plaintiff, the defendant has appealed.

W. E. Hemingway, E. B. Kinsworthy and *James H. Stevenson,* for appellant.

Perishable or live freight is given a preferred or quicker handling than dead freight, and this is reasonable. 2 Hutch. on Car., § 651. And this is required by law. 1 Fed. Stat. Ann. 444. All undue preferences to any shipper are prohibited. 3 Fed. Stat. Ann. 816-7; act of Cong. Feb. 4, 1887; 40 Fed. 1091; 39 Fed. 54; 43 Fed. 37. What is a reasonable time must depend on the circumstances. 18 W. Va. 361; 46 Miss. 458; 56 Md. 209. Instructions should not assume that the facts necessary to sustain them have been proved. 14 Ark. 286; *Id.* 530; 16 Ark. 568; 24 Ark. 540; 33 Ark. 350; 59 Ark. 417; 76 Ark. 333; 66 Ark. 506; 71 Ark. 38; 76 Ark. 468; 70 Ark. 337; 74 Ark. 563. Instructions should be based on the evidence, such as are not are abstract and improper. 8 Ark. 183; 15 Ark. 491; 14 Ark. 226; 21 Ark. 370; 23 Ark. 101; 26 Ark. 513; 33 Ark. 350; 41 Ark. 282; 54 Ark. 336; 63 Ark. 177; 65 Ark. 222; 70 Ark. 136; 70 Ark. 441; 63 Ark. 387; 77 Ark. 20. Only the damages are recoverable which may fairly be considered as naturally arising from the breach of the contract. 9 Exch. 341; 72 Ark. 275; 74 Ark. 358; 3 Hutch. on Car., § 1369.

HART, J., (after stating the facts.) Counsel for appellant insist that the court erred in giving instruction No. 1 at the request of appellee. They contend in the first place that it assumes that there was an "unreasonable delay in the delivery." We do not think the instruction open to that objection, when read in connection with the other instructions given by the court. It is the settled rule of this court that instructions must be read and considered as a whole. In the instructions given at the request of the appellant, the court specifically told the jury that

it was their province to determine whether the delay was unreasonable. We refer to instruction No. 4 which, when read in connection with instruction No. 1, shows that the question of the reasonableness or unreasonableness of the delay was submitted to the jury. *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325; *Ames Shovel & Tool Co.* v. *Anderson,* 90 Ark. 231.

The giving of instruction No. 4 asked by counsel for the defendant on this point was direct notice to them that the court did not mean to assume in any of its instructions that the delay was unreasonable, and if they thought the instruction in question was ambiguous or misleading in that respect they should have called the court's attention to it by a specific objection, and, not having done so, they have waived it. *Aluminum Co. of North America* v. *Ramsey,* 89 Ark. 522.

Again, they urge that the instruction is erroneous because it allowed the plaintiff to recover the net earning capacity of the teams and grading implements during the period of the alleged delay. There was no error in this. The defendant was put upon notice by the plaintiff that he would suffer this special damage if delay was made in the shipment of the grading implements, and the case is within the rule announced in *Chicago, R. I. & P. Ry. Co.* v. *Planters' Gin & Oil Co.,* 88 Ark. 77. In that case the court held:

1. "Where there was a delay in the transportation of machinery intended for a special use known to the carrier, it was responsible for such damages as were fairly attributable to the delay, having been informed that special damages would result therefrom, though it was bound to accept the shipment when tendered, and, under the Hepburn amendment to the interstate commerce act, could not make a special contract to compensate it for the additional risk."

2. "Notice to a carrier of special circumstances which would result in special damages to a shipper from delay in transportation of machinery imposes on the carrier the duty to use diligence commensurate with the requirements of the case, which duty the carrier performs when he uses reasonable diligence to forward the goods promptly."

Moreover, if there was any error in this instruction in this respect, it was repeated by the defendant in instruction No. 3

given by the court at its request, and it is not, therefore, ground for reversal. *Little Rock & M. Ry. Co.* v. *Russell,* 88 Ark. 172; *St. Louis & S. F. Rd. Co.* v. *Vaughan,* 88 Ark. 138.

It is next urged by counsel for appellant that the court erred in allowing testimony to go to the jury as to the amount of a feed bill paid by plaintiff on his car of mules while *en route* at Argenta, Ark., and as to the amounts paid his employees other than the drivers. These errors were eliminated by the verdict of the jury. The evidence of the plaintiff himself shows that the net earning capacity of the mules and grading implements during the period of delay contended for by him was $206.25. This was all the testimony there was on this point, and no effort was made to contradict it by cross examination of the plaintiff or otherwise. Hence it may be said that the verdict of the jury, being for that precise amount, was based entirely on his testimony, and that the other testimony introduced had no influence on the jury in forming their verdict. Its admission, therefore, could not have prejudiced the rights of appellant, and it is the settled rule of the court that there will be no reversal except for prejudicial errors.

The judgment will therefore be affirmed.

LOUISIANA & NORTHWEST RAILROAD COMPANY *v.* REEVES.

Opinion delivered May 23, 1910.

1. TELEGRAPH COMPANY—NOTICE OF SPECIAL DAMAGES.—A telegram which on its face apprises the telegraph company that a certain person is very sick and requests the addressee to notify another of such fact is sufficient to apprise the company that the last-mentioned person would be likely to suffer mental anguish by nondelivery of the message. (Page 216.)
2. SAME—DILIGENCE IN DELIVERING MESSAGE.—Whether a messenger who was charged with the delivery of a telegram, and who failed, in the addressee's absence, to deliver it at his residence, exercised ordinary diligence is a question of fact for the jury. (Page 216.)
3. SAME—DAMAGES—EXCESSIVENESS.—Under the rule that where there is no fixed rule of compensation the theory of the law is that the verdict of a jury awarding damages is conclusive unless it appears to be the result of passion or prejudice, a verdict awarding to a wife $750 for the negligence of a telegraph company in failing

to deliver a message whose prompt delivery would have enabled her to reach the bedside of her dying husband, was not excessive. (Page 217.)

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

STATEMENT BY THE COURT.

This action was instituted in the Columbia Circuit Court by Mrs. Bertie Reeves against the Louisiana & Northwest Railroad Company, to recover damages for mental anguish caused by the failure to promptly deliver the following telegram:

"Rev. J. J. Menifee, Magnolia, Ark.

"Austin very low. Tell Bertie to come at once. Answer.

(Signed) "W. O. Reeves."

The facts are as follows: The telegram was sent from Bloomberg, Texas, by W. O. Reeves to J. J. Menifee at Magnolia, Arkansas, on the 27th day of December, 1908. It was received by the defendant railroad company at 4:53 o'clock P. M. on that day. The railway company operated the telegraph line over which the message was in part transmitted to Magnolia. It ascertained that the Rev. J. J. Menifee was staying at the house of a Mr. Burleson in the town of Magnolia, but that he was not in town that day. No effort was made to find out if he had a family, or who the beneficiary in the telegram was; and no further effort was made to deliver the telegram until the next morning.

Austin Reeves and Bertie Reeves, his wife, were the persons referred to in the telegram as "Austin" and "Bertie." The latter was the daughter of J. J. Menifee, the addressee of the telegram. At the time the Rev. J. J. Menifee with his wife and daughter, Bertie, were all staying at the house of Mr. Burleson. The telegram was delivered at the residence of the latter at 8:30 o'clock A. M. on the 28th inst., and was received by Mrs. Bertie Reeves. She left on the next train for the bedside of her husband, but he was dead when she arrived. She testified that she was at Mr. Burleson's throughout the day of the 27th inst., and that, had the telegram been delivered at his residence promptly on that day, she could and would have started at once to her husband's bedside, and would have arrived there about 12 hours before his death. The evidence shows that she suffered great mental anguish because the telegram was not delivered.

There was a trial before a jury, which returned a verdict against the railroad company for $750. From the judgment rendered against it the latter has appealed to this court.

C. W. McKay, for appellant.

Telegrams of this nature are strictly confidential. Kirby's Dig., § 7943. Therefore appellant was justified in declining to deliver to any one else than the addressee. A telegraph company is not liable to one whose interest does not appear on the face of the telegram. 141 Fed. 538.

W. H. Askew, for appellee.

The telegram on its face is sufficient to put the telegraph company on inquiry as to the relationship existing between the parties mentioned therein. 82 Ark. 526; 87 Ark. 303; 18 Am. St. R. 25; 16 *Id.* 920. The question of diligence is one exclusively for the jury. 10 Am. St. R. 772; 77 Ark. 531. The telegram was sufficient on its face. 82 Ark. 526; 18 Am. St. R. 37; 76 Tex. 217. The telegram should have been delivered at the residence of the addressee. 27 Am. St. R. 918; 44 Pac. 989; 24 Fed. 119. The verdict is not excessive. 82 Ark. 526.

HART, J., (after stating the facts.) "A telegraph company owes a duty to the transmission and delivery of messages only to persons of whose beneficial interest in the telegram the company receives information from the face of the telegram itself or from other sources; and it is liable for special damages only where notice of the facts which give rise thereto is received either from the face of the telegram or from other sources." *Western Union Tel. Co.* v. *Weniski,* 84 Ark. 457; *Western Union Tel. Co.* v. *Blackmer,* 82 Ark. 526.

It owes a duty to the party whose beneficial interest appears from the face of the telegram because injury to such person is the natural and probable consequence of its want of care. We think the body of the message brings this case within the rule, and that appellant ought reasonably to have anticipated from the language of the telegram that the party interested would suffer mental anguish.

The principal contention made by counsel for appellant is that the court erred in giving the following instruction:

"The jury are instructed that, upon receipt of the message, it became and was the duty of the defendant to use reasonable effort for the prompt delivery of same; and if you believe from a preponderance of the evidence that it failed to use such effort, then and in that event you are told that it was guilty of negligence. As to whether, under the facts and circumstances detailed in evidence by the witnesses, the defendant company was negligent in the delivery of this message is a question to be determined by you from all the evidence in the case."

They urge that the court should have told the jury as a matter of law that appellant discharged its duty when it learned that the addressee of the message was not in Magnolia, and that it owed no duty except to deliver the message to him in person. We think the question of negligence in the delivery of the message, under the facts and circumstances of this case, was properly left to the jury to determine.

"Whether the messenger who is charged with the delivery of the telegram, and fails to present it at the residence or place of business of the addressee, has used ordinary diligence, such as the law requires, is a question of fact for the jury." *Western Union Tel. Co.* v. *Mitchell,* 40 L. R. A. (Tex.) 209; *Pope* v. *Western Union Tel. Co.,* 9 Ill. App. 283; *Western Union Tel. Co.* v. *Woods,* 44 Pac. (Kan.) 989; 2 Joyce on Electrical Law, § 744.

At least ordinary and reasonable effort must be made to deliver the message. The undisputed evidence in this case shows that if the railroad company had delivered the message at the residence of Mr. Burleson, where Mr. Menifee and family were staying, the plaintiff would have received it, and could have reached the bedside of her husband before his death.

It is next insisted that the verdict is excessive. The amount recovered was $750. Where there is no fixed rule of compensation, the theory of the law is that the verdict of the jury is conclusive, unless it appears to be the result of passion or prejudice. In the present case the negligence of the defendant prevented a wife from reaching the bedside of her dying husband and ministering to him; and we do not think the verdict was excessive.

The judgment will be affirmed.

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

Opinion delivered May 23, 1910.

1. STATUTES—CONSTRUCTION OF PENALTIES.—The rule that penal statutes should be construed strictly does not require that the words of a penal statute should be so narrowed as to exclude cases which those words, in their common and ordinary acceptation, would comprehend. *St. Louis, I. M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42, followed. (Page 219.)
2. CARRIERS—OVERCHARGE—PARTY AGGRIEVED.—Where a ticket was purchased for plaintiff by another, and was accepted by the railroad company for her fare, she was the "party aggrieved" by an overcharge therefor and entitled, under Kirby's Digest, § 6620, to recover the penalty therefor. (Page 219.)

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

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

The party who purchased the ticket is the only person entitled to sue for the statutory penalty. 30 Cyc. 1340. The statute is a penal one. *St. L., I. M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42. And it must be strictly construed. 64 Ark. 271; 65 Ark. 159; 68 Ark. 34; 74 Ark. 364; 79 Ark. 214; *Id.* 517; 87 Ark. 409; 88 Ark. 277; 89 Ark. 488. Only the sender of a dispatch is the party aggrieved. 115 Ind. 191. In a suit for a statutory penalty, the person to whom the message is sent cannot become the party aggrieved. 95 Ind. 12; 108 Ind. 538; 157 Ind. 37. The father could not be the "party aggrieved." 138 Pa. 48. "Aggrieved," in its legal sense, means having suffered loss or injury. 23 Tex. Civ. App. 80; 90 Tex. 89; 18 Tex. Civ. App. 400.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment rendered against it in favor of Mrs. Ervina McGettie Freeman. The action was brought by her to recover the penalty provided by section 6620 of Kirby's Digest for an overcharge in passenger fare.

The ticket in question was bought and paid for by Cyrus Gordan, her father. It was purchased for the use of the plaintiff, and was used by her on one of the defendant's passenger trains in going from Hope, Ark., to Mandeville, Ark.

The sole question raised by the appeal is, was she entitled to maintain the action? Sec. 6620 of Kirby's Digest, under which the suit was brought, reads as follows:

"Any of the persons or corporations mentioned in sections 6611, 6612, 6613 and 6614 that shall charge, demand, take or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed shall forfeit and pay for every such offense any sum not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee, to be taxed by the court, where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction. And any officer, agent or employee of any such person or corporation who shall knowingly and wilfully violate the previsions of this act shall be liable to the penalties prescribed in this section, to be recovered in the same manner."

It is contended by the counsel for the defendant that she is not the "party aggrieved" within the meaning of the statute, and therefore not entitled to maintain the action.

In construing this statute in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Waldrop,* 93 Ark. 42, the court held (quoting syllabus):

"The rule that a penal statute should be construed strictly does not require that the words of a penal statute should be so narrowed as to exclude cases which those words, in their common and ordinary acceptation, would comprehend."

We think the persons referred to in the first part of the section of the statute quoted are those intending to become passengers, and that the statute was passed for their protection. The ticket in question, although paid for by Gordan, was destined for the use of the plaintiff. It was purchased for her benefit, and was accepted by the railroad company in payment of her fare. We are of the opinion that she was the "party aggrieved," and was entitled to maintain the action.

The judgment will be affirmed.

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

Opinion delivered May 23, 1910.

1. CARRIERS—DUTY TO PASSENGERS ON MIXED TRAINS.—Though passengers on a mixed freight and passenger train are held to have assumed all the risks incident to travel on such trains, yet where the railway company undertakes the carriage of passengers on such a train it owes to them the same high degree of care to protect them from injury as if they were on a regular passenger train. (Page 223.)
2. SAME—DUTY TO HOLD CARS.—A carrier of passengers on mixed trains is required to furnish reasonably safe means of entering the car and to hold the car in a reasonably safe manner for a reasonable time to permit those who wish to enter to do so with safety. (Page 223.)
3. SAME—REASONABLE TIME TO BOARD CAR.—In determining whether a reasonable time has been afforded to a passenger in getting on board a train the particular circumstances of each case and of the passenger should be considered, such as his physical ability, his incumbrance with baggage, and his being accompanied by those dependent on him for attention. (Page 223.)
4. SAME—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, a passenger on defendant's road, had entered a passenger coach to deposit some bundles, and had returned to the platform to get her infant child, and while there was injured by a sudden jar of the train, negligently caused by defendant while passengers were still entering the coach, it was a question for the jury whether she was guilty of contributory negligence in being on the platform. (Page 223.)
5. INSTRUCTION—GENERAL OBJECTION.—An instruction that "railroad companies are required, in the carriage of passengers, to use the utmost care and foresight, and are held responsible for even a small degree of negligence causing an injury to a passenger, and are required to exercise the highest degree of practicable care, diligence and skill in the operation of their trains to prevent injury to passengers," if subject to verbal criticism, cannot be reached by general objection. (Page 225.)
6. CARRIERS—DUTY TO PASSENGERS BOARDING TRAIN.—A railway company operating a mixed freight and passenger train which has just drawn up at a station for the purpose of receiving passengers is bound to anticipate the presence of passengers going on board of the train and to exercise care not to injure them. (Page 225.)
7. SAME—CONTRIBUTORY NEGLIGENCE IN STANDING ON PLATFORM.—A passenger on a mixed freight and passenger train is not negligent as matter of law in standing upon the platform, provided the standing is not so protracted or uncalled for as to become unnecessary or imprudent. (Page 225.)

8. DAMAGES—MENTAL PAIN.—Where the testimony showed that plaintiff suffered severe physical injuries, it was not error to instruct the jury that she could recover for mental pain suffered by her as an incident to her physical suffering. (Page 226.)

9. SAME—EXCESSIVENESS.—Where the evidence tended to prove that by defendant's negligence plaintiff, a delicate woman, was violently thrown against an iron brake and railing, that her breast was injured, her skin torn from her arm, and the muscles of her shoulder badly wrenched, and that she suffered pain for a year and a half, a verdict allowing her $2,500 was not excessive. (Page 227.)

Appeal from Phillips Circuit Court; *Hance N. Hutton,* Judge; affirmed.

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews and *Jas. H. Stevenson,* for appellant.

The evidence does not sustain the verdict. 101 Mo. App. 52. A passenger riding on a freight train assumes all the risks of damages incident thereto. 87 Ark. 109; 76 Ark. 520; 83 Ark. 22. And the company is bound to exercise only the highest degree of care. 4 Elliott on Rds., § 1629; *Ark. S. W. Ry.* v. *Wingfield,* 94 Ark. 75; 90 Ark. 494. The passenger assumes the risk of the increased danger. 195 Mo. 104; 165 Mo. 612; 144 Ill. 261; 84 Mo. App. 498. In instructing the jury, it is error for the court to assume a fact in issue as proved. 24 Ark. 540. Every instruction should be hypothetical. 14 Ark. 520; 31 Ark. 684.

It is error to point out what particular inference may be drawn from the facts in proof (49 Ark. 147), or to tell them what weight should be given to the evidence. 23 Ark. 115; 58 Ark. 108; 37 Ark. 580; 45 Atl. 161; 88 Ark. 7; 82 Vt. 42; 71 Atl. 836; 118 S. W. 612; 115 S. W. 85; *Id.* 615; 14 L. R. A. (N. S.) 1118. It is error to submit to the jury an issue upon which there is no evidence. 80 Ark. 260; 89 Ark. 147. The verdict is excessive. 87 Ark. 109.

J. M. Jackson and *Bevens & Mundt,* for appellee.

Carriers of passengers are held responsible for the slightest negligence. 55 Ark. 254; 34 Ark. 625; 60 Ark. 556; 90 Ark. 498; 76 Ark. 520; 83 Ark. 22; 87 Ark. 109; 57 Ark. 418; 87 Ark. 602. All grounds of objection not specified are waived. 87 Ark. 101; 65 Ark. 371; 30 Ala. 363. Appellant's general objection to plaintiff's fourth instruction was not sufficient. 73.

Ark. 531; *Id.* 595; 65 Ark. 255; 87 Ark. 607. Standing is not, under all circumstances, negligent. 79 Ark. 337; 83 Ark. 25; 85 Ark. 503; 87 Ark. 572; *Id.* 109; *Id.* 101. Appellant cannot complain of an error in an instruction when the same error was in an instruction given at its request. 88 Ark. 175; 69 Ark. 145; 67 Ark. 539; 75 Ark. 198; 88 Ark. 146; 87 Ark. 399.

FRAUENTHAL, J. This was an action instituted by Mrs. Grace Hartung, the plaintiff below, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages on account of personal injuries which she alleged she sustained while a passenger upon one of defendant's trains. The defendant ran a mixed train from Watson to Helena, two stations upon its line of railroad, in which it carried passengers and freight. The testimony on the part of the plaintiff tended to prove that she had paid her fare, and was entering defendant's train as a passenger at Watson for Helena.

In the train were two passenger coaches, and some freight cars were being switched for the purpose of putting them in the train. The train was preparing to leave, and passengers were entering the train. The plaintiff was accompanied by her baby, which was in the arms of her husband as she first entered the coach. She deposited some bundles upon the seat and then returned at once to the platform of the coach to take the baby from her husband. As she was thus standing on the coach platform, the engine backed three flat cars loaded with timber against the passenger coach with great and unnecessary force and violence, so that, as one of the witnesses testified, it almost lifted the end of the coach off the track. By the great jar and jolt the plaintiff was thrown across the coach platform on which she was standing and against the brake beam and guard rail of the next car, and thereby she was severely injured.

Upon the trial of the case the jury returned a verdict in favor of the plaintiff for $2,500; and from the judgment entered thereon the defendant has appealed to this court.

It is urged by counsel for defendant that, inasmuch as this was a mixed train, the plaintiff was guilty of negligence which contributed to the injury by going on the coach platform after entering the coach; and that on this account she is not entitled to recover, as a matter of law. But the fact that

this was a mixed train did not alter or diminish the duty, which was required of defendant as a carrier, to stop its train for such a reasonable time as would permit passengers to go on board with safety. Where the carrier accepts passengers on such mixed trains, the same rules of law will apply to it for the exercise of care in protecting its passengers from injury as apply to it when receiving them on regular passenger trains. In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Brabbzson,* 87 Ark. 109, it is said: "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." *Pasley* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 22; *Arkansas Central Railroad Co.* v. *Janson,* 90 Ark. 494; *Arkansas S. W. Ry. Co.* v. *Wingfield,* 94 Ark. 75.

The carrier of passengers on mixed trains is required, like carriers on regular passenger trains, to furnish reasonably safe means of entering the car and to hold the car in a reasonably safe manner for a reasonable time to permit those who wish to enter to do so with safety. If therefore, while the passenger is getting on the car, the train is negligently started, or so negligently handled by permitting other cars to be thrown against it with such violence that the passenger is injured, the carrier will be liable. The time that is allowed a passenger to enter a train depends to a great extent on the particular circumstances of each case and of the passenger; the physical ability of the passenger, his incumbrance with baggage and his being accompanied by those who are dependent upon him for attention may all be taken into consideration in determining whether a reasonable time has been afforded the passenger in getting on board the train. 2 Hutchinson, Carriers (3d Ed.), § 1111; 6 Cyc. 613.

In the case at bar the plaintiff was accompanied by her infant child, and she had come to the coach platform to take it from the arms of the father, who was standing on the depot platform. Other passengers were at the time entering the train, and all of them had not entered when the injury occurred. It became a question for the jury to say under the testimony in the

case whether the plaintiff went to the car platform without unreasonable delay, and whether she remained on the platform a reasonable time to get her child. If she acted with reasonable diligence to do this, then it cannot be said as a matter of law that she was guilty of contributory negligence which would defeat her right to recover.

The court gave a number of instructions to the jury, both at the request of the plaintiff and of the defendant. These instructions fully told the jury that the plaintiff assumed all the ordinary risks and hazards that were incident to the travel on a mixed train, and properly declared to them the care that the law required the plaintiff to exercise as a passenger on such train. Amongst other instructions it gave the following at the request of plaintiff:

"3. You are instructed that railroad companies are required in the carriage of passengers to use the utmost care and foresight, and are held responsible for even a small degree of negligence causing an injury to a passenger, and are required to exercise the highest degree of a practicable care, diligence and skill in the operation of their trains to prevent injury to passengers."

It is urged that the court erred in giving this instruction because it was not applicable to the carrier of passengers on a mixed train. But we do not think this contention is correct. The duty of a carrier of passengers on a freight or mixed train is thus stated in the case of *St. Louis Southwestern Ry. Co.* v. *Cobb,* 89 Ark. 82: "The passenger assumes the risks and hazards that are incident to the operation of a freight train; but the general duty of the carrier to use the utmost care for the safety of the passengers is the same. Freight trains and passenger trains are operated differently, but a freight train carrying passengers cannot be operated carelessly without subjecting the company to liability, any more than a passenger train. * * * In the operation of a freight train the operatives can no more overlook the due care of their passengers than can the operatives of a passenger train." See also *Rodgers* v. *Choctaw, O. & G. Rd. Co.,* 76 Ark. 520; *Pasley* v. *St. Louis, I. M. & S. Ry. Co.,* 83 Ark. 82; *St. Louis, I. M. & S. Ry. Co.* v. *Brabbzson,* 87 Ark. 109; *Arkansas Central Rd. Co.* v. *Janson,* 90 Ark. 498.

If there was any defect in the verbiage of the instruction, the defendant should have called the court's attention thereto by a specific objection, so that it could have been corrected in that particular. *St. Louis, Iron Mountain & S. Ry. Co.* v. *Richardson,* 87 Ark. 602.

It is urged that the court erred in giving the following instruction: "4. You are instructed that a railway company operating a mixed train which carries passengers and which has drawn up to a station for the purpose of receiving passengers is bound to anticipate the presence of passengers aboard the passenger car and to exercise care not to injure them."

Under the circumstances of this case we do not think that any error was committed by giving this instruction. The passenger coaches were stopped at the depot, and passengers were at the time entering the train. Preparations were being made for the departure of the train, and the trainmen were bound to anticipate the presence of the passengers going on board of the train under these circumstances. *St. Louis. I. M. & S. Ry. Co.* v. *Harmon,* 85 Ark. 503; *St. Louis, I. M. & S. Ry. Co.* v. *Gilbreath,* 87 Ark. 572.

It is urged that the court erred in giving the following instructions:

"5. You are instructed that in the operation of mixed trains jars of great, unusual and unnecessary violence would be evidence of negligence on the part of the trainmen, and you are further instructed that, as a matter of law, it is not necessarily negligence for a passenger to be standing on a mixed train, but on the other hand one has a right to so stand, provided the standing is not so protracted or uncalled-for that it becomes unnecessary or imprudent."

The principle of law set out in this instruction is, we think, correct. A passenger is not guilty of negligence *per se* to stand up in a mixed train. There are circumstances which often arise that justify a passenger in standing up. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Gilbreath,* 87 Ark. 572, it is said: "This court has repeatedly held that it is not necessarily negligence for a passenger on a freight train to stand up, but that it is generally a question for the jury to decide under the circumstances disclosed in each case." See also *St. Louis, I. M. & S. Ry. Co.* v. *Billingsley,* 79 Ark. 337; *Pasley* v.

St. Louis, I. M. & S. Ry. Co., 83 Ark. 22; *St. Louis, I. M. & S. Ry. Co.* v. *Harmon*, 85 Ark. 503; *St. Louis, I. M. & S. Ry. Co.* v. *Richardson*, 87 Ark. 101; *St. Louis, I. M. & S. Ry. Co.* v. *Brabbzson*, 87 Ark. 109.

Nor do we think the instruction is otherwise prejudicial. We do not think that the fair meaning of the language would indicate that it assumes the existence of the facts therein recited, but that it is in effect hypothetical.

In other instructions given on behalf of the defendant the court had told the jury fully as to what acts would have constituted contributory negligence on the part of the plaintiff by standing up; and the effect of this instruction was only to tell the jury what acts in that regard would not as a matter of law constitute such contributory negligence. Its effect was still to leave to the jury the province to determine the facts and whether or not under the circumstances of this case the plaintiff was guilty of contributory negligence in standing up. Inasmuch as the defendant had requested and obtained the giving of instructions which singled out facts on this issue, we do not think that any prejudicial error was committed by the court in this regard in this instruction.

It is urged by the defendant that the court erred in instructing the jury that the plaintiff could recover for mental pain and anguish as an element of damage. It claims that the evidence shows an entire absence of mental suffering. We do not think that this contention is correct. The evidence shows that the plaintiff, a delicate woman, was thrown with great force and violence across the end of the car and against the iron brakes and rails. Her breast was injured, the skin was torn from her arm from the wrist to the elbow and the muscles of her shoulder were badly wrenched. She suffered physical pain at the time, and has continued to suffer such pain for more than one and one-half years after the injury. A physician of defendant waited on her immediately after the injury, and later she required the attention of another physician. She suffered such rheumatic pains, which were caused by the injury, that she consulted a specialist; and with all the medical assistance which she obtained she still endures pains that are a result of the injury. Mental suffering is so intimately connected with physical suffering that mental pain and anguish was necessarily inci-

dent to her condition from the injury. *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 84 Ark. 46; *Arkansas S. W. Ry. Co.* v. *Wingfield,* 94 Ark. 75.

There was evidence in the very nature, extent and circumstances of the injury which was sufficient to sustain an instruction relative to mental pain as an element of the damages. And under the testimony that was adduced in this case as to the nature and extent of the injury we cannot say that the verdict of $2,500 was excessive.

The judgment is affirmed.

McINTOSH v. BULLARD, EARNHEART & MAGNESS.

Opinion delivered May 23, 1910.

1. COURTS—PERJURY IN FEDERAL TRIBUNAL—JURISDICTION.—Where a witness gives his testimony in a matter pending in a court of the United States or before a judicial tribunal of that sovereignty, he is accountable for the truth of his testimony only to the United States, and perjury committed in so testifying is a crime only against the laws of the United States, and the prosecution therefor is within the exclusive jurisdiction of the Federal courts. (Page 229.)
2. JUSTICE OF THE PEACE—JURISDICTION IN FEDERAL OFFENSES.—Under Rev. Stat. U. S. § 1014, providing that "for any crime or offense against the United States the offender may by any * * * justice of the peace * * * be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of such offense," a justice of the peace of the State has authority to issue a warrant for and to bind over a person charged with perjury alleged to have been committed against the laws of the United States. (Page 230.)
3. FALSE IMPRISONMENT—PROCESS.—An action of false imprisonment under a wrongful arrest will not lie where the arrest complained of was under lawful authority. (Page 230.)
4. SAME—LIABILITY FOR GIVING INFORMATION TO OFFICER.—Where a person does no more than give information by affidavit to an officer relative to a matter over which he has jurisdiction, such person is not liable for a trespass for false imprisonment for acts done under a warrant which the officer issues on said charge. (Page 231.)
5. JUSTICE OF PEACE—LIABILITY FOR JUDICIAL ACTS.—A justice of the peace, having authority under the laws of the United States to issue warrants for the apprehension of alleged offenders against its laws, and to determine whether such alleged offenders shall be

held for trial or not, is not liable to a civil action for an erroneous decision made in good faith in the exercise of such jurisdiction. (Page 231.)

6. WRIT AND PROCESS—WHEN PROTECTION TO OFFICER.—A warrant or other process is a protection to the officer who executes it if it is fair and regular on its face, although it may in fact have been issued wrongfully or without authority. (Page 232.)

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

George W. Reed, for appellant.

The offense being against the United States, no State officer had jurisdiction; and one undertaking such jurisdiction is liable for his acts. 32 Ark. 117; 34 Ark. 174; Cooley on Torts, vol. 2, p. 805; 134 U. S. 372. The corporation is liable for the acts of its president. 75 Ark. 579.

McCaleb & Reeder, for appellee.

The acts of appellees were purely judicial. 34 Ark. 105; 14 L. R. A. 138; 73 N. Y. 27. Judicial officers are not held liable civilly for their judicial acts. 14 L. R. A. 145. The proceedings were in accordance with law. Compiled Stat., § 1014; Kirby's Dig., § 2110.

FRAUENTHAL, J. This was an action instituted to recover damages for an illegal arrest and false imprisonment. The defendants were Bullard, Earnheart & Magness, a domestic corporation, W. K. Ruddell, a justice of the peace, and W. C. Meacham, a constable of Ruddell Township, Independence County, Arkansas.

In his complaint the plaintiff, in substance, alleged that W. C. Bullard, the president of said corporation, acting for and on its behalf, filed an affidavit in the court of said justice of the peace charging that the plaintiff did "commit the crime of perjury by false swearing in a material matter of *in re* W. R. McIntosh, pending before Chas. F. Cole, referee in bankruptcy;" and in the affidavit there was a prayer that said justice of the peace should issue a warrant "to apprehend said McIntosh, and bring him before him to be dealt with according to law." Thereupon said justice of the peace issued a warrant addressed "to any constable of Independence County," commanding him to arrest said McIntosh, and bring him before the said justice of the peace to answer said charge. Under this warrant the

constable arrested the plaintiff and deprived him of his liberty and brought him before the justice of the peace, who set the hearing of the matter for a subsequent day, and required the plaintiff to give bond for his appearance on that day. On the hearing of the charge the justice of the peace ordered that plaintiff be bound over for his appearance to answer the charge before the grand jury of Independence County. He alleged further that the justice of the peace had no jurisdiction over the offense charged in the affidavit, and had no authority to issue the warrant, and that on this account the arrest was illegal, and the deprivation of his liberty thereunder was a false imprisonment. He also alleged that said prosecution was instigated wrongfully, and that he was discharged by said grand jury.

To this complaint the defendants interposed a general demurrer, which was sustained; and, the plaintiff refusing to plead further, the lower court dismissed the complaint; and from the judgment dismissing the complaint the plaintiff has appealed to this court.

It is urged by counsel for plaintiff that the allegations of the complaint are sufficient to constitute a cause of action for false imprisonment. It is claimed that the complaint alleges that plaintiff was arrested upon a charge which was an offense, if any, only against the United States, and not against the sovereignty of the State of Arkansas; and therefore it is contended that the justice of the peace, who was an official of the State, had no jurisdiction over such alleged offense, and that the warrant issued by him in such matter was void; and that his arrest and detention thereunder was a false imprisonment. The offense charged against the plaintiff in the affidavit filed before the justice of the peace was perjury, but it was therein alleged that the perjury was committed before a referee in bankruptcy, an official of the United States, and not before an officer or tribunal of the State of Arkansas. A witness who gives his testimony in a matter pending in a court of the United States or before a judicial tribunal of that sovereignty is accountable for the truth of his testimony only to the United States, and perjury committed in so testifying is a crime only against the laws of the United States, and the prosecution therefor is within the exclusive jurisdiction of its courts. The courts of the State

have no jurisdiction to entertain or proceed with a prosecution for the offense of perjury committed in a matter pending before the judicial tribunals of the United States. *State* v. *Kirkpatrick,* 32 Ark. 117; *Thomas* v. *Loney,* 134 U. S. 372.

But, notwithstanding the justice of the peace had no jurisdiction as a State official to entertain proceedings for a prosecution for this offense under the laws of the State of Arkansas, nevertheless, as an agency and officer designated by the laws of the United States, he did have authority and jurisdiction to arrest and imprison or bail for trial any offender against the laws of the United States.

It is provided by enactment of Congress (United States Compiled Statutes, 1901, p. 716, Rev. Stat. § 1014) that "for any crime or offense against the United States, the offender may by any * * * justice of the peace * * * be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of such offense."

The justice of the peace was designated by Congress as an official upon whom it conferred the authority to issue the warrant for and to bind over the person charged with perjury committed against the laws of the United States. The justice of the peace had, therefore, the jurisdiction to perform this function; and the warrant issued by him was not illegal and void. *Thomas* v. *Loney,* 134 U. S. 372.

Inasmuch as the justice of the peace had jurisdiction over this matter by virtue of the laws of the United States, the defendant, who only gave the information and merely preferred the charge, would not be liable for false imprisonment. 19 Cyc. 329; *Langford* v. *Boston & Alb. Rd. Co.,* 144 Mass. 431; *Gifford* v. *Wiggins,* 50 Minn. 401; *Murphy* v. *Walters,* 34 Mich. 180.

False imprisonment is a trespass committed against the person of another by unlawfully arresting and detaining him without any legal authority or by institgating such unlawful arrest. It must be alleged that the arrest was without legal authority before an action can be founded upon a false imprisonment. It is not claimed that the complaint alleges a cause of action for malicious prosecution. In such action the arrest must be made by legal process; the prosecution is apparently legal, but it is instigated by malice and without probable cause. *Vinson* v. *Flynn,* 64 Ark. 453; 26 Cyc. 9; *Davis* v. *Pac. Tel. & Tel. Co.,*

57 Pac. 764; *Nebenzahel* v. *Townsend;* 10 Daly 235.

It is not alleged that the defendant preferring the charge before the justice of the peace in any way participated in the arrest of plaintiff or his commitment, nor that it interfered therewith by giving any direction to the officer or otherwise. Where a person does no more than to give information by affidavit to an officer relative to a matter over which he has jurisdiction, such person is not liable for a trespass for false imprisonment for the acts done under a warrant which the officer issues on said charge. 9 Cyc. 330; 12 Am. & Eng. Enc. Law, 739.

It therefore follows that, even though the complaint had made sufficient allegations that the corporation had authorized the preferment of the charge, it does not make sufficient allegations to show that it is liable for an action for false imprisonment.

Nor do we think that the allegations in the complaint are sufficient to constitute a cause of action for false imprisonment against the justice of the peace who issued the warrant and entertained the charge against the plaintiff. The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil action for their judicial acts, even when those acts are in excess of their jurisdiction; and we think that the weight of authority is that this immunity from civil liability is equally applicable to a judge whose jurisdiction is limited. There is a clear distinction between an absence of all jurisdiction and a jurisdiction exercised erroneously or irregularly over the subject-matter. Where a justice of the peace or a judge of an inferior court is invested by law with jurisdiction over the general subject-matter of an alleged offense, and acts with entire good faith, he should not be held liable in damages for an erroneous decision to a party who has been injured thereby.

If he has the power under authority of law to hear and pass on cases to which the particular offense belongs, the same reason should require that he should be protected from civil liability for an erroneous decision which exempts judges of superior or general jurisdiction from such liability.

"Nothing is more essential and important than that the judiciary shall be independent. Every judge should feel per-

fectly free to follow the dictates of his own judgment; and the one thing essential to that independence is that they shall not be exposed to a private action for damages for anything that they may do in their official capacity. No judge would feel free if he knew that upon the rendition of a judgment or order he might be subjected to a suit by the defeated party, and, in the event that it should be held erroneous, and that he had mistakenly exceeded his jurisdiction and powers in some particular, be mulcted in damages." *Comstock* v. *Eagleton,* 11 Okla. 491.

As is said in the case of *Trammell* v. *Russellville,* 34 Ark. 105, "It is a universally recognized principle that one acting judicially in a matter within the scope of his jurisdiction is not liable in an action for his conduct. Whenever the State confers judicial powers upon an individual, it confers them with full immunity from private suit." *Bradley* v. *Fisher,* 13 Wall. 335; *Austin* v. *Vrooman,* 14 L. R. A. 138; *Lange* v. *Benedict,* 73 N. Y. 12; *Grove* v. *Van Duyn,* 44 N. J. L. 654; 23 Cyc. 568; *Savacool* v. *Boughton,* 5 Wend. 172.

The statute of the United States has designated the justice of the peace as an official upon whom it has conferred the power and jurisdiction to issue a warrant for the apprehension of alleged offenders against its laws and to hear and determine in such matter whether or not to discharge or hold such alleged offender for trial before its courts. Being invested with that judicial authority, the justice of the peace is not liable to a civil action for any erroneous decision made in entire good faith in the exercise of that jurisdiction which was conferred upon him. The allegations of the complaint do not show an absence of jurisdiction of the justice of the peace to issue the warrant as an official of the United States for the offense charged against the laws of the United States, nor such an exercise of that jurisdiction for which he could be held liable in damages in an action for false imprisonment.

Nor do we think that the allegations of the complaint are sufficient to constitute a cause of action for false imprisonment against the constable. The law protects an officer in the execution of process or a warrant, if it is fair and regular on its face. He is not to look beyond the warrant; he is not to exercise his judgment as to whether or not the process is valid. If it is in due form and issued by an official who apparently has ju-

risdiction of the case or the subject-matter, the officer must obey its commands. In such case the officer is protected in the service of the process, although it may have in fact been issued wrongfully or without authority. *Lavender* v. *Hudgens,* 32 Ark. 763; *Trammell* v. *Russellville,* 34 Ark. 105; *Chrisman* v. *Carney,* 33 Ark. 316; *Cassier* v. *Fales,* 139 Mass. 461; *Haskins* v. *Ralston,* 69 Mich. 63; *Page* v. *Citizens Banking Co.,* 111 Ga. 73; *Savacool* v. *Boughton,* 5 Wend. 172; 12 Am. & Eng. Enc. Law, 739; 19 Cyc. 344; *Emerson* v. *Hopper,* 94 Ark. 384.

The allegations of the complaint do not state facts sufficient to constitute a cause of action for false imprisonment against any of the defendants.

The judgment is affirmed.

GASTON *v.* STATE.

Opinion delivered May 23, 1910.

1. INCEST—MUTUAL ASSENT.—In a prosecution under Kirby's Digest, § 1811, providing that "persons * * * within the degrees of consanguinity within which marriages are declared by law to be incestuous * * *, who shall commit adultery or fornication with each other, shall be deemed guilty of incest," *held,* that where the parties to sexual intercourse are within the prohibited degrees the male may be convicted of incest, even though he accomplished the act without consent of the female and against her will. (Page 234.)
2. SAME—WHETHER FEMALE AN ACCOMPLICE.—A female with whom incestuous intercourse is had against her will is not an accomplice of the male, and therefore need not be corroborated as a witness. (Page 235.)
3. TRIAL—IMPROPER ARGUMENT.—Where the defendant in an incest case was convicted solely upon the testimony of the prosecuting witness, and there was testimony of another witness tending to impeach her credibility, the error of permitting the prosecuting attorney to refer in his argument to the impeaching witness as a liar and professional witness, and as having been present at a former trial of the cause and not called by defendant, when unsupported by testimony, was prejudicial, and such prejudice was not removed by a direction of the court not to consider anything not in evidence. (Page 236.)

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

C. T. Wetherby, for appellant.

The verdict is not supported by the evidence. 48 Ark. 66; 58 Ark. 3; 61 Ark. 62; 6 Conn. 417. The evidence showed rape conclusively, and the former jury must have acquitted appellant because of the improbability of witness' story. 20 Ore. 427; 141 Mo. 281; 2 Mont. 193; 22 O. St. 541; 36 Pac. 302; 74 Mo. 395; 21 Neb. 171.

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

An acquittal on charge of rape does not bar a prosecution for incest. 60 Am. St. R. 35. A party may be convicted of incest though he accomplish his purpose by such means as would make it rape. 19 So. 306; 54 Am. St. R. 140. The crime of incest may exist, although the consent of the female to the act was never obtained. 90 Cal. 359; 119 Cal. 456; 151 Cal. 604; 74 Mo. 385; 204 Ill. 479; 106 Ind. 163; 30 Tex. App. 695; 20 Wash. 522; 131 Mass. 577; Bish. Stat. Crimes, 660; 44 Ga. 209; 68 Ga. 672; 90 Wis. 527; 82 Wis. 571; 9 Pac. 532. The aim of the statute is to prevent unnatural intercourse. 117 La. 122. No corroboration is required. 42 Fla. 184. The woman is an accomplice only when she consented to the act. 11 Tex. App. 92; 103 N. W. 159. Where she did not consent, her uncorroborated testimony is sufficient. 75 Pac. 166; 103 Ia. 720; 91 N. W. 191; 59 Vt. 614. Remarks of counsel were not prejudicial. 76 Ark. 39; 88 Ark. 62; 71 Ark. 403; *Id.* 62; 84 Ark. 131.

FRAUENTHAL, J. The defendant, James Gaston, was convicted of the crime of incest, and he has appealed to this court to obtain a reversal of the judgment of conviction. The testimony on the part of the State tended to prove that the defendant was a married man, and the father of Annie Martin, and that he did have carnal knowledge of his said daughter. The principal witness on behalf of the State was the daughter; and the testimony tended to prove that the defendant obtained the sexual intercourse with her without her consent and forcibly and against her will. It is urged that, in order to constitute the crime of incest, it is necessary that both parties should assent to the intercourse. In some jurisdictions it has been held that such consent is necessary upon the theory that the crime is a joint one. Our statute (Kirby's Digest, § 1811) provides that "persons marrying who are within the degrees of consanguinity

within which marriages are declared by law to be incestuous or void absolutely, or who shall commit adultery or fornication with each other, shall be deemed guilty of incest." The crime of incest is committed by adultery when the accused party is married. The gravamen of the crime of incest is the unlawful carnal knowledge, and it is unlawful because of consanguinity. The object of the statute is to prohibit by punishment the sexual intercourse of those who are related within the prescribed degrees. The intercourse is unlawful because of consanguinity, and without regard to the means by which the intercourse is accomplished. The intent of the male is equally criminal, and his act is equally unnatural, whether the female consents or not. The consent of the female can add nothing to the moral or legal turpitude of the male. The defendant is punished, not because of the act of another, but because of his own evil intent and criminal act. Mr. Bishop in his work on Statutory Crimes, § 660, says: "Where the crime consists of one's unlawful carnal knowledge of another, it is immaterial whether the other participated under circumstances to incur guilt or not." In 10 Am. & Eng. Enc. Law, 341, it is said: "The weight of authority seems to be to the effect that where incestuous fornication is shown to have been committed by defendant in full knowledge of the relationship between himself and the other participant the fact that he may have or did use force in the accomplishment of his object is entirely immaterial, and he may be convicted of the crime of incest notwithstanding." We are of opinion that under our statute where the parties to the sexual intercourse are within the prohibited degrees the male may be convicted of incest, even though he accomplished the act without consent of the female and against her will. Wharton on Criminal Law, § 1751; *State* v. *Ellis,* 74 Mo. 385; *Mercer* v. *State,* 17 Tex. App. 452; *Porath* v. *State,* 90 Wis. 527; *People* v. *Barnes,* 2 Idaho 161; *Smith* v. *State,* 108 Ala. 1; *Norton* v. *State,* 106 Ind. 163; *Com.* v. *Bakeman,* 131 Mass. 577.

It is urged that the testimony of the witness Annie Martin was not corroborated, and that the defendant can not be convicted of the crime of incest upon her uncorroborated testimony because she is necessarily an accomplice in the commission of the crime. An accomplice has been defined to be one who unites in the commission of a crime and who participates in the crim-

nality of the act. The female upon whom the crime of rape is committed does not participate in the criminality of the act, and is therefore not an accomplice to that crime. And for the same reason the female with whom adulterous intercourse is obtained by force or against her will does not unite with the commission of the crime. She does not intentionally co-operate with or aid in the commission of the criminal act. She is free of guilt, and she is therefore not an accomplice. Her testimony does not require corroboration as a matter of law. Wharton on Criminal Ev., § 440; *Bridges* v. *State,* 113 N. W. 1048; *Mullinix* v. *State,* 26 S. W. 504; *Whittaker* v. *Com.,* 95 Ky. 632.

It is earnestly contended by counsel for defendant that a prejudicial error was committed in the trial of the case by the improper remarks that were made by the attorney for the State in his closing argument to the jury. The defendant had introduced testimony tending to prove that the members of his family were expecting money upon what they called an "Indian Claim" pending before a department of the United States, and that the prosecuting witness and her mother were anxious for defendant's conviction, so that he could not be free to spend this money. He introduced at the trial several witnesses who testified to contradictory statements made by the prosecuting witness. His most important witness was Tom Delaney, who testified that he overheard a conversation between the prosecuting witness and her husband in an adjoining room, after the alleged commission of the offense charged against the defendant, in which she stated that her father did not commit the crime, and that she on that account was unwilling to give testimony against him, and that her husband in forcible language insisted with threats that she must give the testimony against her father, even if it was false. In the course of his closing argument to the jury the prosecuting attorney said:

"The defendant has produced a mass of perjured testimony. Marshall Causey, Jim Appleby, Epp Potts and Tom Delaney, all are unworthy of belief. You take the witness Tom Delaney, and, bless your heart, Tom Delaney is the biggest liar in this whole country. I tell you, he is a professional witness. He testifies in all the criminal cases in this court. Absolutely, he would not know the truth if he met it in the road."

Defendant at this point objected to the remarks, as being improper argument, and called on the prosecuting attorney to stop until he could make his objections, and appealed to the court, but the prosecutor refused to stop, and proceeded in a very loud tone of voice: "I tell you another very significant fact. Tom Delaney was here all last July term of court, when Gaston was being tried for raping this same daughter of his, and the defendant never put him on the stand as a witness. I tell you, gentlemen, this is a strong circumstance to show his testimony was made up to suit this occasion."

At this point defendant called on the prosecuting attorney to stop until he could make his objections and exceptions, and appealed to the court to compel him to desist from this course of argument; but, before there was any ruling, the prosecutor proceeded in a very loud tone of voice, talking to the defendant's attorney: "Yes, you object. You always object. You can't get along without objecting; but I will tell you you can object till you bawl your head off. I am arguing this case, and I don't want you to butt in."

The defendant asked the court to rebuke the prosecuting attorney, and asked that he instruct the jury that his remarks were improper, and should not be considered by them. The court said: "I have already told the jury not to consider anything not in evidence, and I believe they understand it." And: "They will try this case on the law and the evidence, and not on the argument of counsel."

In the trial of the case there was no testimony tending to impeach any of these witnesses referred to by the prosecuting attorney on the ground that their general reputation for truth and morality was bad; there was no testimony tending to prove that the witness Delaney was a professional witness, and no testimony tending to show whether or not this witness had been present at a former trial of the defendant, or whether or not he had testified at such trial. We have repeatedly called to the attention of the lower courts and their prosecuting officers that the due and proper administration of justice demands that the remarks of the attorneys before the jury should be kept within the bounds of legitimate argument; that no remarks should be made, especially by the prosecuting attorney, which would tend to deprive the accused of a fair, unprejudiced and impartial

trial. In the case of *Holder* v. *State,* 58 Ark. 473, we said: "A prosecuting attorney is a public official acting in a *quasi* judicial capacity." His statements to a jury should and do carry great weight on account of his judicial position. In the case of *Kansas City, F. S. & M. Rd. Co.* v. *Sokal,* 61 Ark. 130, we said: "Material statements made by counsel of appellee outside of the evidence, which were likely to injure appellant and were excepted to by him at the time and were not cured by the court, do constitute a good cause for reversal." And in the same case it is said: "Ordinarily, an objection by opposing counsel, followed by a rebuke from the bench and an admonition from the presiding judge to the jury to disregard prejudicial statements, is sufficient to cure the prejudice; but instances sometimes occur in which it is not sufficient." And in *Vaughan* v. *State,* 58 Ark. 353, speaking of improper remarks by counsel in argument, we said: "Whenever it occurs to us that any prejudice has most likely resulted therefrom, we shall not hesitate to reverse on that account." The object and purpose of a judicial trial is to obtain a true determination based solely upon the evidence and the law. If therefore an undue advantage has been obtained by an improper argument which has worked such a prejudice to the losing party that it cannot be said that he has obtained a fair and impartial trial under the law and facts of the case, then an error has been committed in the trial which is prejudicial, and which should call for a reversal of the judgment arrived at in such a trial. No fixed and rigid test can be laid down by which to determine what is and what is not legitimate argument. The legitimacy of remarks of attorneys in their argument to the jury must necessarily depend upon the peculiar circumstances of each case. Counsel have undoubtedly the right to criticise opposing witnesses where the testimony in the case shows contradicting facts or their interest in the result of the trial or the parties to the case; and mere expressions of opinion will not ordinarily be deemed prejudicial. But they have not the right to make statements of or argue relative to matters of fact about which there has been no evidence introduced in the trial of the case. And when it manifestly appears that such argument has worked such an undue advantage to the opposing party as to deprive him of an impartial trial under the law and evidence

of the case, it will be determined that such argument is a prejudicial error.

In the case at bar the prosecuting witness was the sole witness who testified to any incriminating act against the defendant. Her testimony was uncorroborated. The defendant introduced a witness who gave evidence tending to prove that the testimony of the prosecuting witness was false. The prosecuting attorney in his closing argument to the jury stated that this witness of defendant was a professional witness. That was a statement of a fact not supported by any testimony in the case, and not merely an expression of opinion. He further stated that this witness had been present at a former trial of the defendant relative to the same act, and that he had not been called as a witness in that trial. There was no testimony in the case upon which to base these statements of alleged facts. This argument was highly improper and prejudicial. Upon objection being made thereto, the court told the jury that they should try the case on the law and the evidence, and not on the argument of counsel. But the counsel had made statements which were not in the evidence; and, being made by the prosecuting officer as facts testified to in the case, the jury may have thought that the statements were a part of the evidence. The court should have gone further, and told the jury specifically that these statements of the prosecuting attorney were not evidence in the case, and that they should disregard them. We do not think that the statement of the court cured the prejudice of these remarks. The improper argument of counsel, we think, worked such a prejudice to the cause and defense of the prisoner that we cannot say that he has had a fair and impartial trial under the law and the evidence that was actually adduced in the case.

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

BRYANT v. STATE.

Opinion delivered May 30, 1910.

1. VENUE—WHEN CHANGE OF, PROPERLY DENIED.—Where a petition for a change of venue in a criminal case, assigning as ground that the

minds of the inhabitants of the county were prejudiced, was corroborated by four witnesses, three of whom showed that their information as to the minds of the inhabitants of the county was too limited to enable them to form an opinion, and that they swore recklessly, and where the other witness was not a qualified elector of the county, it was not error to deny the petition. (Page 241.)

2. HOMICIDE—EVIDENCE—CHARACTER OF DECEDENT.—Where a witness for the defense in a murder case swore to the effect that the decedent was aggressive, quick to take offense and to resent it with unnecessary force, it was not error to permit the State to prove in rebuttal the general reputation of the decedent for being a quiet, peaceable citizen. (Page 241.)

3. APPEAL AND ERROR—BRINGING UP REJECTED TESTIMONY.—The refusal to permit the introduction of certain writings in evidence will not be considered if the record does not show what the writings contained. (Page 241.)

Appeal from White Circuit Court; *Hance N. Hutton*, Judge; affirmed.

U. S. Bratton and *Garner Fraser*, for appellant.

Defendant was entitled to a change of venue. 85 Ark. 518; 83 Ark. 36; 71 Ark. 180; 54 Ark. 247. A party producing a witness cannot impeach him if he is not an indispensable witness. Kirby's Dig., § 3137. Malice aforethought means the dictate of a wicked, depraved and malignant heart. 49 N. H. 399. Unless the character of deceased is attacked, the prosecution can not prove his peaceableness. 37 Ala. 103; 96 Ky. 212; 28 S. W. 500; 1 Whart. Crim. Law., 549. The character of deceased is not in issue in murder. 51 N. C. 381; 67 Cal. 223; 7 Pac. 643; 13 Kan. 414; 43 La. Ann. 541; 9 So. 493; 34 Tex. Crim. 161; 29 S. W. 1074; 21 Gratt. 909; 8 Wash. 292; 36 Pac. 139, 75 Ark. 299.

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

Unless exception was saved to the alleged error, and that exception preserved in the motion for a new trial, it is deemed waived. 77 Ark. 418; 73 Ark. 455; 30 Ark. 337; 43 Ark. 391; 39 Ark. 221. Where, on a motion for a change of venue, the examination of the supporting witnesses shows that they do not know the general consensus of opinion of the people in the county, it is not error to overrule the motion. 85 Ark. 518; 83 Ark. 336; 76 Ark. 276; 80 Ark. 360; 121 S. W. 925; 54

Ark. 243; 71 Ark. 180. This court can not say whether the court erred in excluding the notices as evidence, since they are not preserved in the bill of exceptions. 36 Ark. 484; *Id.* 74; *Id.* 653; 70 Ark. 364. Evidence showing that deceased was a peaceable man was competent. 75 Ala. 351; 77 Ala. 18; Whart. on Homicide, § 207; 153 Ind. 375; 75 Ark. 299.

BATTLE, J. The grand jury of White County indicted Will Bryant for murder in the first degree. He was convicted of murder in the second degree, and his punishment was assessed at seven years in the penitentiary; and he appealed.

He moved for a change of venue on the ground that the minds of the inhabitants of White County were so prejudiced against him that he could not get a fair and impartial trial in that county. His motion was corroborated by the affidavits of four witnesses. To test their credibility they were examined under oath. The testimony of three of them showed that their information as to the minds of the inhabitants was too limited to enable them to form an opinion, and that they swore recklessly, and in this case was not credible. The other was not a qualified elector of the county, as required by the statute. The court committed no error in overruling the motion. *Kinslow* v. *State,* 85 Ark. 518; *White* v. *State,* 83 Ark. 36; *Duckworth* v. *State,* 80 Ark. 360; *Maxey* v. *State,* 76 Ark. 276; *Price* v. *State,* 71 Ark. 180; *Jackson* v. *State,* 54 Ark. 243.

On cross examination of Mrs. Minta Potter, the widow of the man killed, the witness testified that the deceased "was quick to get mad and fight, and he was a brave man, and would fight at the drop of a hat." The State by many witnesses proved in rebuttal that the general reputation of the deceased for being a quiet, peaceable citizen was good. The appellant contends that the court erred in admitting it. It was only admissible for the purpose of sustaining the reputation of the deceased after it had been attacked. In this case the evidence adduced by the defendant on cross examination tended to prove that the deceased was aggressive, quick to take offense, and resent it with force unnecessarily. The evidence adduced by the State was admissible to remove such impression. Wharton on Homicide (3 ed.), § 269, and cases cited.

The court refused to allow the defendant to read as evidence certain notices. The contents of the notices were not

shown, and we are unable to determine whether the court committed a reversible error in excluding them.

The evidence was sufficient to sustain the verdict in this court.

Judgment affirmed.

JACKSON v. KELLER.

Opinion delivered May 16, 1910.

1. APPEAL AND ERROR—CHANCELLOR'S FINDING—CONCLUSIVENESS.—A chancellor's finding of facts will not be set aside unless it is clearly against the preponderance of the evidence. (Page 244.)
2. WATERS—OBSTRUCTING FLOW OF SURFACE WATER.—A lower adjacent proprietor will not be liable to the upper proprietor for obstructing the flow of surface water by a levee where that was the only practical method of protecting his land from surface water thrown against it by a ditch dug by the upper proprietor. (Page 245.)

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

Appellant, *pro se.*

Spence & Dudley, for appellee.

WOOD, J. Appellant is the owner of the north half of the northeast quarter of section 14, township 20 north, range 8 east, in Clay County, Arkansas. Appellee owns the southeast quarter of the northest quarter of the above section adjoining the lands of appellant on the south. Appellant by this action seeks to enjoin appellee from constructing a dam or levee on the land of appellee which appellant alleges obstructs the natural flow of water that passes off of his land on to the land of appellee, thereby causing the water to overflow appellant's land and to render same unfit for cultivation.

Appellee, answering the complaint, denied that there was a branch or drain of natural formation on appellant's land running from north to south on to appellee's land; alleged that on appellant's land there were low "swaggy" places and ponds with no definite course; that appellant has cut a system of ditches through his land, and on to the land of appellee, in order to drain the low places on the land of appellant, thereby deliver-

ing upon the land of appellee a large stream of water which would never reach appellee's land by any natural flow thereof. Appellee denied that he had obstructed any natural drain from the lands of appellant; alleged that he had cut a ditch of similar dimensions to that cut by appellant, on his land; that appellee cut this ditch on his own land further south of the ditch cut by appellant on appellant's land; that this ditch was cut on the west side of the land of appellee and running south into a large ditch on the public road; that appellant had dammed this ditch on appellee's land by driving stakes in same, thereby turning the water of said ditch into the ditch cut on the south side of appellant's land running east; that, if the ditch cut by appellant on his land was permitted to flow south into the ditch cut by appellee, it would carry off all the water, etc., intended to be carried by it. Appellee alleged that the small embankment made by him is at a low swaggy place in the northwest corner of his land, and this low place also extends over into appellant's land; that the making of this embankment was only for the purpose of protecting appellee from the volume of water turned on him by the ditches that appellant had made on his own land. Appellee prayed that appellant's complaint be dismissed for want of equity.

It will be observed that appellee admits that he erected a "small embankment" across a "low swaggy place on the northwest corner of his land." But he also says that the making of this embankment was "only for the purpose of protecting his land from the volume of water turned on it by the ditches that appellant had constructed on appellant's land."

The testimony of appellant and a plat which is in the record and made a part of his evidence shows that there was "a flat just north of where the water passed from appellant's land on to the land of appellee, forming a pond covering about an acre and a half. Appellant testified that there were two outlets from his land into appellee's land, which united just after passing into appellee's land, the eastern outlet being four rods wide and the western outlet being thirteen rods wide with a spot of high ground two rods wide between them; that these drains where they enter the land of appellee had well-defined banks that confined the water within them; that appellee had erected a dam or levee about two feet high across these two outlets

or drains, causing several acres of appellant's land to overflow. Appellant further testified that he cut a ditch about sixty rods long between his two forties; that this ditch was four feet wide at the top and about two feet deep. It ran due south from its point of beginning on appellant's land to the dividing line between the land of appellant and appellee, thence east to a point of high land. Appellant testified that the object in cutting these ditches, or this ditch, was to prevent the water from overflowing into appellee's land through the eastern outlet, and to bring it to the old ditch that was cut years ago on the west side of the appellee's land, and that ditch was now nearly filled. In another place in his testimony he says: "The object in cutting this ditch was to concentrate the water of these ponds to the old ditch west of Keller's land. About twenty rods of this ditch was cut through land that did not overflow except in very high water. That twenty rods was intended to catch the water before it got into these ponds." Appellant himself also testified: "The drains, as marked down in several places, have well-defined banks; some places they were not." But he was satisfied "that the drains as marked designate the natural flow of the water." One witness on behalf of appellant testified: "These drains on the map are just low slashy places, and have no banks. There is part of them in cultivation, and some in thickets. They plow across these drains. Another witness, when asked if "these drains that are marked in purple on this plat have any well-defined banks," replied: "Well, no; not any banks; just a natural low place in the land, about two hundred feet wide, and wider in some places than in others."

The circuit judge, in the absence of the chancellor from the county, refused a temporary restraining order to appellant, and the chancellor on the final hearing denied appellant's prayer for injunction and dismissed his complaint.

The decree was not clearly against the preponderance of the evidence. The question was one of fact as to whether appellee by building the levee across the low place on his own land had unnecessarily injured appellant in endeavoring to protect himself. The testimony warranted a finding that this was surface water. The low place on appellee's land into which the water came from appellant's land did not have any well-defined channel or banks. Appellee had the right to protect

himself from this surface water as best he could without doing unnecessary damage to the upper proprietor. It was the duty of appellee, if he could have done so at reasonable expense, to have controlled the waters that came upon his land, in their natural flow, from appellant's land, by means of ditches instead of the embankment, if the former could have been made as effectual as the latter. For by the embankment appellee injured the lands of appellant while protecting his own. However, under the evidence in the record, the court was justified in finding that the embankment resorted to by appellee was the only practical method of protecting his land from the water that came upon it from the appellant's land. The testimony tends to show that appellant by digging ditches on his own land to control the surface water had thereby thrown same in greater volume on to appellee's land, and it also tends to prove that appellant had driven stakes in the ditch running south on the western part of appellee's land, and that this ditch would not carry off the water in the volume that it came upon appellee's land after the digging of the ditches by appellant. The chancellor evidently found that appellant was at fault in digging ditches that turned the water on to appellee's land in greater volume than it would have gone had it been permitted to run in its natural course along and into the swale that existed where the waters passed from appellant's land on to the land of appellee. Appellant, while protecting himself from the surface water that accumulated on his land, had no right to concentrate and throw it by ditches with greater force and volume than it otherwise would have gone upon appellee's land, so as to unnecessarily damage him. See *St. Louis, I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46. Appellee had the right to erect an embankment to protect his land against such increased flow upon it. In the draining of one's land of surface water it is not permissible to direct the flow of the water upon the adjoining land, or to increase the volume of the flow by the construction of a drain or ditch. Tiedeman on Real Property, § 615, p. 587. The doctrine of *Baker* v. *Allen,* 66 Ark. 275, when applied to the facts of this case, shows that the decree was correct.

Affirm.

RUTHERFORD v. WILSON.

Opinion delivered May 30, 1910.

1. LIFE ESTATE—RIGHT TO CUT TREES.—A life tenant is authorized to cut growing trees only when necessary to the proper and reasonable enjoyment of his life estate in conformity with good husbandry. Thus he may clear land for the purpose of putting it in cultivation provided the cleared land as a whole, as compared with the wooded tract left, does not exceed the proportion of cleared to wooded land usually maintained in good husbandry, and provided further that he does not materially lessen the value of the inheritance. (Page 247.)
2. SAME—CUTTING TIMBER FOR SALE.—A life tenant is not authorized to cut growing timber merely for purposes of sale. (Page 248.)
3. SAME—WASTE—BURDEN OF PROOF.—In a suit against a life tenant to hold her liable for waste in cutting growing timber the burden of proving that the timber was wrongfully cut is on the plaintiff. (Page 249.)

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

Samuel M. Casey, for appellant.

In no case is the tenant allowed to cut wood for sale unless this is the customary mode of using the land. Tied. on Real Prop., § 74. And this rule applies to a dowress. 4 Kent, Com. 76. The cutting and selling of timber by a life tenant is waste for which the reversioner may sue. 92 Am. St. R. 621; 53 Am. Dec. 621. The timber can only be cut or used for the proper enjoyment of the estate for life, and not merely for sale. 63 Ark. 15. A verdict should have been directed for plaintiff, for defendant failed to make out a defense. 35 Ark. 147; 69 Ark. 562. The verdict is so palpably against the evidence as to shock the sense of justice of a reasonable person. 70 Ark. 386. It is error to give conflicting instructions. 74 Ark. 44; 72 Ark. 14; *Id.* 440.

Oldfield & Cole, for appellee.

In America a life tenant may cut and remove timber for the purpose of putting the land in cultivation. 63 Ark. 15; 14 Tenn. 334; 27 Am. Dec. 467; 33 S. W. 293; 59 Wis. 557; 18 N. W. 527; 2 Am. Dec. 258; 5 *Id.* 258; 72 *Id.* 721; 1 Tiffany on Real Prop., 564. The burden is on the remainderman to show that the life tenant went beyond her rights in cutting the timber. 72 Am. Dec. 721. There is some testimony

to support the finding of the jury that the purpose of the life tenant was to clear the land, and that is sufficient here. 67 Ark. 399; 73 Ark. 377; 75 Ark. 111; 82 Ark. 188; 84 Ark. 74; 89 Ark. 321. Before plaintiff could recover anything it was incumbent on him to show that his reversionary interest had been damaged. 63 Ark. 15; 21 N. C. 631; 14 Tenn. 334; 27 Am. Dec. 467; 11 Vt. 293; 63 N. W. 368; 33 S. W. 561. If the trees were dead or dying, their removal could not injure the inheritance. 99 N. C. 583; 1 Atl. 308; 11 Vt. 293.

McCULLOCH, C. J. A tract of land in Independence County, containing 229.32 acres, was assigned to the defendant, Mrs. Angie Wilson, as dower out of the estate of her deceased husband, about 150 acres of this tract being cleared and in cultivation, and the remainder being woodland. Plaintiff, W. A. Rutherford, is the owner of the reversion.

In the year 1907 defendant sold and allowed to be removed the timber on 20 or 25 acres of the woodland, for which she received the sum of $104.77, its market value; and in February, 1909, plaintiff instituted this action against her to recover said sum so received, alleging that she committed waste by removing the standing timber, and that the freehold was damaged to that extent. A trial before a jury resulted in a verdict for defendant, and plaintiff appealed.

The evidence shows that the land from which the timber was removed is tillable, but that it had not been put in cultivation at the time of the trial, except a small part—something less than an acre. It will be ready for the plow as soon as the brush and undergrowth is burned. Defendant testified that she sold and allowed the timber to be cut so that she could put the land in cultivation as soon as practicable, and that she is proceeding to put it in cultivation.

This court, in the case of *McLeod* v. *Dial*, 63 Ark. 10, laid down the following rule as to the rights of a life tenant: "He had no right to cut trees growing on this portion of the land, or allow them to be cut, except so far as was necessary to the proper and reasonable enjoyment of his life estate in conformity with good husbandry. For the purpose of using it as farming land, he had the right to clear a part of it, provided such part and that already prepared for cultivation, as compared with the remainder of the tract, did not exceed the proportion of cleared

to wooded land usually maintained in good husbandry; and provided, further, that he did not materially lessen the value of the inheritance. He also had the right to cut and use so much of the timber standing on the one-half which belonged to his wife as was necessary for fuel, and for making and repairing fences and buildings on the same. But the timber could only be cut or used for the proper enjoyment of the estate for life, and not merely for sale." Citing *Davis* v. *Clark,* 40 Mo. App. 515; *Owen* v. *Hyde,* 6 Yerger 334; *Jackson* v. *Brownson,* 1 John. 227; *Clemence* v. *Steere,* 1 R. I. 272; *Ballentine* v. *Poyner,* 2 Hayw. 110; 1 Washburn, Real Property, pp. 146, 148. The same rule has been stated by this court in subsequent cases. *Nashville Lumber Co.* v. *Barefield,* 93 Ark. 353; *Cherokee Const. Co.* v. *Harris,* 92 Ark. 260.

Now, measured by the law thus announced, it was a question for the jury to determine whether or not the removal of the timber amounted to waste, and constituted an injury to the inheritance. What is "good husbandry" is not always easily determined, as that depends on the peculiar facts and circumstances of each case. The whole tract contained 229.32 acres, with about 150 acres already in cultivation. With 20 or 25 acres more in cultivation, there would be left 55 or 60 acres of woodland. This may be sufficient to afford firewood and material for repairs, such as fenceposts, rails, boards or even lumber with which to build houses. That, of course, depends on the amount and kind of timber. We can not say that the jury were unwarranted in finding that it would be good husbandry to put the additional quantity of land in cultivation.

Another element of the inquiry is the relative value of the land and the timber. There is nothing to show that this land is chiefly valuable for timber. On the other hand, there is testimony to the effect that the land is not injured by removing the timber and putting it in cultivation, and that it will be a benefit to the freehold, in point of value, to remove the timber and put the land in cultivation. All of the land is tillable, so the witnesses say, and the value of the timber on the 20 or 25 acres was only $104.77.

The jury were also warranted in finding that the defendant sold the timber, not for profit, but for the purpose of imme-

diately putting the land in cultivation. She did not do that at once, but it is not essential that it be done within any given time. There may be more or less delay in getting land ready for the plow, even after the timber was removed. It may not be poor husbandry to wait for the roots to decay and for the land to dry out to some extent after the timber is removed, before commencing to cultivate. Defendant testified that a considerable part of the land would be ready for the plow as soon as the brush was burned off; and at the time of the trial her tenant was going ahead with the clearing. Under all the facts and circumstances of the case we think it was peculiarly a question for the jury to decide whether or not waste had been committed. There being evidence to sustain the verdict, we are not concerned with its weight, for that was within the province of the jury.

The instructions of the court were, we think, within the principles of law herein announced, and we find no error in the proceedings. It devolved on the plaintiff to show that waste had been committed to his injury, and the amount of damage, if any, to the freehold. This includes the burden of proving that the alleged act of the life tenant was not rightfully done, for the presumption is in favor of the latter until the contrary appears from the evidence. 30 Am. & Eng. Enc. Law, 304; *Lynn's Appeal,* 31 Pa. St. 44.

Judgment affirmed.

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

Opinion delivered May 30, 1910.

1. CARRIERS—DISCRIMINATION—REPEAL OF STATUTE.—Kirby's Digest, § § 6722, 6725, 6733, declaring that all individuals, associations and corporations shall have an equal right to have property transported over railroads, and imposing a penalty of not less than $50 nor more than $1,000 for a violation of such right, to be recovered by any party aggrieved, was not repealed by the later statute creating the Railroad Commission (Kirby's Digest, § § 6804, 6813), which prohibits discrimination in charges or in furnishing shipping facilities, and imposes a penalty of not less than $500 nor more than $3,000 for each violation, to be recovered by the State. (Page 251.)

2. SAME—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 6733, imposing a penalty for violating the rights secured by § § 6722 *et seq.*, is remedial in its nature, though operating as a penalty on the wrongdoer. (Page 252.)

3. PLEADING—DEFECTIVE STATEMENT—REMEDY.—Where a complaint for overcharges in freight is defective in failing to specify the dates of the overcharges and what the separate charges were, but nevertheless states a cause of action, the defect should be met by a motion to make the complaint more specific. (Page 252.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk,* Judge; reversed.

J. W. Blackwood and *Dunaway & Hammock,* for appellant.

Penal statutes should not be so narrowed as to exclude cases which would ordinarily fall within their purpose, and are naturally comprehended by the words thereof. 5 Wheat. 76; 6 Wall. 385; 2 Lewis' Suth. Stat. Const., § 519. The remedy given by the statute should be given favor of the party aggrieved. 2 Lewis' Suth. Stat. Const., § 532; 91 S. W. 419; 85 Mo. 164. The law is designed to protect person against the wrongful acts thereby prohibited, and it is immaterial what the amount awarded be denominated. 31 Mo. 574. The law is of a penal and police nature, as well as being compensatory. 145 Mo. 105.

W. E. Hemingway, E. B. Kinsworthy and *Jas. H. Stevenson,* for appellee.

The act of 1887 was repealed by the act of 1899. 10 Ark. 589; *Welch Stave Co.* v. *Stevenson,* 92 Ark. 266; 82 Ark. 302; 88 Ark. 324. The demurrer was properly sustained, because the complaint failed to state a cause of action.

J. W. Blackwood and *Dunaway & Hammock,* in reply.

If the complaint did not state a cause of action with sufficient certainty, the remedy was by motion to make more specific. 59 Ark. 629; 70 Ark. 161; 69 Ark. 208.

McCULLOCH, C. J. Appellant instituted this action against appellee railway company to recover statutory penalties for alleged discrimination in switching charges on carloads of rock transported from a rock quarry near the cities of Little Rock and Argenta. He bases his suit on sections of the act of March 24, 1887 (Kirby's Digest, § § 6722, 6725), which declare that all individuals, associations and corporations shall enjoy equal rights to have property transported over railroads, and that

unjust or undue discrimination in charges or in furnishing facilities for transportation shall be unlawful. The statute also provides that a penalty of not less than $50 nor more than $1,000 shall be adjudged against any railroad violating its terms, the same to be recovered in a civil action by the party aggrieved. Section 6733.

It is insisted on behalf of appellee that the statute above referred to was repealed by the act of March 11, 1899, creating the railroad commission and defining its powers and duties, which also prohibited discrimination by carriers in charges or in furnishing shipping facilities, and which prescribed a penalty of not less than $500 nor more than $3,000 for each violation, the same to be recovered in an action brought by the State. Kirby's Dig., § § 6804, 6813. It also authorizes a recovery of double damages by the party injured. Section 30 of the act reads as follows: "That the remedies hereby given shall be regarded as cumulative, and this act shall not be construed as repealing any statute giving such remedies." Kirby's Dig., § 6826.

In a recent case we held that the act of March 11, 1899, did not repeal the act of 1887, which fixed the maximum rate of charges for the transportation of passengers by railroads (*Chicago, R. I. & P. Ry. Co.* v. *McElroy,* 92 Ark. 600); and of section 30 of the act of 1899 we said: "If the substantive rights prescribed by the act of 1887 are not repealed by the later statute, the remedy is not abolished, for the later statute expressly preserves all such remedies, and declares those in the new act to be cumulative." Both of the statutes in question, with respect to unjust discrimination in charges of furnishing transportation facilities, are but declaratory of the common law on the subject. 4 Elliott on Railroads, § 1467; 2 Hutchinson on Carriers, 512. They confer no new right, but each provides a new remedy for the wrong done, and, as we said in the McElroy case, *supra,* the later statute expressly preserves all the remedies conferred by the former statute. In the McElroy case it became necessary to determine whether or not the maximum rate of passenger fare prescribed by the act of 1887 was repealed by the later statute giving the railroad commission power to fix passenger rates, for, if it was repealed, then the remedy necessarily fell with the right, notwithstanding the provision of the latter act preserving other remedies. The substantive right

conferred by the former statute was that of having transportation furnished at not exceeding the maximum rate prescribed by that statute; and, if that right had been taken away by a repeal of the statute, the remedy would have fallen too, for there could not be a remedy without a right to enforce or a wrong to be redressed. That is axiomatic. But discrimination by a public carrier against a shipper is a wrong, independent of statute, and the act of 1887 declared the wrong and prescribed a remedy. The statute falls within that class which is remedial in its nature, though operating as a penalty on the wrongdoer. *Nebraska Nat. Bank* v. *Walsh,* 68 Ark. 433; *Huntington* v. *Attrill,* 146 U. S. 657; Lewis's Sutherland, Stat. Con. 532; *Casey* v. *St. Louis Transit Co.* (Mo.), 91 S. W. 419.

The fact that the recovery allowed is not entirely compensatory does not take the statute out of the remedial class. It was obviously the intention of the framers of the act of 1899 to preserve the remedy prescribed by the former statute, though it resulted in allowing a double recovery from a wrong-doer—one in favor of the aggrieved party and one in favor of the State. The two provisions are not repugnant to each other; and since the latter statute expressly preserves the remedies prescribed by the former, the question of implied repeal does not arise.

The third paragraph of the complaint for overcharge on freight is defective in failing to specify the dates, etc., of the overcharges, and also in failing to state what the separate charges were; but it nevertheless stated a cause of action—defectively, it is true—but the defect should have been met by a motion to make the complaint more definite and certain. *Murrell* v. *Henry,* 70 Ark. 151; *Choctaw, O. & G. Rd. Co.* v. *Doughty,* 77 Ark. 1.

Reversed and remanded with directions to overrule the demurrer to the complaint.

COLONIAL & UNITED STATES MORTGAGE COMPANY, LIMITED, v. LEE.

Opinion delivered May 30, 1910.

1. ADVERSE POSSESSION—PAYMENT OF TAXES—CONTINUITY.—The continuity of constructive possession of unimproved and uninclosed land by virtue of paying the taxes thereon is broken where an adverse claimant made actual entry upon the land before the statute had run. (Page 253.)
2. DEEDS—PATENT AMBIGUITY.—A deed describing the land sought to be conveyed as the east part of a certain quarter section (north of bayou), containing 93.74 acres, is void where the quarter section appears on the government survey to be a full one, where there is no bayou running through the land, and there is nothing in the deed which shows what land was intended to be conveyed. (Page 255.)

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

Watson & Perkins, for appellant.

N. B. Scott and *Baldy Vinson*, for appellees.

McCULLOCH, C. J. This is an action at law instituted by appellant against appellees to recover possession of a tract of land in Chicot County, described on the plat of the government survey as "the east half of the northeast quarter of section 10, township 17 south, range 2 west." A trial before a jury resulted in a verdict and judgment in favor of appellees, from which an appeal is prosecuted.

Both parties claim title from a common source. Appellant's claim of title comes from the Government, through one W. D. Hill, the appellee's grantor. Hill acquired title to the land by deed dated November 22, 1886, and on October 7, 1889, he executed a mortgage or trust deed, which was afterwards foreclosed and under which appellant claims title. There was a patent error in the description of the land in the deed to appellant, which was subsequently corrected by the execution of a new deed accurately describing the land; but, inasmuch as the error was thus corrected, it is unnecessary to determine whether or not this error in the description was such as rendered the conveyance inoperative.

Appellant attempted to establish its title by proving, in addition to the chain of title deeds, adverse possession by paying taxes for the statutory period under color of title; and the

question relating to the error of description in the first deed to appellant became important in determining whether or not the deed constituted color of title. The importance of that question has ceased, however, since the jury found, on conflicting evidence, that appellant's possession was broken by an actual entry of the land by appellees less than seven years before the first of the four payments of taxes made by appellant prior to the passage of the act of 1899. *Updegraff* v. *Marked Tree Lumber Co.*, 83 Ark. 154; *Taylor* v. *Leonard*, 94 Ark. 122.

Appellee's claim of title to the land in controversy is based on the following deeds:

On January 30, 1870, John Hill as administrator of the estate of Alfred Flowers, deceased, executed to W. D. Hill a deed purporting to convey, pursuant to an order of the probate court of Chicot County, a tract of land described therein as follows: "The east part of the northeast fractional quarter (north of bayou) of section ten (10), township seventeen (17), range two (2) west, containing 93.74 acres." On March 31, 1870, W. D. Hill by warranty deed conveyed the land by the same description to the heirs at law of Alfred Flowers, under whom appellees claim title.

There is nothing to show that Alfred Flowers had any title to, or any interest in, the land in controversy; but if the description in the said deed of W. D. Hill was sufficient to cover the land in controversy, then the title which he subsequently acquired in 1886 inured to the benefit of his grantees under that deed, and he had no title to convey in 1889, at the time he executed the mortgage or trust deed upon which appellant's claim of title is based. Kirby's Digest, § 734.

The controlling question in the case, therefore, is whether or not the description in the deed from Flowers' administrator to W. D. Hill, and in the latter's deed to the heirs of Flowers, was sufficient to identify the land as embracing the tract in controversy.

The correct description of the tract in question, according to the plat of the Government survey, is "the east half of the northeast quarter of section 10, township 17 south, range 2 west, containing 80 acres." The description in the Hill deed, under which appellees claim title, is "the east part of the northeast fractional quarter (north of bayou) of section 10, township 17,

range 2 west, containing 93.74 acres." A copy of the Government plat of that township was introduced in evidence, and also a copy of the field notes of section 10. The northeast quarter of that section is not fractional, and contains 160 acres. Neither the plat nor the field notes show any bayou traversing that quarter section. Bayou Macon is shown on the plat to run through the west half of section 10, and thence southerly and easterly through adjoining sections; but in no way can that bayou affect the description in the Hill deed.

It was proved by oral evidence at the trial that there is a narrow slough or bayou which commences a short distance south of the north line of the east half of the quarter section, and runs southwesterly and forks in the southeast quarter of the section, one fork running easterly through the southeast quarter. Some of the witnesses call it a bayou, and some call it a slough. The evidence does not show the number of acres lying north of the bayou or slough in the northeast quarter.

The description in the Hill deed is, we conclude, void for uncertainty. Nor can it be made certain by application of the descriptive words to any natural objects. The descriptive words can not be construed to mean all the northeast quarter lying north and east of the bayou, for they do not say that. If the words are construed to refer to a bayou running west and south of the quarter section, they do not aid the description any, for they do not refer to land east of the bayou. The words refer to lands in the northeast quarter, lying north of the bayou, but only to the "east part" of the quarter section. There is nothing to indicate the boundaries of the east part. It is the same as if the description read, the east part of the quarter section, without referring to the bayou at all.

The bayou can not be accepted even as the southern boundary, for, according to the testimony, it does not in its easterly course touch the northeast quarter, but runs easterly through the southeast quarter. The descriptive words can not be made to fit any tract of land at all. So the deed is void for uncertainty. *Doe* v. *Porter,* 3 Ark. 18; *Mooney* v. *Cooledge,* 30 Ark. 640; *Freed* v. *Brown,* 41 Ark. 495; *Adams* v. *Edgerton,* 48 Ark. 419.

Resort may be had to extrinsic evidence in order to fit a description of the land conveyed, but the descriptive words in

the deed must furnish the key to the identity. *Dorr* v. *School District,* 40 Ark. 237; *Paragould* v. *Lawson,* 88 Ark. 478; *Fordyce Lumber Co.* v. *Wallace,* 85 Ark. 1. Here the descriptive words furnish no means of identifying the land conveyed, for there is nothing to show what was meant by the words "east part." This being true, the undisputed evidence establishes appellant's title to the lands in controversy, and the judgment should have been in its favor.

Reversed and remanded with directions to enter judgment for appellant for the recovery of the land.

GATLIN v. LAFON.

Opinion delivered May 30, 1910.

1. EXCHANGE OF PROPERTY—WHAT CONSTITUTES.—Where a guardian of minors released his wards' interest in the homestead in consideration of a release by the widow of a tract of land assigned to her as dower for and during the minority of the wards or either of them, the transaction constituted an exchange of land. (Page 262.)
2. GUARDIAN AND WARD—EXCHANGE OF WARD'S LAND.—The probate court has no power to authorize a guardian to exchange the lands of his wards for other lands. (Page 262.)
3. HOMESTEAD—ABANDONMENT BY WIDOW.—By conveying the homestead to another, a widow will be held to have abandoned her rights therein, and the homestead thereupon became vested in the minor children. (Page 263.)
4. SAME—LIABILITY OF MINOR FOR IMPROVEMENTS.—Minors are not liable for permanent and valuable improvements placed by an occupant on their homestead; but, in the absence of a contract, the occupant should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements. (Page 263.)

Appeal from Craighead Chancery Court; *Edward H. Mathes,* Special Chancellor; reversed in part.

Lamb & Carraway, for appellants.

The order of the probate court, if treated as a sale of the homestead of the minors, is valid. 65 Ark. 355. The probate court being of superior jurisdiction, the proceedings therein will be presumed to be regular. 26 Ark. 421; 51 Ark. 338. The allowance made by the court to Gatlin was proper. 33 Ark. 490; 40 Ark. 219; 48 Ark. 297.

Basil Baker, for appellee.

The exchange of the minors' homestead for other land was not a sale. 47 Ark. 460; 37 Ark. 412. It is the homestead interest, and not the fee that is protected. 29 Ark. 633; 37 Ark. 316; 47 Ark. 504; 49 Ark. 75; 53 Ark. 400; 64 Ark. 1. A guardian can not improve his ward out of a homestead. 47 Ark. 445; 55 Ark. 369; 61 Ark. 26. The court will not compensate a guardian who has earned only its disapproval. 23 Ark. 47.

Lamb & Carraway, in reply.

The order of the probate court was nothing more than a lease; and a lease is no more than a contract for the possession and profits of lands. 88 Mo. App. 434; 24 Me. 542; 7 Barb. 74; 5 How. Pr. 58; 59 Pac. 857; 28 Pac. 310; 32 N. E. 574; 101 U. S. 71; 39 U. S. 526.

BATTLE, J. On the 20th day of April, 1907, Maude Lafon filed, in Craighead Chancery Court, Western District, a complaint against A. E. Gatlin and sureties on his bond as guardian of plaintiff during her minority, and alleged substantially as follows: That T. T. Gatlin died on the first day of August, 1896, leaving V. F. Gatlin, his widow, who afterwards married R. H. Altman, and seven children, one of whom was the defendant, A. E. Gatlin, and three others, were Burton Gatlin, Myrtle Gatlin and Maude Lafon, born Gatlin, the plaintiff, who were minors.

"That at the date of his death T. T. Gatlin owned south half of southwest quarter, northwest quarter, and 14 acres on the west side of northeast quarter of southwest quarter of section 17; northeast quarter of northeast quarter of 18; west half of southeast quarter and southeast quarter of northwest quarter, and 8 acres on the north side of northeast quarter of southwest quarter and 32 acres on the north side of southwest quarter of northwest quarter of section 20; southwest quarter of section 21; and south half of southwest quarter of section 28; all in township 15 north, range 5 east—726 acres.

"That on August 28, 1896, the widow, V. F. Gatlin, became administratrix of the estate, and so continued until her marriage with Altman, when she made final settlement in the probate court, which was confirmed January 11, 1897. That A.

E. Gatlin, defendant, then became administrator, and later, July 12, 1898, A. E. Gatlin was appointed guardian of Maude Gatlin (now Lafon), plaintiff, and Myrtle Gatlin, minors; that the other defendants, C. L. Gregson and J. T. Gibson, and Vinson, were securities upon his bond as guardian.

"That, during the administration of the widow, dower and homestead were assigned, final order being made April 14, 1897, setting apart southeast quarter of southwest quarter of section 17, and northeast quarter of northwest quarter of section 20, township 15 north, range 5 east, as the homestead of the widow and minors, Burton, Maude and Myrtle, and northeast quarter of southwest quarter, and southeast quarter of northwest quarter, and northwest quarter of southeast quarter of section 20 were set apart to the widow as dower.

"That thereafter, while defendant Gatlin was acting as guardian, he, without right, 'made a pretended trade with the said V. F. Altman whereby the said A. E. Gatlin attempted to surrender and release unto the said V. F. Altman all the interest of his said wards in and to the land set apart as their homestead, and attempted to take in lieu thereof from the said widow, V. F. Altman, northeast quarter of southwest quarter of section 20, and at the January term of the probate court for the year 1899, the said court on the 9th day of January, 1899, attempted to approve and confirm the said pretended trade.

"That thereafter the widow abandoned the homestead and released the same to the defendant A. E. Gatlin who, while acting as guardian of plaintiff, entered into possession of the homestead, and has since held it without accounting to plaintiff for rents and profits.

"That the pretended trade or release between the widow and defendant A. E. Gatlin was fraudulent for the reason that the homestead consisted of 80 acres, and the land given to the minors under the trade or release was but 40 acres, and that plaintiff Maude Lafon should have been credited by her guardian, A. E. Gatlin, with one-third of the rents and profits of the homestead up to January 13, 1902, the date of the death of Burton Gatlin, and that thereafter she should have been credited with one-half of the rents and profits. That the homestead as originally set off, 80 acres, had a rental value of $3.50 per acre; that none of the minors had resided on it since its

alleged abandonment by the widow. That plaintiff was ready and willing to account for and be charged with rents and profits of northeast quarter of southwest quarter of section 20, and prayed that the settlements of A. E. Gatlin as guardian be restated, and that she have judgment against him for an amount found to be due; and that she have possession of an undivided one-half of the homestead until she arrived at the age of twenty-one years, and for other relief.

"An amendment to the original complaint was filed, the same being similar to the original except that it more specifically alleges the items rendering it erroneous, fraudulent and necessary to restate the account of the guardian, A. E. Gatlin, as shown in the several settlements, and further stating that some land in section 28-15-5 had been sold by the guardian for $150, which had not been accounted for in any settlement made by him; that land of the minor wards was sold to Robinson for $80, and not accounted for in the settlements.

"The answer admits the death of Gatlin, survival of the widow, and heirships alleged in the complaint; that V. F. Altman, widow, was appointed administratrix August 28, 1896; that she afterwards married Altman, filed her final settlement, which was approved January 11, 1897; that the defendant A. E. Gatlin then became administrator; that dower and homestead were assigned as alleged; denied that A. E. Gatlin, without power or authority, entered into the trade or made the release or surrendered any of the rights of his minors as alleged in the complaint; denied that the widow had abandoned her homestead rights; denied that any fraudulent or wrongful conduct on his part occurred, or that his settlements were erroneous or fraudulent; alleged that he became administrator and guardian solely on account of his regard and affection for the children and his interest in the estate; that he had undertaken to faithfully perform all his duties; and that he was equally desirous with the children that, if any mistake had occurred, it should be corrected; that all charges made by him against the minors were but a meagre compensation for the expense, trouble, annoyance and responsibility involved."

(The above is a copy of appellant's synopsis of the pleadings).

A master was appointed by the court to state an account between the parties, with leave to take proof.

The following were a part of the facts proved: T. T. Gatlin died on the first day of August, 1896, leaving heirs and children and widow, and seized and possessed of a homestead and other lands as stated in the pleadings. Three of his children, Burton Gatlin, Maude Lafon and Myrtle Gatlin were minors. Burton died on the 13th day of January, 1902, without issue; Maude was twenty years old in February, 1908, and Myrtle was eighteen years of age on the first day of April, 1908. A. E. Gatlin was appointed and qualified as guardian of Maude and Myrtle, and as such filed annual accounts in the probate court. Dower was assigned to the widow in the estate of her deceased husband.

It was also proved that A. E. Gatlin, as guardian of Maude and Myrtle Gatlin, attempted to exchange his wards' interest in the homestead for the interest of V. F. Altman, the widow of T. T. Gatlin, deceased, in one tract of forty acres of land that had been assigned to her as dower, for and during the minority of the wards or either of them. This was evidenced by an instrument of writing, "by the terms thereof," the record says, "said V. F. Altman, as widow of said T. T. Gatlin, releases to A. E. Gatlin, as such guardian, and his said wards for and during minority of said wards, or the minority of either of them, the northeast quarter of the southwest quarter of section twenty, township fifteen north, range five east, and the said A. E. Gatlin, as such guardian, releases to said V. F. Altman, for and during her natural life, the entire homestead of said T. T. Gatlin as the same has heretofore been assigned and set apart to said V. F. Altman as widow, and the minor heirs of said T. T. Gatlin; and it being further provided in said contract that the said V. F. Altman shall during the period of her life pay all taxes assessed against said homestead, and the said A. E. Gatlin, as such guardian, shall, during the period of minority of said wards or either of them, pay the taxes upon said northeast quarter of the southwest quarter of section twenty in township fifteen north, range five east." This exchange was submitted by the parties to the probate court, and was by it in all things confirmed and approved.

On the 29th day of May, 1900, V. F. Altman, in consideration of the sum of $700, conveyed to A. E. Gatlin all her right of dower and homestead in the entire estate of T. T. Gatlin, deceased. The deed was read as evidence in the hearing of the case.

The master, having heard the evidence adduced by both parties, stated an account between them, and returned it into court. He treated the exchange of the minor's interest in the homestead for an interest in other lands as void. He refused to allow an account for repairs, taxes and insurance filed by Gatlin with his deposition, he having already been allowed in his several annual settlements filed by him as guardian in the probate court a sum aggregating $54.84 for taxes, and $58.57 for repairs, which was allowed by the master in the account stated. He found the rental value of the homestead to be $200 per annum, repairs being made by the tenant, and charged the defendant, A. E. Gatlin, at that rate for the years 1898-9-1900, 1901, 1902, 1903, 1904, 1905, 1906 and 1907, and found that the amount owing to the plaintiff by the defendant A. E. Gatlin to be $1,030. Both parties filed exceptions to his report.

The report of the master and exceptions to the same were presented to the chancery court, and heard upon the pleadings, depositions and exhibits, and the court found:

That V. F. Altman, the widow of T. T. Gatlin, deceased, abandoned the homestead which had been set apart to her and the minor heirs of the deceased, and that such abandonment occurred on the 29th of May, 1900. That the master's finding as to the rental value of the homestead is excessive, and that the same ought to be reduced to $175 per year, and that the report should be restated so as to charge Gatlin at that rate for the years 1900, 1901, 1902, 1903, 1904, 1905 and 1906, and by consent at the same rate for 1907 and 1908. That the master's report should be restated so as to show a credit claimed by Gatlin of $542.64, same being amounts claimed by him for improvements and repairs, taxes and insurance up to date of April 21, 1908, which does not include $56 claimed for hauling manure. And the court found that upon a statement of account, according to its findings, the defendant Gatlin was indebted to plaintiff in the sum of $751.75, and rendered judg-

ment against him in her favor for that amount. Both parties have appealed.

Appellant Gatlin insists that the exchange of his wards' interest in the homestead for an interest in a tract of forty acres of land ought to be sustained; that such exchange on his part was a lease of his wards' interest in the homestead. It does not so appear in the record. He, as guardian, released his wards' interest in the homestead to Mrs. Altman for and during her natural life, in consideration of a release by her of a forty acres of land assigned to her as dower for and during the minority of his wards or either of them. The interest conveyed by the parties was for an indefinite period of time and as a whole, and was not conveyed as a compensation for use and occupation of land, but an interest for an interest, which is an exchange of property. *Meyer* v. *Rousseau,* 47 Ark. 460.

The Constitution of this State ordains: "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life; provided, that if the owner leaves children, one or more, said child or children shall share with said widow, and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's rights to cease at twenty-one years of age—and the shares to go to the younger children; and then all to go to the widow; and provided that said widow or children may reside on the homestead or not. And in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate." Const. 1874, art. 9, § 6. One of the objects of this provision of the Constitution is to "secure to the widow and orphans the family roof-tree as a fixed home during the widowhood or life of the widow and minority of the children." It sets it apart as a home and sanctuary for the widow and minor children in which they can always find the shelter, comfort and security of a home, and, for the purpose of preventing other persons from invading it under a claim of right, guards and protects it against sales and transfers of the land constituting it for the payment of the debts of the deceased owner, and forbids the partition of it between the widow and children. *Garibaldi* v. *Jones,* 48 Ark. 230; *Kessinger* v. *Wilson,*

53 Ark. 402; *Sansom* v. *Harrell,* 51 Ark. 429. It can not be lawfully exchanged for an interest in other lands to serve the same purpose; none other can do so.

In *Merrill* v. *Harris,* 65 Ark. 355, this court held that the interests of the minor in the homestead may be sold under an order of the proper probate court, where it is unavailable to him and his necessities demand the sale of it. Only in such cases did the court in that case justify the exercise of the power to sell.

The exchange made by the guardian and Mrs. Altman was null and void.

Mrs. Altman by the conveyance of the homestead to A. E. Gatlin, on the 29th day of May, 1900, abandoned her rights therein, and the same became vested in the minor children. Her rights in the same were personal, and could not be transferred. *Garibaldi* v. *Jones,* 48 Ark. 230; *Gates* v. *Steele,* 48 Ark. 539.

The right to surcharge and falsify the account of Gatlin, as guardian, is unquestioned. One of the grounds for doing so is the failure of the guardian to charge himself with proper amounts for rent of homestead and other property. The court in restating his accounts charged him in his account with plaintiff for rents of the homestead at the rate of $175 annually. After a careful reading of the evidence we find, according to the preponderance of the same, he should be charged at the rate of $200 annually for the years 1898-1907, both inclusive. The court allowed Gatlin in his accounts as guardian $542.64 for improvements and repairs, taxes and insurance. As to improvements and repairs this court said in *Sparkman* v. *Roberts,* 61 Ark. 27, 32: "Minors are not liable for permanent and valuable improvements placed on their homestead. They can not be improved out of their homesteads; nor can the occupants be lawfully charged an increased rent on account of their improvements. In the absence of a contract, the occupant should be allowed a reasonable compensation for necessary repairs, and charged with such rents for the premises as they would have yielded without the improvements. *McCloy* v. *Arnett,* 47 Ark. 456; *Reynolds* v. *Reynolds,* 55 Ark. 369."

According to the rule stated, cross appellant, Lafon, should be charged for improvements and repairs, and credited with rents.

The decree of the chancery court is reversed as to rental value of homestead and improvements and repairs, and judgment for $751.75, and in other respects is affirmed; and the cause is remanded with directions to the court to restate the account between the parties and render judgment in accordance with this opinion.

PULASKI HEIGHTS SEWERAGE COMPANY v. LOUGHBOROUGH.

Opinion delivered May 30, 1910.

1. SEWERS—PUBLIC INTEREST.—A sewer built not for private use but for any persons who might wish to connect with it upon paying a fee therefor is devoted to a use in which the public has an interest. (Page 266.)
2. SAME—REASONABLE FEE.—In the absence of legislation as to the maximum of charges for the use of sewers, the courts may determine what is a reasonable fee in a particular case. (Page 267.)
3. SAME—HOW REASONABLENESS OF CHARGE DETERMINED.—In determining what is a reasonable price to be charged for services by a public sewer company, the interest of the public should be considered as well as the right of the stockholders in the sewer company. (Page 267.)

Appeal from Pulaski Chancery Court; *John E. Martineau,* Chancellor; affirmed with modification.

R. C. Powers, for appellant.

All previous agreements were merged in the written contract, and evidence of a previous agreement was inadmissible. Anson on Contracts, 213; Lawson on Contracts, § 372; Greenl. on Ev., § 275. Any person who taps a sewer must pay in proportion to the value of his property to be benefited thereby. Kirby's Dig., § 5726. The sewerage company is entitled to a charge which will pay its expenses, repay the investment made by the stockholders and a reasonable profit on the same. 179 Pa. 231; 36 L. R. A. 260; 174 U. S. 179; 72 Fed. 955; 118 Cal. 556; 124 Fed. 599; 212 U. S. 19; 12 East 527; 116 U. S. 307; 148 U. S. 312; 94 U. S. 141; 134 U. S. 418; 154 U. S. 362; 169 U. S. 466; 164 U. S. 578; 174 U. S. 739; 176 U. S. 167; 186 U. S. 275; 206 U. S. 1; 161 Fed. 995; 78 Fed. 261.

The return must not be less than the legal rate of interest. 114 Fed. 561; 123 Fed. 951; 13 N. Y. S. 392; 124 Fed. 598; 7. Ont. App. 226; 169 U. S. 534; 1 L. R. A. 744; 169 U. S. 466. Without a contract with the sewerage company plaintiff had no right to empty his sewerage upon its property, and equity would enjoin him from doing so. 77 Hun 604; 191 Ill. 210; 113 Ga. 963; 142 Ill. 194; 59 App. Div. 30; 70 N. Y. S. 284.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

Since the record does not contain all the evidence before the chancellor, it should be affirmed without going into the merits. 45 Ark. 240; 38 Ark. 477; 58 Ark. 134; 72 Ark. 185; 80 Ark. 583; 83 Ark. 425; 77 Ark. 200; 81 Ark. 528. The charges for connection must be reasonable and not arbitrary. 94 U. S. 113; *Id.* 155; 110 U. S. 347; 115 U. S. 650; 143 U. S. 517. In the absence of legislation on the subject, the courts will fix a reasonable rate or charge. 149 Ill. 374; 143 N. Y. 277; 122 N. C. 207; 47 O. St. 1; 158 Ind. 519; 17 Pac. 490; 56 Ga. 431. The value of service to the public is the limit of the charge. 74 Fed. 87; 174 U. S. 739. Discriminating charges are unreasonable. 196 Ill. 626; 57 O. St. 336; 193 Pa. 175. Appellee was entitled to the injunction. 104 Ala. 315; 87 Me. 287; 64 How. Pr. 33; 165 N. Y. 27.

BATTLE, J. The Pulaski Heights Sewerage Company is a corporation organized under the laws of Arkansas for the purpose of building a sewer in the territory known as Pulaski Heights. Before the sewer was constructed J. F. Loughborough purchased many lots of ground in that territory. After his purchase the sewer was completed. Loughborough built a residence upon a part of his lots, and connected his house with the sewer in usual manner. He did so without compensating the sewerage company for the same. On this account the sewerage company severed his connection, and Loughborough thereupon again united and filed a complaint in the Pulaski Chancery Court against the Pulaski Heights Sewerage Company and Pulaski Heights Land Company, and asked that defendants be restrained from interfering with his connections with the sewer until the town council of Pulaski Heights has given the sewerage company a right to operate the sewer and has fixed

the fees for connection with the same. An order temporarily restraining the defendants from interfering with the sewer connection was made by the court. The defendants answered.

The only question in the case is, what compensation will entitle Loughborough's house to connection with the sewer of Pulaski Heights Sewerage Company? The chancery court, after hearing the evidence, held that plaintiff was entitled to connect his house with the sewer upon payment of $50, and made the temporary restraining order perpetual, and the defendants appealed.

The sewerage company contends that it is a private corporation, and no one has a right to connect with its sewer except upon terms to which it shall agree. Is it correct? In *Munn* v. *Illinois,* 94 U. S. 113, 126, it is said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." "Upon this principle, the Legislature can fix the maximum of charge for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers, bakers, hackmen, ferriers, wharfingers, innkeepers, and the like; 'and in so doing to fix the maximum of charge to be made for services rendered, accommodations furnished and articles sold.' *Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *Dow* v. *Beidelman,* 125 U. S. 680; S. C. 49 Ark. 325; *Mobile* v. *Yuille,* 3 Ala. (N. S.) 140. Upon the same principal it was held in *Spring Valley Waterworks* v. *Schottler,* 110 U. S. 347, 'that it is within the power of the government to regulate the price at which water shall be sold by one who enjoys a virtual monopoly of the sale.'" *Leep* v. *Railway Company,* 58 Ark. 416.

The sewerage company was organized for the purpose of constructing, maintaining and operating sewers, and renting

or selling the right to connect with and use the same. It constructed a sewer about twelve or thirteen hundred yards long, or longer. All persons who wish, upon payment of the fee demanded, are allowed to connect with and use it. About one-third of it is built upon private property. It is not confined to the use of any particular persons, but all who can are invited to connect with and use it upon the payment of a fee agreed upon. All persons hereafter buying real estate sufficiently near to make it useful, upon paying the fee, may make connection and use it. To the public within reach of it, or who may come within reach of it, it is useful and necessary in many ways. The sewerage company has in this way devoted the sewer to a use in which the public has an interest.

In the absence of legislation as to the maximum of charges for the use of sewers courts in cases like this can determine what is reasonable. They can not prescribe rates which shall be charged in the future and in cases other than that before them. That would be a legislative act. *Munn* v. *Illinois,* 94 U. S. 133, 134; *Salt River Valley Canal Co.* v. *Nelssen* (Ariz.), 85 Pac. 117.

In *Salt River Valley Canal Co.* v. *Nelssen,* 85 Pac. 117, in which the court determined the amount a corporation should charge, the court said: "In determining what is a reasonable price to be charged for services by a public corporation, an examination must not only be made from the point of view of the corporation, but from that of the one served also. A reasonable rate is not one ascertained solely from considering the bearing of the facts upon the profits of the corporation. The effect of the rate upon persons to whom services are to be rendered is a deep concern in fixing thereof, as is the effect upon the stockholders or bondholders. A reasonable rate is the one that is as fair as possible to all whose interests are involved."

In *Covington & Lexington Turnpike Road Co.* v. *Sandford,* 164 U. S. 578, 596, the question under consideration was what was a reasonable toll to be charged by a turnpike company? The court said: "It can not be said that a corporation is entitled as of right, and without reference to the interest of the public, to realize a given per cent. on its capital stock. When the question arises whether the Legislature has exceeded its

constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interest are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public. * * * The public can not be properly subjected to unreasonable rates in order simply that the stockholders may earn dividends. * * * If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon the payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable." See also *Smyth* v. *Ames,* 169 U. S. 466. 544; *San Diego Land Co.* v. *National City,* 174 U. S. 739, 757; *Railway Co.* v. *Smith,* 60 Ark. 221.

The evidence in this case fails to furnish a satisfactory standard to determine what compensation for connection of plaintiff's residence with the sewer of Pulaski Heights Sewerage Company would be reasonable and just to all parties. The nearest approach is the average costs of connections with sewers in Little Rock. The sewer in question is in the vicinity of that city. In Little Rock the average cost is about fifty or sixty dollars for a connection, mostly $50. One charge was as high as $83. As the cost of the sewer in question was expensive, more so than the average in Little Rock, we think that $60 should be allowed for a connection with it in this case, the highest average in Little Rock; and it is so ordered.

Decree modified in accordance with this opinion.

FIELD v. MORRIS.

Opinion delivered May 30, 1910.

1. FIXTURES—RIGHT TO REMOVE.—To justify one in removing houses, machinery, etc., from land, it is sufficient to show that he was not a

trespasser in going upon the land and that the house, machinery, etc., in controversy were not annexed to the soil in such manner as to become immovable fixtures. (Page 274.)

2. SAME—REMOVAL OF TRADE FIXTURES.—Where a building and gin machinery were placed on land by a tenant in such manner that they might be put on rollers and removed, and with the intention that they might be removed by him during the term, they will not be considered as permanent fixtures, but as trade fixtures and subject to removal. (Page 274.)

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

STATEMENT BY THE COURT.

In February, 1892, John Darter and his wife (the latter relinquishing dower) conveyed a tract of land in Lawrence County, Arkansas, to W. A. Townsend. The grantors made the following reservation: "Reserving to ourselves the use of one and one-half acres free of rent where the mill and gin stands in southwest corner of said tract, with the privilege of removing buildings and machinery therefrom, * * * and we are to have the use of one and one-half acres free of rent as long as we or others holding under us may want to use same for running machinery at said point."

The grantee, W. A. Townsend and his wife, conveyed the land to H. W. Townsend with the same reservation, and the latter on the 3d day of October, 1901, conveyed three acres of the same land in the southwest corner thereof to B. W. Field, and the deed to Field contained the same reservation as to the use of the one and a half acres. On the 28th of November, 1902, B. W. Field conveyed the three acres to his wife without the reservation. On the 25th of September, 1903, Mrs. Field and B. W. Field conveyed the same land to Carrie E. Stevenson, and she reconveyed it on the 2d day of October, 1903, to Laura C. Field.

On the 28th day of September, 1903, John Darter conveyed to J. W. Morris by deed as follows: "All of my right, title, privilege and interest reserved by me to 1½ acres of land lying in the south half of the southwest quarter of section 29, township 17 north, range 2 west, described more fully in deed made by me to W. A. Townsend, in which I reserve the 1½ acres free of rent as long as I or those holding under me keep

or run machinery thereon. The reserved privilege to be had and held by the said Dr. J. W. Morris as holding under me, to whom I deed, convey and transfer said privilege."

Morris took possession of the one and a half acres, and this suit was instituted by appellant against him for the land and damages. The cause came here on appeal (*Field* v. *Morris*, 88 Ark. 148), and we held that the reservation in the deed of Darter was personal, and died with him. The cause was reversed and remanded for new trial. There was a motion for reconsideration, and in passing on this we said: "The only question decided was: 'Was the right to use the one and a half acres appendant or appurtenant to the land, or was it personal? The case will go back to the circuit court for a new trial. Appellee can present his rights to improvements and to remove the same to that court for consideration and adjustment." On the second hearing the appellant by amended complaint alleged that appellee had without her consent and against her protest erected in 1903 the houses and machinery on the one and a half acres of land, that she was the owner of the land and buildings and machinery thereon, and was entitled to rent during the time appellee had occupied same. She prayed judgment on this account in the sum of $1,500. The appellee in an amended answer set up the following:

"That said buildings and machinery were placed upon said lands while he was in the peaceful possession of the same and holding under said conveyances, which were color of title. That under the law he is entitled to be reimbursed for whatever improvements or machinery he may have placed upon said lands as hereinbefore set out. That at the time of the purchase of said property by the defendant, Berry Field, the husband of this plaintiff, was the owner of said lands, and he represented to this defendant that the title was perfectly good, and that he would not be disturbed in the enjoyment of the same, which was known to this defendant, and by which she is now estopped to claim title.

"Further answering, defendant says that said buildings and machinery are not permanent fixtures upon said land, but the intention at the time of their location was that they should be and remain as personal property and be removed by the de-

fendant. He therefore prays that he be given judgment against the plaintiff in the sum of $5,000, being the value of said improvements, or that he be permitted to remove them, for costs and all proper relief."

This pleading, which is designated by counsel as an amended answer, was really a cross complaint also against appellant for the improvements on the land. Appellant answered this cross complaint, denying that appellee placed certain machinery and buildings on the land under and by virtue of the two conveyances set up by him, and denying that the buildings and machinery were placed on the land while appellee was in possession and holding under color of title. On the issue as thus made the cause was submitted to the jury.

Appellee introduced his deed from Darter set out above and the following instrument: "I, C. Davis, do hereby grant, bargain and sell all my right, title and interest in all my machinery, mill, gin, and all things belonging thereto to J. W. Morris, to have and to hold the same unto the said J. W. Morris, for which I am paid in full.

(Signed) "C. Davis."

Davis testified that he bought the machinery, etc., mentioned in the above instrument from John Darter and the right to enter upon the ground and to erect and use other machinery which he placed on the ground after getting possession; that Berry Field knew, at the time that the machinery was being erected there, that witness sold all to Morris and put him in possession the same as witness had gone into possession under Darter.

One witness testified: That the machinery was not fastened to the house; that the boiler and engine were not enclosed in brick and mortar; that they were covered with dirt; that the engine bed was not permanent; that it was just set on stones that were laid on the ground; that the building could be taken and put on rollers and rolled away.

Berry Field testified that Dr. Morris went into possession of the land in controversy under him and with his consent; that he helped to haul the machinery and other materials and put it on this ground, and at that time he was the owner of the land. "I knew that the buildings were to be erected and

the machinery operated there, and I agreed to it. At the time I hauled the machinery there, at that time I showed Dr. Morris where to put the wire fence for inclosing his gin yard, and he fenced in the premises with my approval. I owned the land up to the time Laura Field and myself made the deed to Carrie Stephenson. I told Dr. Morris there would be no rents as long as I owned the lands or as long as they were in my possession."

J. W. Morris, the appellee, testified: "In the erection of buildings and machinery on the lands in controversy, I was careful to erect them up off the ground, so that if it became necessary they could be put on rollers and taken away. The cotton house and all the other houses were erected in the same way, except the boiler room, which is not a part of the present gin building. It was already there. I covered it and put it in good condition. I assessed the buildings, machinery, there as personal property and paid taxes on it. I bought the machinery that is located on this property at the present time from the Gullett Gin Company, of Meek City, Ill. They reserved the title to the property until it was fully paid for. The houses were not all erected on this land and the machinery placed there before I got the deed from Darter. Will Field never came to me and said anything about not putting up the buildings or placing machinery there until after it was done. I thought I had peaceable possession; for I came and looked over the court records, and Berry Field told me everything was all right. I advised with attorneys, and they said everything was all right. Darter died on the 4th of March, 1904."

The jury returned the following verdict: "We, the jury, find for the defendant for the removal of the machinery and buildings and for the plaintiff in the sum of $210 with six per cent. interest."

Thereupon judgment was rendered August 27, 1909, in favor of Laura C. Field against J. W. Morris for $241.50, "and that the defendant be allowed 30 days in which to remove his house and machinery from the 1½ acres of land belonging to Laura C. Field."

The appellant appealed "from so much of the judgment herein as allows the defendant to move this house and machinery from this land."

Geo. Dent, for appellant.

A bond for title is not color of title. 47 Ark. 528; 18 How. 56; 67 Ark. 188. Carelessness is not to be rewarded by the bestowal of the benefits under the betterment act. 59 Ark. 145. The grantee of a way is limited to use his way for the purposes specified in his grant. Wash. on Easements, § § 183 and 186. A reservation of a way ceases on the destruction of the property. 138 Ind. 200; 46 Am. St. R. 376; 84 Hun 158. There is no right of removal. 29 Wis. 655; 5 Blackf. 556; 36 Am. Dec. 556; 2 Greenl. 542; 52 Wis. 554. A purchaser of land must take notice of his title. 66 Miss. 21; 14 Am. St. R. 538. The property sought to be removed passed to the purchaser of the land. 65 Ark. 26.

H. L. Ponder, for appellee.

A person making improvements will be presumed to have acted in good faith. 61 Am. Dec. 73; 1 Sawy. 15. Notice of an adverse claim does not necessarily negative good faith. 43 S. W. 1094. A will, though defective on its face, is color of title. 70 Ark. 483. If a person improves land, believing that he is the owner, he is entitled to pay for the improvements. 51 Ark. 275; 86 Ark. 401. A deed from one without title is color of title. 15 Ga. 336; 53 N. Y. 287; 66 Ala. 332; 58 Ga. 427; 7 Hill 476. The deed need not be recorded to be color of title. 21 How. 493. Neither need it be acknowledged. 7 So. 841; 47 N. W. 59; 54 Mo. 105; 84 Mo. 352. A defective or void deed constitutes color of title. 10 Fed. 531; 47 Fed. 614; 48 Am. Dec. 226; 58 *Id.* 549; 3 Me. 316; 10 S. E. 991; 5 Vt. 209; 70 Am. Dec. 473; 77 Am. Dec. 586. As to what will constitute color of title, see 148 U. S. 301; 24 Ala. 347; 59 U. S. 50; 18 Am. Dec. 463; 66 Ga. 169; 33 Ga. 239; 47 Ark. 528; 5 Fed. 899; 47 Fed. 614; 6 N. W. 403. The property was trade fixtures. 29 Am. R. 560; 55 *Id.* 817; 85 Am. Dec. 745; 36 *Id.* 556; 55 Fed. 229. The purchaser of the land acquired no title to the machinery. 72 Ark. 500. The rigor of the ancient law with regard to fixtures must yield to the contingencies of modern times. 12 Abb. Pr. 393. A tenant at sufferance has the right of removal. 26 Am. R. 697.

WOOD, J., (after stating the facts). The only question presented by this appeal is whether or not appellee had the right to remove the house and machinery from the land.

The reservation in Darter's deed gave him and tenants under him the right to hold as long as Darter lived. When Darter died, the right to hold the land by any one claiming under him was extinguished. Such was the effect of the holding of this court on the former appeal, where we said: "The deed says, 'as long as we or others holding under us may want to use same for running machinery at said point.' The last quotation from the deed shows only how long Darter and wife were to have the use of the land free of rent. 'Others holding under us' refers to persons holding like tenants." Appellee under his deed from Darter might enter and hold as long as a tenant of Darter could hold. A tenant of Darter could hold, if such were the contract, as long as Darter lived. It follows therefore that appellee, in entering upon the land and holding it and the houses and machinery in controversy under his contract with Davis and his deed from Darter, was not a trespasser. The contract with Davis gave appellee title to the machinery, etc., mentioned therein, provided these were not attached to the land in such manner as to become realty. The deed from Darter to appellee gave him color of title to the land and the right to possess and use same for the purposes therein mentioned so long as Darter lived.

To justify appellee in removing the house, gin, machinery, etc., from the land it was not necessary for him to show a technical color of title to the freehold. That would only be essential where appellee was seeking pay from the owner of the freehold for the improvements. It is sufficient to sustain the judgment appealed from if appellee has shown that he was not a trespasser in going upon the land, and that the house, gin, machinery, etc., in controversy were not annexed to the soil in such manner as to become immovable fixtures. The testimony of Berry Field, aside from the deed from Darter and the contract with Davis, shows that appellee was not a trespasser in going upon the land and in placing the machinery, etc., thereon. It is clear from the uncontradicted evidence in the record that appellee made the improvements and put the

machinery, etc., on the land in good faith. The only other question then is, were these improvements, machinery, etc., fixtures? While there is no precise definition of a "trade fixture," the articles in controversy, under the undisputed evidence, fall clearly within the designation of a "trade fixture," as that term is used by the authorities in describing property that has been annexed to the freehold for the purpose of carrying on a trade. Trade fixtures "are articles erected or annexed to the realty by the tenant for the purpose of carrying on a trade, and are removable by him during his term, provided the removal does not affect the essential characteristics of the article removed or reduce it to mass of crude materials." 13 Am. & Eng. Enc. L. (2 ed), p. 642, and cases cited in note; *Van Ness* v. *Pacard,* 2 Pet. 137. "Besides being removable on the grounds of public policy, trade fixtures are also removable because, from the nature of the tenure, they are not presumed to have been annexed with the intention of making them permanent additions to the realty." 19 Cyc. 1065b.

Now, here was property devoted to the business of ginning and milling. Such parts of it as were annexed to the soil were so constructed that they could, "if it became necessary, be put on rollers and taken away." It was all assessed as personal property, and the evidence shows that it was not the intention of the party who placed it there, nor of the owner of the soil on which it was placed, to have it annexed permanently to the freehold. The intention of the party erecting the structure and placing the machinery in cases of this kind will generally control. *Markle* v. *Stackhouse,* 65 Ark. 23; *Bemis* v. *First National Bank,* 63 Ark. 628, and cases there cited.

It follows from what we have said that there could not have been any prejudicial error in the rulings of the court in the giving of instructions. The judgment was right upon the undisputed evidence, and it is therefore affirmed.

NORTH ARKANSAS TELEPHONE COMPANY *v.* STEINER.

Opinion delivered May 30, 1910.

1. MASTER AND SERVANT—DUTY TO WARN INEXPERIENCED SERVANT.—Where a plaintiff, a young and inexperienced lineman, was employed to re-

move the lines from a telephone pole, and was injured by the pole breaking at the ground, it was not error to charge the jury that if plaintiff, by reason of his youth and inexperience, did not know the danger of the situation, and defendant knew or should have known of his inexperience, it was defendant's duty to warn him of his danger. (Page 277.)

2. DAMAGES—EXCESSIVENESS.—Where plaintiff's right shoulder was dislocated, his left ankle badly torn, both bones of his right leg broken below the knee, where he suffered pain for two years, and where a physician testified that there was a diseased condition of his right limb which might cause lameness, a verdict for $3,850 damages was not excessive. (Page 278.)

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

McDaniel & Dinsmore, for appellant.

Appellee assumed the dangers incident to climbing the telephone poles when he entered the service. 70 Am. St. 244; 61 *Id.* 62; 72 Fed. 250.

Walker & Walker, for appellee.

If all the instructions can be read together as a harmonious whole, they should be so treated. 74 Ark. 377; *Id.* 458; 83 Ark. 61; 87 Ark. 396; 88 Ark. 433. Appellee being an inexperienced youth, it was the duty of appellant to instruct him concerning the dangers of his employment. 53 Ark. 117; 73 Ark. 49; 71 Ark. 55; 81 Ark. 247; 90 Ark. 407. The doctrine of assumed risks does not apply to employees of mature years. 56 Ark. 216; 71 Ark. 55; 84 Ark. 74.

HART, J. This is an appeal by the North Arkansas Telephone Company from a judgment recovered against it by A. F. Steiner, suing by M. A. Williams as his next friend, for damages for injuries suffered by him on account of the alleged negligence of the company in failing to warn and instruct him as to the dangers incident to his employment.

The injury was received on the 3d day of December, 1907, and Steiner was at that time 17 years old. He was in the service of the company as a lineman, and had worked in that capacity for about two weeks. He had, however, previously worked for the company for several months as night operator. He was engaged in removing the wires from old pole to a new one when he was injured. The pole was an old one, but it was not being moved because it was old, but because the

city wanted to build a sidewalk where it was placed. The pole appeared to be sound. Steiner climbed the old pole by means of climbing spurs, and, after reaching the top, fastened his body to the pole by means of a safety strap in order that he might have free use of his hands. The pole which he climbed was not guyed or braced in any manner except by the service wires strung on it. When he cut these wires loose for the purpose of transferring them to the new pole, the old pole broke where it entered the earth, and Steiner fell to the ground with it. He jerked his feet loose, but his body being fastened to the pole by his safety belt, he could not detach himself from it, and fell face downward with the pole. As the result of the fall his right shoulder was dislocated, his left ankle badly torn up, and both bones of his right leg just below the knee were broken. He adduced testimony tending to show that his right leg had not recovered, and that he might become permanently lame. He stated that he still suffered pain from it when he walked a great deal. The trial occurred about two years after the accident happened. Steiner also testified that the pole was rotten where it entered the earth; that he had had no previous experience as a lineman except his two weeks' service with the company, and that he had not been warned or instructed as to the dangers incident thereto.

The only assignment of error insisted upon by counsel for appellant is the action of the court in giving the following instruction:

"If defendant, by its authorized agent, ordered plaintiff into a place of danger to aid in disconnecting wires from a pole, and plaintiff by reason of youth and inexperience did not know of and appreciate the danger of the situation, and defendant knew this, or ought, in the exercise of ordinary care on its part, to have known it, then it was defendant's duty to warn him of his danger, so that, as far as might be by proper care on his part, plaintiff could perform his duty in safety to himself; if the defendant failed in this respect, and plaintiff, while exercising due care for his own safety, by such failure suffered the injuries sued for, then plaintiff should recover in this action."

The instruction in all essential respects is similar to one approved by this court in the *St. Louis Stave & Lumber Com-*

pany v. *Sawyer*, 90 Ark. 473; and the principles of law embodied in it are discussed and approved in the case of the *Arkansas Midland Ry. Co.* v. *Worden*, 90 Ark. 406, in which our previous decisions on the subject are cited. Hence it may be said that the only question presented for our consideration is, was there sufficient testimony upon which to base the instruction? We must answer that question in the affirmative. The evidence shows that the pole was rotten at the point where it emerged from the earth. That experienced linemen always test old poles with a crowbar or other instrument at this point before climbing them. If found unsafe, the pole is braced in some way before the lineman climbs it; for the pole is in some measure braced by the service wires attached to it, and when these are removed there is no support whatever to the pole. If it has become decayed where it comes out of the ground, the swaying motion of the lineman while engaged in his work has a tendency to cause the pole to break at this point and fall when the support of the service wires is taken away. Of these dangers Steiner says the company gave him no instructions or warning whatever, and of them he had no knowledge himself. It is true that he was well developed physically, as contended by counsel for appellant, and, so far as the record discloses, was possessed of average intelligence for a boy of his age. But he testified that, while he had worked for several months in the office as an operator, he had no experience in the work of a lineman. And on cross examination he said that, while he would naturally suppose that the work was dangerous to some extent, he did not know the dangers of rotten poles. His testimony, when considered as a whole, warranted the court in giving the instruction to the jury.

The jury returned a verdict for $3,850, and it is insisted that this was excessive. We do not think so. One of the physicians who attended Steiner testified that his injuries were extremely painful, and healed very slowly. He stated that he examined the break in the right leg three or four days before the trial, and that there was a surplus fluid in the joint that did not belong there. That a diseased condition of the limb caused the fluid. That, while he believed the fluid would disappear in time and restore the knee to its normal condition,

he could not state it as a positive fact. That it might continue to increase and cause lameness.

The judgment will be affirmed.

DEISCH v. WOOTEN-AGEE COMPANY.

Opinion delivered May 30, 1910.

1. PAYMENT—MISTAKE OF FACT—RECOVERY.—A payment made under a mistake of fact may be recovered unless the payee has changed his position to his prejudice and cannot be put *in statu quo* by the payer. (Page 280.)
2. SAME—WHEN RECOVERABLE.—Where a purchaser of a tenant's crop by mistake drew a check to his landlord for more than was due, the fact that the landlord had given the tenant credit for such excess before he was informed of the mistake did not change the landlord's position to his prejudice, nor deprive the purchaser of the right to recover such overpayment. (Page 280.)

Appeal from Phillips Circuit Court; *Hance N. Hutton*, Judge; affirmed.

Fink & Dinning, for appellant.

The statute giving a landlord a lien on the crop of his tenant is in derogation of the common law, and is strictly construed. 163 Ill. 646; 52 Ala. 223; 69 Ala. 590; 113 Ala. 592. The lien is not enforceable for supplies against an innocent of the crops from his tenant. 67 Ark. 362; 31 Ark. 131; 44 Ark. 111; 36 Ark. 572; *Id.* 575. Not after six months. 67 Ark. 455. The landlord can not sue a trespasser for damage to the crop of his tenant. 63 Ark. 536. The property is in the tenant. 24 Ark. 545; 6 Yerg. 252; 29 Ark. 577; 38 Ark. 246; 60 Ark. 361.

John I. Moore and *J. M. Vineyard*, for appellee.

Appellant should, as soon as he found he had made the mistake, have charged the amount back to Young's account. 49 Ark. 425.

HART, J. This case was commenced in a justice of the peace court, and is here on appeal from the circuit court, where the case was tried *de novo* on appeal from the justice's court. The facts are as follows:

Peter Mengoz died testate in April, 1908, owning certain lands in Phillips County, Arkansas, and the appellant, Peter Deisch, qualified as executor under the terms of his will. Steve Young was one of the tenants on the place at the date of the death of Mengoz, and continued to work and gather his crop, the probate court having made an order authorizing and directing said executor to furnish the tenants with necessary supplies, which was done by him. In October, 1908, with the consent of the executor, Young sold to the appellee, Wooten-Agee Company, nine bales of cotton which he had grown on said lands, and it paid for the same by a check drawn in favor of said Peter Deisch. Through an error in computing the amount due for the cotton, the check was made for $9.30 too much, which sum appellee seeks in this action to recover from appellant. Appellee, when it bought the cotton, was advised and believed that Young was a tenant of said Peter Deisch. When discovering its mistake, appellee wrote to Peter Deisch informing him of that fact and demanding a return of the amount overpaid. Deisch recognized the fact that he had been overpaid, but refused to return the amount, $9.30, on the ground that he had credited the account of Young with it before he was informed of the mistake having been made.

Under this state of facts the circuit court directed a verdict in favor of appellee for the sum of $9.30, the amount so overpaid. The action of the court was right.

The undisputed evidence shows the sum of $9.30 more than was due was paid through a mistake of fact. Appellee was advised by Young that he was a tenant of appellant, and was selling the cotton with his permission; and for that reason the check was made payable to appellant. Repayment of the excess was demanded before there was any change of position to his prejudice on the part of appellant. The mere fact that he had credited Young's account with it did not change his position to his prejudice; for that was a mistake which, like any other mistake in the account, could have been corrected. It is only where "the payee has changed his position to his prejudice because thereof and can not be put *in statu quo* by the payer," that money paid under a mistake of fact can not be recovered. 30 Cyc. 1321.

The judgment will be affirmed.

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

Opinion delivered May 30, 1910.

1. CARRIERS—OVERCHARGE FOR TRANSPORTATION OF PASSENGERS—PARTY AGGRIEVED.—One for whom a railroad fare is paid by another is the "party aggrieved" within Kirby's Digest, § 6620, imposing a penalty upon a railroad company for charging a greater compensation for the transportation of passengers than is allowed by law. (Page 283.)
2. SAME—OVERCHARGE.—Where a passenger upon a railway train tendered a full fare ticket to her destination and a greater amount was wrongfully demanded and received by the train auditor, the company will be held to have charged an excessive compensation. (Page 283.)

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

W. E. Hemingway, E. B. Kinsworthy and *James H. Stevenson,* for appellant.

As between the passenger and conductor, the ticket produced must govern. Hutch. on Car., § 1061; 65 Ark. 177; 88 Ark. 282. If a passenger loses his ticket he may be required to pay again, and the auditor is not required to take excuses, nor decide upon the *bona fides* of the passenger. Hutch. on Car., § 1036. Even if there were an overcharge, the plaintiff was not the party aggrieved within the meaning of Kirby's Dig., § 6620.

J. O. A. Bush, for appellee.

The company made an overcharge, within the meaning of Kirby's Dig., § § 6611-14.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment recovered against it by Mattie Frisby for an alleged overcharge of passenger fare.

The plaintiff was an orphan girl, 18 years old, and lived with T. J. Hawkins near Prescott, Arkansas. Mr. Hawkins bought two tickets from Prescott to Hope, Arkansas, for the use of the plaintiff and his daughter, Gladys, who at the time was not quite 12 years of age. He purchased a round trip ticket for an adult for the use of the plaintiff and a half-fare single ticket for his daughter. The girls boarded one of defendant's passenger trains at Prescott *en route* to Hope, and

occupied the same seat, the plaintiff being next to the window of the car. By mistake, each had the ticket intended for the other. The train auditor first took up the ticket handed him by Gladys, and gave back to her that part of it intended for the return trip. The plaintiff then handed him the ticket she had, and, after he had punched it, asked him if he was not going to give back to her the return part of it. The auditor then looked at her and asked her how old she was, and she replied 18 years. The auditor then told her that she could not ride on a half-fare ticket. Plaintiff then noticed the mistake in handling the tickets and explained to the auditor that she and Gladys had gotten their tickets changed by mistake. That she had given him Gladys's ticket and that Gladys had handed him plaintiff's ticket. The auditor did not accept the explanation, and demanded of her an additional sum to make up the difference between a half and a whole-fare ticket. The plaintiff told him she had no money, but Gladys paid him the additional fare demanded.

This is substantially the version of the transaction as narrated by the plaintiff and her witnesses.

The train auditor testified that they did not tell him that the half-fare ticket was for the little girl. He said he asked them if they had not got their tickets mixed, and that they said they had not. He does admit, however, that he demanded of plaintiff and received the sum of 23 cents, which was the difference in price between a half and a whole fare ticket.

The action was brought under section 6620 of Kirby's Digest, which is as follows:

"Any of the persons or corporations mentioned in sections 6611, 6612, 6613 and 6614 that shall charge, demand, take or receive from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed shall forfeit and pay for every such offense any sum not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee, to be taxed by the court, where the same is heard on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction."

It is first insisted by counsel for defendant that the plaintiff can not maintain the action because she did not herself purchase the ticket and was not the "party aggrieved" within the meaning of the statute; but this question has been decided adversely to their contention in the recent case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Freeman, ante* p. 218.

It is next contended by counsel for appellant that the facts as stated in other respects do not constitute an overcharge for fare. They say: "It is not contended that the ticket seller overcharged plaintiff; and the action of the auditor alone must be looked to to determine whether any was made."

The statute is directed against the railway company and its object is "to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as will effectually stop the practice." Fetter on Carriers of Passengers, § 263; *St. Louis, I. M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42.

The language of the statute is "shall charge, demand, take or receive from any person or persons any greater compensation," etc.; and is referable to the company itself, and not to its agents. Of course, a corporation can only act through agents; but where it is in direct and explicit terms forbidden to do a thing, the acts of all its agents, who contributed to the thing done, must be considered the acts of the corporation itself. The thing forbidden by the statute under consideration is charging or receiving fare in excess of the maximum rate provided by law. The tickets in question seem to have been of the kind, merely naming the places between which they were good for passage, and, as such, were in the nature of receipts for the passage money. 1 Fetter on Carriers of Passengers, § 275; Moore on Carriers, p. 806.

The undisputed evidence shows that the tickets were exchanged by mistake. The plaintiff's evidence shows that the mistake was explained to the train auditor, and that she was entitled to have the mistake corrected. When that is done, we have the case of a passenger presenting to the auditor a receipt for passage money of the amount the company was allowed by law to charge. The auditor refused it, and de-

manded and received an additional sum in excess of the amount so tendered. The ticket seller and the auditor were each entitled to receive money for passage, and their acts must be deemed to be those of a single agent; and, when so treated, it is evident that a greater fare than that allowed by law was demanded and received by the railroad company.

The disputed questions of fact were submitted to the jury under proper instructions of the court, and the judgment will be affirmed.

DARDANELLE PONTOON BRIDGE & TURNPIKE COMPANY v. CROOM.

Opinion delivered May 30, 1910.

1. BRIDGES—CARE IN CONSTRUCTION AND MAINTENANCE.—A toll bridge should be reasonably safe for the purpose for which it was erected and is used; and where a guard rail is reasonably necessary for the safety of travelers and their property in crossing the bridge, then the owner would be liable for an injury caused by a failure to construct and maintain such rail. (Page 287.)
2. SAME—SUFFICIENCY OF GUARD RAIL.—A guard rail on a toll bridge should be constructed and maintained in such a reasonably strong and substantial manner as to withstand the ordinary weights and forces that may be expected to be pressed against it. (Page 288.)
3. INSTRUCTIONS—REPETITION.—The refusal to give a correct instruction in a case was not error where other instructions given by the court in effect covered the requested instruction. (Page 290.)
4. EVIDENCE—OPINION OF WITNESS.—The opinion of a witness that the guard rail of a toll bridge was constructed in an improper manner was properly admitted where the witness was shown to possess experience and knowledge relative to such matters to qualify him as an expert. (Page 290.)
5. TRIAL—ARGUMENT.—Where the testimony of a witness for appellant was in conflict with other testimony or with established facts in the case, it was not error to permit appellee's counsel to refer to the interest which such witness had in the result of the trial. (Page 290.)

Appeal from Yell Circuit Court, Dardanelle District; *Hugh Basham,* Judge; affirmed.

H. M. Jacoway and *Sellers & Sellers,* for appellant.

There is no way of keeping counsel within bounds but by setting aside verdicts. 62 Ark. 126; 22 Ia. 253; 58 Ia. 473;

61 Ark. 130; 71 Ark. 415; 74 Ark. 256; 70 Ark. 306. Counsel has no right to assail an unimpeached witness. 77 Ark. 238; 65 Ark. 625; 75 Ark. 577; 72 Ark. 468; 63 Ark. 174; 74 Ark. 210; 72 Ark. 139; 76 Ark. 276; 65 Ark. 389; 70 Ark. 179; 76 Ark. 370; 89 Ark. 58; 87 Ark. 461; *Id.* 515; 81 Ark. 25; *Id.* 231; 80 Ark. 23. There are extraordinary incidents, out of the usual course of travel, for which no provision is required to be made. 61 Ark. 149; 77 N. Y. 83; 125 Pa. 24; 81 Pa. 44; 145 Pa. 220; 109 N. Y. 134; Whart. on Neg., § § 103, 104; 68 Md. 389.

Bullock & Davis, for appellee.

Witness was qualified from years of experience to testify as an expert. 57 Ark. 572; 23 Ark. 200. A resident on a stream may state that a dam has been raised too high to be safe. 17 Conn. 249. The instructions were correct, 61 Ark. 141; 138 Ill. 465.

FRAUENTHAL, J. This was an action to recover the value of a team of mules and a wagon which fell from defendant's bridge, and were lost. It was alleged in the complaint that the loss was due to the defendant's negligence in failing "to have a safe and sufficient guard rail properly braced and strong enough to insure safe passage over said bridge, and to prevent frightened teams from breaking through into said river." The defendant owned and operated a bridge across the Arkansas River near the town of Dardanelle, and charged and collected fare for the crossing of persons and property over it. The plaintiff had driven his mules and loaded wagon upon the bridge, and was crossing over same when the mules, either from fright or other cause, backed the wagon against the railing of the bridge, which broke and gave way, and the mules and wagon were precipitated into the river; the mules were drowned and the wagon lost.

The testimony on the part of the plaintiff tended to prove that the bridge was built of boats, and was what is known as a "pontoon" bridge. Along its sides the defendant had built a railing or barrier. This railing was composed of upright posts upon which was fastened a plank or streamer. The posts were made of pine, and were fastened to the bottom of the boats with bolts. The testimony on behalf of the plaintiff

tended to prove that the posts were not built of strong wood, that the timbers in the railing were light and frail, and that the posts and railing were not braced. That because the posts were not braced the railing was not substantial and not strong enough to withstand the weight of a wagon that might ordinarily be expected to be pressed against it. And the testimony tended further to prove that if the railing had been built of heavier and sounder timber, and the posts properly braced, it would have withstood such pressure. And we are of opinion that there was some evidence adduced in the case which was sufficient to warrant the jury in finding that the railings were not constructed and maintained in such a proper and substantial manner as was necessary to secure the safety of teams that ordinarily crossed the bridge, and which might press against the railings with such force that might be, in the exercise of due care and caution, expected and foreseen; that the loss was due to the insecure and unsubstantial manner in which the railing was constructed and maintained; and that the plaintiff was at the time in the exercise of due care.

At the request of the plaintiff the court gave the following instruction:

"1. If you find that the defendant owned and operated a bridge across the Arkansas River, for the transportation of freight and passengers for toll, it was bound to use reasonable skill and diligence in providing against the ordinary dangers of travel, and to provide and maintain a reasonably safe bridge; and if guard rails and banisters be reasonably necessary for that purpose and practicable, it was bound to construct and maintain them in the places needed and of sufficient strength to be reasonably safe; and if you find that the defendant failed to so construct and maintain or keep in repair the said bridge by reason of which the injury complained of occurred you will find for the plaintiff."

At the request of the defendant the court gave among other instructions the following:

"3. Defendant is not an insurer of the safety of property carried over its bridge; nor is it required to keep guard rails of such strength that they will not give way or break under any circumstances, or resist extraordinary pressure. It is only

required to use ordinary care to keep its guard rails in a reasonably safe condition, which means a condition of safety under ordinary circumstances."

"5. Before you would be justified in finding for the plaintiff, you would have to find from the evidence that at the time of the accident the bridge, by reason of the defective guard rail, was insufficient to furnish protection to teams under such conditions and circumstances as were likely to occur on said bridge; and you would have to find further that such defective condition existed and was caused by defendant's failure to use ordinary care."

"6. Before you would be justified in finding for the plaintiff, on account of the defective guard rail as alleged in the complaint, the proof would have to show that, in order to furnish protection to wagons and teams crossing said bridge under the usual and ordinary circumstances, it was necessary to have guard rails of greater strength and sufficiency than the ones shown to have given away; and further that the failure to have rails of greater strength was caused by the negligent failure of defendant to use ordinary care."

The jury returned a verdict in favor of the plaintiff, and the defendant has appealed to this court.

It is contended by counsel for defendant that the evidence adduced in the trial of this case was not sufficient to impose a liability upon it, and was not sufficient to sustain the verdict of the jury. The determination of that question depends upon the duty which the defendant owed to the plaintiff as one of the traveling public over its bridge and the manner in which defendant has performed that duty. The defendant was the proprietor of a bridge, and made a charge against the public for crossing same. It thereby became its duty to exercise reasonable and ordinary care and prudence in the construction and maintenance of its bridge for the safety and protection of those using it and to make reasonable provisions to prevent injuries from causes which are likely to arise in the ordinary use of the bridge.

A toll bridge should be so constructed that it shall be safe for travel, and the degree of the strength of the structure must be determined by the use which is fairly to be ex-

pected to be made of it. It should be constructed in a manner strong enough to sustain those weights and to protect from injury that character of property which may fairly be expected to cross over it. While not an insurer of the person or property of its customer, the proprietor of a toll bridge is bound to exercise care to see that it is reasonably safe and secure for the purpose for which it was erected and is used. The liability of the proprietor of the bridge is founded upon negligence; and his negligence arises from the failure to exercise the necessary care in seeing that the bridge is safely constructed and maintained. If guard rails are reasonably necessary for the safety of travelers and their property in crossing the bridge, then the owner would be liable for an injury which was caused by a failure to construct and maintain such railing or barrier. In 2 Dillon on Municipal Corporations, § 1005, it is said: "Where a rail or barrier is reasonably necessary for the security of travelers on the road which from its nature would otherwise be unsafe and the erection would have prevented the injury, it is actionable negligence not to construct and maintain such guard or barrier." *Little Rock Traction & Elec. Co.* v. *Dunlap,* 68 Ark. 291; 5 Cyc. 1101; *Eads* v. *Marshall,* 29 S. W. 170.

The guard rail should be effective for the purpose for which it is erected, and should therefore be constructed and maintained in such a reasonably strong and substantial manner as to withstand the ordinary weights and forces that may be likely expected to be pressed against it. This is necessary in order to put the railing in a safe condition for the travel in the ordinary manner over such bridge. Whether or not the railing is in such condition is a question to be determined by the jury under the peculiar circumstances of each case. 2 Dillon on Municipal Corporations, § 1019; Wharton on Negligence (2 ed.), § 103.

In the case of *Walrod* v. *Webster Co.,* 47 L. R. A. 480, it appears that the horses became frightened and pressed up against the rail of the bridge, which gave way and the horses fell from the bridge. In that case it was held that there was a liability to the owner of the horses in event the accident would not have happened if the railing had been reasonably substantial; and that this was a question for the jury to determine.

In 4 Am. & Eng. Enc. Law, 942, it is said: "It is the duty of a bridge proprietor to provide and keep in repair proper railings, so far as they are necessary to secure the safety of travelers, and a failure of this duty affords ground of action to one sustaining injury in consequence." See also *St. Louis, I. M. & S. Ry. Co.* v. *Aven,* 61 Ark. 149; *Tift* v. *Towns,* 53 Ga. 47; *Rosedale* v. *Golding,* 55 Kan. 167; *Townsend* v. *Susquehannah Turnpike Road,* 6 Johns. 90; *Palmer* v. *Andover,* 2 Cush. 600; *Gage* v. *Railroad Co.,* 105 Mich. 335.

In the case at bar we think that the jury were warranted in finding that railings upon the bridge were reasonably necessary for the safety of travelers and their property, and there was some evidence tending to prove that the railings that were provided were not reasonably substantial enough and suitable for the safety of the persons and their property that ordinarily might be expected to cross the bridge and to sustain the weights that ordinarily might be expected to press against them. We are of opinion, therefore, that there was sufficient evidence to sustain the verdict of the jury, and that the court did not err in giving the instruction number 1 at the request of the plaintiff.

The defendant requested the court to instruct the jury in effect that if the guard rail was not of sufficient strength to meet ordinary requirements at the time of the accident, but that such weakness arose after the rail was placed on the bridge, then before the plaintiff could recover it was necessary to prove that defendant knew of the defect or could have known by the use of ordinary care. The court refused to give the instruction; and in this ruling we do not think that the court committed a prejudicial error. By instruction number 2 given at the request of the defendant the court instructed the jury that, before the plaintiff could recover, he must prove that the defendant had been negligent in the manner alleged in the complaint, and that the act of negligence therein set out caused the injury. The act of negligence set out in the complaint was that the defendant "failed to have a safe and sufficient guard rail properly braced and strong enough to insure safe passage over said bridge;" that is to say, that the rail was not constructed of strong enough timbers and was not properly braced.

This was the act of negligence that the plaintiff was required to prove before he could recover. The act of negligence therefore consisted in a failure to properly construct the guard rail in the beginning; and the liability of the defendant was not made dependent upon the weakness of the rail which was caused by some act or agency that occurred after its construction. The instruction requested was therefore without the issue presented by the complaint and pleadings and was abstract. The other instructions given by the court confined the right of the plaintiff to recover to his establishing by proof the act of negligence set forth in the complaint; and in effect covered this instruction requested by defendant. *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 89 Ark. 327.

It is urged that the court erred in permitting the witness Edgar Shinn to testify that the guard rail was constructed in an improper manner, and that it was not substantial and safe. This contention is made upon the ground that this was but the opinion of the witness. But we think that this witness possessed an experience and knowledge relative to the subject-matter to qualify him as a skilled witness. The conclusion and judgment of the witness related to a subject-matter not universally understood. 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. His testimony was therefore admissible. "A witness' opinion is admissible as evidence, not only where scientific knowledge is required to comprehend the matter testified about, but also where experience and observation in the special calling of the witness give him knowledge of the subject in question beyond that of persons of common intelligence." *Railway Company* v. *Shoecraft,* 56 Ark. 465; *T. & C. Ins. Co.* v. *Fouke,* 94 Ark. 358; Lawson on Expert Ev., 73; 17 Cyc. 36; *Moore* v. *Kenockee,* 4 L. R. A. 555; *Porter* v. *Pequonnac Mfg. Co.,* 17 Conn. 249.

Complaint is also made of certain remarks of counsel for the plaintiff in his argument to the jury. Some of these remarks were mere expressions of opinion, and some were instigated by and in retort to remarks made by opposing counsel. In some of the remarks criticism was made of an opposing witness. The counsel said that the career of this witness was

wrapped up in this bridge, and he had to sustain it by his testimony. We think that counsel have the right to refer to the interest which opposing witnesses have in the result of the trial, and to comment upon such interest if the testimony of such witnesses is in conflict with other testimony or established facts in the case. We have carefully examined all the remarks complained of, and we are of the opinion that, while some of them were improper, none of them was of such a prejudicial nature as to call for a reversal. *Kansas City So. Ry. Co.* v. *Murphy,* 74 Ark. 256; *Reese* v. *State,* 76 Ark. 39; *Byrd* v. *State,* 76 Ark. 276; *Choctaw, O. & G. Rd. Co.* v. *Doughty,* 77 Ark. 1; *St. Louis, I. M. & S. Ry. Co.* v. *Raines,* 90 Ark. 398.

We have examined into the other errors which counsel for defendant urge were committed in the trial of this case. We do not deem it useful to set them out. We do not think that any of these alleged errors was so prejudicial as to deprive the defendant of a fair and impartial trial upon the issues involved in the case.

The judgment is affirmed.

A. L. CLARK LUMBER COMPANY *v.* NORTHCUTT.

Opinion delivered May 30, 1910.

1. CONTINUANCE—TIME FOR PREPARATION.—As Kirby's Digest, § 6190, prescribes that a case shall stand for trial at the term following 10 days' service of summons upon defendant, that period is presumed to be sufficient time in which to prepare for trial. (Page 293.)
2. SAME—DISCRETION OF COURT.—Refusal of a continuance asked on account of the absence of a witness will not be ground for new trial where it does not appear that the absent witness knew any facts not known to the witnesses who testified in the case. (Page 294.)
3. MASTER AND SERVANT—ASSUMED RISK—MASTER'S NEGLIGENCE.—While, in entering the service of another, a servant assumes all the ordinary risks and hazards incident to the employment, he does not assume the risk of dangers that arise from the master's negligence unless he is aware of that negligence and appreciates the danger therefrom. (Page 294.)
4. SAME—RIGHT OF SERVANT TO RELY UPON MASTER'S CARE.—In the absence of knowledge on his part, a servant has a right to rely upon the assumption that the master has performed the duties devolving upon him so as not to expose him to extraordinary hazards. (Page 295.)

5. SAME—DUTY OF SERVANT TO OBEY.—When a servant is directed by the master or a vice principal to do certain work or to perform service in a certain place, he is justified in obeying such order and does not assume the risk incident thereto unless he realizes the danger to which he is thereby exposed. (Page 295.)

6. SAME—OBVIOUSNESS OF DANGER.—Whether a particular danger is so obvious that a servant should take notice of it is ordinarily a question for the jury. (Page 296.)

7. INSTRUCTIONS—REPETITION.—It was not prejudicial error to refuse an instruction substantially covered by other instructions which were given. (Page 296.)

8. SAME—APPROPRIATENESS.—It was not error to refuse to give an instruction which was not correct under the circumstances of the case. (Page 297.)

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

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

Under the circumstances plaintiff can not be heard to say that he did not know the car was on the track wrong end in front. 79 Ark. 241; 41 Ark. 542; 48 Ark. 333; 58 Ark. 125; 78 Ark. 520. Plaintiff is presumed to have been aware of the danger arising from the act of so placing the car on the track. 122 S. W. 118; 126 S. W. 375; 76 Ark. 69. He assumed the risk of the danger incident to the riding of the car so placed on the track. 56 Ark. 237; 58 Ark. 125. An instruction which singles out and gives undue prominence to certain facts is improper. 86 Ill. 62; 59 Ind. 105; 43 Md. 70; 81 Ill. 478; 33 Mich. 143; 57 Mo. 138; 45 Ark. 256. Instructions should be hypothetical. 31 Ark. 699.

W. P. Feazel, for appellee.

There was no error in refusing to direct a verdict for defendant. 71 Ark. 445; 76 Ark. 522; 89 Ark. 534. The question was one of fact, and was properly submitted to the jury. 77 Ark. 278; 87 Ark. 321; 90 Ark. 228; 89 Ark. 522. The evidence does not show that appellee was guilty of contributory negligence. 90 Ark. 226; *Id.* 556; 89 Ark. 427; 87 Ark. 327; 122 S. W. 118. He did not assume the risk of the danger to which he was subjected. 77 Ark. 378; 90 Ark. 228; 90 Ark. 567; 88 Ark. 548; 79 Ark. 56. If one desires an instruction on any particular phase of the case, he should request a proper one. 87 Ark. 528; 89 Ark. 327.

FRAUENTHAL, J. This was an action instituted by a servant to recover damages which he alleged he sustained by reason of the negligence of his employer. The defendant below owned and operated a railroad in connection with its sawmill and lumber plant, and the plaintiff received the injuries complained of while in its employment as a section hand. The injury occurred by reason of the derailment of a handcar upon which the plaintiff at the time was riding at the close of the day's work, and while the car was being taken to the tool house. At the time the section crew was preparing to quit the day's work the foreman who had authority over the crew directed the plaintiff to gather up the tools along the track. While the plaintiff was absent gathering up the tools, the attention of the foreman was called to the fact that the handcar was upon the track with its rear end in front, which was a dangerous way in which to operate the car. The foreman stated that, although it was dangerous to thus run the car, he thought it could be done safely for the distance they intended to go; and he, in effect, directed the crew to operate the car in that manner. The testimony on the part of the plaintiff tended to prove that he did not know that the car was being operated in this dangerous manner; and when he returned he got on the car and with other members of the crew proceeded to propel it. When the car got to the switch, it was derailed, and the plaintiff was severely injured thereby. The testimony tended also to prove that the car was derailed by reason of the improper manner in which it was operated with its rear end in the front.

Upon the trial of the case a verdict was returned in favor of the plaintiff, and the defendant has appealed to this court.

It is urged that the court erred in refusing to grant a continuance of the case upon defendant's motion. The summons in the case was served on September 10, and the case was tried on September 24 following. The defendant asked that the cause be continued in order to allow time to secure the attendance of two witnesses: one of the section crew and the foreman. The testimony which it was claimed that the foreman would give was set out in the motion, and upon the trial this testimony was permitted to be read as evidence in the case.

It was claimed that the defendant had not been able to see the section hand because of the short time since the institution of the suit; and on this account his testimony could not be set out. But it appears that there were at least ten members of this crew, and that a number of them were introduced as witnesses by the defendant; and it does not appear that this section hand knew any facts other than those known by the other members of the crew. The statute prescribes that the case will stand for trial at the term following ten days' service of the summons upon the defendant (Kirby's Digest, § 6190), and it will therefore be presumed that this is sufficient time in which to prepare for trial. The injury occurred in June prior to the meeting of the court; and we do not think that any peculiar circumstances were shown, or any special reasons assigned, so that we can say that the lower court abused its discretion in refusing to continue the case. We have repeatedly held that questions as to continuance of causes rest so much in the sound discretion of the court that, to justify a reversal on the ground of a refusal to continue, it must appear that there has been a clear abuse of that discretion.

At the request of the plaintiff the court gave the following instruction to the jury:

"No. 2. You are instructed that a person engaged in the service of a railroad company, as a section hand, assumes all the risks ordinarily incident to the business for which he is employed, but he does not assume the risks of the negligence of the master himself, or any one [to] whom the master may see fit to intrust his superintending authority, unless it be further shown that the servant was not only aware of the negligence, but he also realized the danger to which he was thereby exposed."

It is urged that the court erred in giving the above instruction because the injury which plaintiff received was due to one of the ordinary hazards of his employment, and was therefore assumed by him.

It is true that when a servant enters into the service of another he assumes all the ordinary risks and hazards incident to the employment; but it is also well settled that he does not assume the risk of any negligence on the part of the master. It is the duty of the master to use reasonable care and dili-

gence in providing for the safety of the servant and in furnishing for his use a suitable and safe place for the purpose of doing the work. He is not an insurer of the servant's safety; and yet he must not expose him to risks or dangers which arise from the master's own negligence. The servant does not, when he enters the service of another or while he continues in that service, assume the risk of dangers that arise from the negligence of the master, unless he is aware of that negligence and appreciates the danger therefrom. And, in the absence of knowledge on his part, the servant has a right to rely upon the assumption that the master has performed the duties devolving upon him so as not to expose him to extraordinary hazards. *St. Louis, I. M. & S. Ry. Co.* v. *Tuohey,* 67 Ark. 209; *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367; *Ozan Lumber Co.* v. *Bryan,* 90 Ark. 226; *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 427; *St. Louis, I. M. & S. Ry. Co.* v. *Holman,* 90 Ark. 556; *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102; Labatt on Master & Servant, § 279.

Furthermore, the testimony tended to prove that the foreman in effect ordered the plaintiff and the other members of the crew to drive the handcar with the rear end in front, and knew the peril of a compliance with that order, and that the plaintiff had no knowledge that the car was being run in this improper manner. One of the duties of a servant is to obey the reasonable commands of the master or his representative. When he is directed by the master or one under whose control he is placed to do a certain piece of work or to perform a service in a certain place, he will be justified ordinarily in obeying the order without being chargeable with having assumed the risks incident to such work or service. He does not assume the risk incident to the act so ordered unless he knows the danger incurred thereby. In Labatt on Master & Servant, § 440, it is said: "The master and servant are not on the same footing. His primary duty is obedience, and if when in the discharge of that duty he is damaged through the neglect of the master, it is but meet that he should be recompensed." The servant has the right to assume that the master will not expose him to unnecessary danger, and will not cause him to take extraordinary risks by obeying orders of those in whose charge

he is placed, and he can not be said as a matter of law to be guilty of negligence in obeying such orders when he does not know the danger. Whether or not the danger is so obvious or patent that he should take notice of and know it is ordinarily a question for the determination of the jury. "The order having the tendency to throw him off his guard, the servant may properly be excused from the exercise of the same degree of care as would have been incumbent on him if the case did not involve this factor." 1 Labatt on Master & Servant, § 440b; *Southwestern Tel. Co.* v. *Woughter,* 56 Ark. 206; *Bloyd* v. *Railway Co.;* 58 Ark. 66; *St. Louis, I. M. & S. Ry. Co.* v. *Rickman,* 65 Ark. 138.

We are of opinion that the court did not err in giving the above instruction number 2 at the request of plaintiff; and we are further of the opinion that it can not be said as a matter of law that the plaintiff assumed the risk of the danger of riding on the car in the manner in which it was propelled, or that he was guilty of contributory negligence under the circumstances of this case. These, we think, were questions which were properly for the determination of the jury, and we think there was evidence to warrant the finding made by them.

The defendant requested the court to instruct the jury, substantially, that if the plaintiff and those working with him caused the injury by pumping or pulling so hard as to throw the front end of the car off the track, then he should not recover. The court refused to give such an instruction, and we do not think that any prejudicial error was committed by this ruling. In other instructions given by the court the jury were told, in effect, that if the injury did not occur by reason of the fact that the handcar was operated with its rear end in the front, then the plaintiff could not recover. In effect, the court instructed the jury that the sole issue as to the cause of the derailment was whether or not it occurred by reason of the car being propelled with its rear end in front; and if the derailment occurred from any other cause, the plaintiff was not entitled to recover. The instruction requested was, therefore, substantially covered by other instructions which were given. *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 89 Ark. 326.

But, in addition to this, the instruction did not contain a proper qualification, in view of the testimony adduced by the plaintiff. The testimony on behalf of the plaintiff tended to prove that he did not know that the car was being operated with the rear end in front, and therefore did not appreciate the danger of pumping or pulling the car with great force. He could not therefore under such circumstances have been declared guilty of negligence as a matter of law by reason of pumping the car in such manner. Without a qualification presenting this view of the plaintiff's contention, the instruction was not a proper one under the circumstances of the case, and it was therefore not error to refuse it. *Horton* v. *Jackson,* 87 Ark. 528.

It is contended that certain instructions given at the request of plaintiff were erroneous because they singled out certain facts. We have carefully examined these instructions; and, while we believe that they are subject to some criticism, we do not think they are erroneous. The instructions were hypothetical in their statements, and did not interfere with the province of the jury in passing upon the testimony and determining its effect. The defendant does not claim that the amount of the verdict was excessive. Upon an examination of the whole case, we do not find that any prejudicial error was committed in the trial by the lower court.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* MACKEY.

Opinion delivered May 30, 1910.

1. WATERS—OBSTRUCTION OF DRAINAGE.—It is the right of each proprietor along a natural drain or watercourse to insist that the water shall continue to flow as it has been accustomed to do; and when its natural course has been obstructed or changed, he will be entitled to compensation for the damages he has sustained thereby. (Page 299.)
2. RAILROADS—DRAINAGE.—Where a railroad company builds across or alters the flow of a natural drain, it must make suitable culverts, bridges or other provisions for effectually carrying off not only the ordinary flow of water but also any extraordinary flow that could reasonably have been foreseen. (Page 300.)

3. NEGLIGENCE—CONCURRING CAUSES.—Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury, and this rule applies where one of the causes is the act of God. (Page 301.)

4. DAMAGES—INJURY TO LAND.—Where an injury to land is temporary only, and may be remedied, the measure of damages is the diminished rental or usable value of the land. (Page 302.)

Appeal from Craighead Court; *N. F. Lamb,* Special Judge; affirmed.

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

J. F. Gautney, for appellee.

A common carrier can not set up as a defense an act of God where the carrier's negligence concurred with that act: it must be free from fault. 11 L. R. A. 615; 59 Cal. 202; 89 Mo. 349; 35 L. R. A. 356. One obstructing the waters of a stream is not relieved from liability by showing that the overflow was an unprecedented flood, unless it appears that his act did not add to the damage. 74 Mo. 301; 32 N. E. 529; 101 N. W. 736; 42 Am. R. 529. The verdict is sustained by the evidence. 74 Ark. 478; 70 Ark. 478.

FRAUENTHAL, J. This was an action instituted by J. F. Mackey, the plaintiff below, to recover for the damage which he alleged was done to his personal and real property by water which it is claimed was wrongfully and negligently diverted from and obstructed in its natural flow and cast upon plaintiff's property. The plaintiff was the owner of two lots in the city of Jonesboro upon which were located a storehouse and his dwelling house. The lots were situated on the south side of the defendant's railroad, and about 75 feet from its roadbed. At this place the natural flow of the water was in a southerly direction and across the defendant's road. Prior to the year 1907 the defendant had constructed and maintained two openings or culverts through its roadbed; and the testimony on the part of the plaintiff tended to prove that these two openings allowed the water that was accustomed to fall upon and drain over the land at this place to pass through the roadbed, and successfully carried it off. One of these openings or culverts was located in front of plaintiff's property, and the other

opening was located about 150 yards east thereof. About 1907 the defendant constructed a switch along the side of its main track at this place, and in doing so built a dump which widened the original roadbed. In building this dump it closed the opening or culvert in the roadbed to the east of plaintiff's property, and from that point it dug a ditch along the south side of its roadbed to the opening or culvert which was situated in front of plaintiff's property, but it did not increase the size of this opening. It thus diverted the water which prior to that time had been used and accustomed to flow east of the plaintiff's property, and caused it to drain to the opening in front of his property. The testimony on the part of the plaintiff tended to prove that this opening or drain was not sufficient to carry off the water that ordinarily fell upon and drained over the land at this place during ordinary rains; that the natural flow of the water was thereby impeded during ordinary rains, and was cast back upon the land of the plaintiff, and greatly damaged it and materially and substantially lessened the use and enjoyment of his property for a number of months during each year from that date up to the time of the institution of this suit. In February, 1907, a great and unprecedented rain fell, which flooded the portion of the city of Jonesboro in which plaintiff's property was situated. The testimony tended to prove that waters from these rains were greatly impeded and obstructed by the insufficiency of the opening in defendant's roadbed, and that they were cast back upon the plaintiff's property. From this cause the waters rose to a considerable height in the dwelling house and store. It injured materially the use and enjoyment of the property, and it destroyed a part of and damaged a considerable portion of a stock of groceries and other goods which plaintiff carried in his store.

Upon a trial of the case the jury returned a verdict in favor of plaintiff, assessing the damage to the rental or usable value of realty at $200, and to the personal property at $150; and from the judgment entered upon the verdict the defendant has appealed to this court.

It is the right of each proprietor along a natural drain or watercourse to insist that the water shall continue to flow

as it has been used and accustomed to do; and when its natural course has been obstructed or changed so as to injure him, it is his right to recover recompense for the damages he has thereby sustained. It is the duty of a railroad company to so construct and maintain its roadbed as to cause no injury that could have been avoided by proper care and skill; and where such roadbed will obstruct and impede the natural flow and drainage of the water, it becomes its duty to make sufficient openings for the passage of the water.

In the case of *Railway Company* v. *Cook,* 57 Ark. 387, its duty and liability is thus expressed: "It is the duty of a railroad company to provide proper and sufficient openings or culverts for the escape of the water of all streams crossing its roadbed, so as not to flood the land of upper riparian owners, whether at ordinary stage of water or during floods which could reasonably have been forseen and guarded against; and if it fails to provide such openings, it is liable to any person damaged thereby." If the railroad company builds across or alters the natural drainage of land, it must make suitable culverts, bridges or other provisions for effectually carrying off the water. The law exacts the exercise of this care and diligence on the part of the railroad company, not only for the escape of the ordinary flow of such water, but where it could reasonably have been foreseen to make suitable provision to carry off the water of extraordinary freshets. For a failure to exercise that care and diligence the railroad company will be liable to those who are damaged thereby. *St. Louis, I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360; *Little Rock & Ft. S. Ry. Co.* v. *Chapman,* 39 Ark. 463; *Bentonville Rd. Co.* v. *Baker,* 45 Ark. 252; Angell on Watercourses (7 ed.), 465b; Pierce on Railroads, p. 203.

But it is urged that the rains which occurred in February, 1907, were so unprecedented, and the flood caused thereby so extraordinary, that it was in legal contemplation the act of God for which the defendant should not be held liable. The defendant can not be held liable for damage caused by the act of God. If the rains and flood in February were of such an overwhelming and destructive character as by their force, and independently of any other real efficient cause, to produce the injury, then there would be no liability against the defend-

ant. But if the injury was produced by the combined effect of the act of God and the concurring negligence of defendant, then it would be liable therefor. Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury, and this rule applies where one of the causes is the act of God. This court, in *City Electric St. Ry. Co.* v. *Conery,* 61 Ark. 381, announced this rule, as stated in the syllabus: "The concurring negligence of two parties make both liable to a third party injured thereby if the injury would not have occurred from the negligence of one of them only." Wharton on Neg. (2 ed.), 144; 1 Shear. & Redf. Neg. (4 ed.), § 39; *St. Louis, I. M. & S. Ry. Co.* v. *Coolidge,* 73 Ark. 112; *Southwestern Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581; *Chicago, R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573.

The act of God which excuses must be not only the proximate cause but the sole cause. And where the act of God is the cause of the injury, but the act of the party so mingles with it as to be also an efficient and co-operating cause, the party will be still responsible. In 1 Shear. & Redf. Neg. (4 ed.), § 39, the rule is thus stated: "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause, for which he is not responsible, including the act of God, * * * the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damage." *Vyse* v. *Chicago, B. & Q. Ry. Co.,* 101 N. W. 736.

The lower court gave a number of instructions, some of which counsel for defendant claims were erroneous. We have examined all the instructions, and we do not think that the court committed any prejudicial error in its ruling on any of them. They, in effect, are in conformity with the above principles, and we do not think that it would serve any useful purpose to set them out or to discuss them in detail. We are also of the opinion that there was sufficient evidence to warrant the verdict of the jury. The testimony proved that the defendant, by closing the eastern culvert through its roadbed, had diverted waters to the opening in the roadbed in front of plaintiff's property. This latter opening was insufficient to allow the passage of the waters that ordinarily were accus-

tomed to drain and flow across the roadbed at this place; and the negligence of the defendant, by not making a sufficiently large opening at this place and at other reasonably necessary places through its roadbed was an active cause that obstructed and impeded the flow of the water in times of extraordinary freshets so as to cast it back and flood the property of plaintiff. We also think that the jury were warranted in finding that the defendant could reasonably have foreseen the coming of these extraordinary rains, and could reasonably have so constructed its roadbed as to permit the waters to pass without the damage which was incurred by plaintiff.

It appears to be conceded by both parties that the manner in which the defendant has obstructed and maintained culverts or openings through the roadbed is only temporary, and can and will be remedied, and that the injury is not therefore permanent. The measure of damages in such case was the diminished rental or usable value of the land, and the market value of the personal property destroyed and the diminished value of that which was damaged. *Railway Company* v. *Cook*, 57 Ark. 387; *Czarnecki* v. *Bolen-Darnell Coal Co.*, 91 Ark. 58; *Junction City Lbr. Co.* v. *Sharp*, 92 Ark. 538.

The court properly instructed the jury as to the measure of damages, and we think that there is some testimony to sustain the jury in the amount of the damages which they found. The verdict of the jury should not therefore be disturbed.

The judgment is affirmed.

FOOHS v. BILBY.

Opinion delivered May 9, 1910.

1. ACTION—GENERAL APPEARANCE.—Any action on the part of a defendant, except to object to the jurisdiction, which recognizes the case as in court will amount to a general appearance. (Page 307.)
2. SAME—SUFFICIENCY OF APPEARANCE.—A nonresident defendant can not object on appeal that the trial court had no jurisdiction of his person for want of service of process where the record shows that his attorney "submitted a written argument or statement" to the trial court. (Page 307.)
3. JUDGMENT—APPLICATION TO VACATE JUDGMENT—EFFECT OF FORMER APPEAL.—The fact that a party against whom a judgment has been

rendered in the circuit court took an appeal therefrom and that the judgment was affirmed on appeal will not preclude such party from applying under Kirby's Digest, § 4431, subdiv. 7, to the circuit court at a subsequent term to vacate the judgment for unavoidable casualty which prevented the party from appearing at the trial. (Page 308.)

4. SAME—APPLICATION TO VACATE—EFFECT OF FORMER APPLICATION.—The fact that a party against whom a judgment has been rendered filed an application to vacate the judgment, under Kirby's Digest, § 4431, and dismissed this application without prejudice to a renewal of it will not preclude a second application filed within a year. (Page 308.)

5. SAME—APPLICATION TO VACATE—LIMITATION.—There is no statute limiting the time within which an application to vacate a judgment may be made under Kirby's Digest, § 4431. (Page 308.)

6. APPEAL AND ERROR—NECESSITY OF BILL OF EXCEPTIONS.—A bill of exceptions is necessary to bring into the record the facts admitted or proved on the trial. (Page 309.)

7. SAME—ABSENCE OF EVIDENCE—PRESUMPTION.—Where evidence was heard on the trial of a case which is not brought upon the record, it will be presumed that every fact necessary to sustain the finding and judgment of the court was proved that could have been proved. (Page 310.)

Appeal from Arkansas Circuit Court; *Eugene Lankford*, Judge; affirmed.

STATEMENT BY THE COURT.

Proceedings were instituted in the Arkansas Circuit Court by John Foohs against J. S. Bilby, under section 4431 of Kirby's Digest, to vacate a former judgment of said court. The original suit was brought by Bilby against Foohs in the Arkansas Circuit Court to recover a lot of staves manufactured from timber cut from land alleged to be owned by Bilby. The judgment of the circuit court was for Bilby, and Foohs appealed to this court. The judgment was reversed, and the cause remanded for a new trial. *Foohs* v. *Bilby*, 83 Ark. 234. The case was again brought to this court on appeal, and the judgment of the circuit court, which was in favor of Foohs, was affirmed on May 3, 1909. *Bilby* v. *Foohs*, 90 Ark. 297.

The judgment of the Supreme Court of Arkansas on the first appeal was rendered on the 17th day of June, 1907, and the mandate was filed in the office of the circuit clerk on the 13th day of August, 1907. At the November term, 1907, of the Arkansas Circuit Court, a judgment was rendered in said cause in favor of Foohs. and the complaint herein was filed by

Bilby on September 18, 1909, to vacate that judgment. Prior to this Bilby had appealed to this court from the judgment, and the judgment of the lower court was affirmed on May 3, 1909, as above stated. Bilby had also made a previous application to the court to set aside the judgment, which on his motion was dismissed without prejudice, and the present complaint was filed within one year thereafter.

The ground upon which Bilby sought to vacate the judgment rendered at the November term, 1907, of the Arkansas Circuit Court was unavoidable casualty which prevented him from appearing at the trial, and the complaint also alleged facts which showed that he had a valid cause of action. The complaint was duly verified, and an affidavit was attached to his complaint stating that Foohs had become a nonresident of the State, and a warning order was issued. At the November term, 1909, of the Arkansas Circuit Court the following judgment was rendered: "Now, on this day this cause comes on for hearing, plaintiff appearing by his attorneys. The court finds that this cause is regularly on the calendar for trial at this term of court, and, same being now reached on the call of the calendar for trial, the court finds that defendant, John Foohs, has been duly served with process of this court for the time and in the manner prescribed by law, and that defendant, John Foohs, and his attorney of record, H. A. Parker, have been each duly notified of the pending of this action, and have actual knowledge thereof, and that the attorney for said John Foohs has submitted a written argument or statement to this court in this cause.

"After hearing the evidence, the court finds that this is a suit to vacate a former judgment of this court rendered at its November term, 1907, on the 13th day of November, 1907, wherein J. S. Bilby was plaintiff and John Foohs was defendant, which judgment is entered in Law Record 'L,' pages 429 and 430 of this court, and further finds that plaintiff herein was represented in said suit by John F. Park, Esq., as attorney of record therein, and that shortly before the rendition of said judgment said John F. Park died, and that said judgment was rendered without the knowledge or consent of said Bilby, the plaintiff herein, or any one for him, and without knowledge on the part of said Bilby that said Park had died, and plaintiff

therefore was without representation therein, and that said Bilby was prevented by unavoidable casualty and misfortune from appearing and prosecuting said cause or being represented therein as he was by right entitled to do. The court further finds that the said Bilby, the plaintiff herein, had and now has a meritorious and valid cause of action in said suit, and that the aforesaid judgment ought to be vacated and set aside and said Bilby permitted to prosecute same, and that for above and other reasons same should be vacated, and the prayer of the complaint herein granted.

"Therefore, the court being well advised, it is considered, ordered and adjudged that said judgment hereinbefore referred to, towit: the judgment in the case of J. S. Bilby *v.* John Foohs, rendered November 13, 1907, and entered in Law Record 'L,' pages 429-430 of this court, be and the same is hereby vacated and set aside, and that the said J. S. Bilby be and he is hereby permitted to prosecute the same as if said judgment had not been rendered, and that the clerk of this court be and he is hereby ordered to reinstate said cause of J. S. Bilby *v.* John Foohs on the docket of this court, and that said cause of J. S. Bilby *v.* John Foohs be and the same is hereby set for trial on the 1st day of the next term of this court."

At the same term of the court John Foohs filed a motion to set aside this judgment, and the court rendered the following judgment: "On this day John Foohs, defendant above named, files his motion to set aside the order of this court rendered in the above-styled cause on November 6, 1909, vacating a previous judgment, and, said motion coming on for hearing and the evidence being heard thereon, the court finds that same should be overruled. Therefore it is considered and adjudged by the court that said motion on this day filed be and the same is hereby overruled, to which action of the court in overruling said motion John Foohs excepts and prays an appeal to the Supreme Court, which is by the court granted, to which act of the court in granting an appeal to the Supreme Court the said J. S. Bilby excepts."

Foohs in his motion to set aside the judgment vacating the former judgment makes all the former proceedings in the case exhibits to his motion, but he filed no bill of exceptions,

and none appears in the transcript. He has brought the case here by appeal.

H. A. Parker, for appellant.

A motion to vacate a judgment must be filed, if filed at all, within the time prescribed by section 4432, Kirby's Digest; 60 Ark. 550; 33 Ark. 454; 90 Ark. 171. A judgment of the Supreme Court can not be reviewed, altered or modified by an inferior court except for matters arising after the judgment of the Supreme Court was rendered. 33 Ark. 161. The decision of the Supreme Court in a case is the law of that case. 29 Ark. 174; 13 Ark. 103; 14 Ark. 304; 11 Ark. 151; 22 Ark. 176; 44 Ark. 383; 55 Ark. 609; 56 Ark. 171. The fraud contemplated by the statute must be in the proving of the judgment. 68 Ark. 495; 33 Ark. 575; *Id.* 727; 54 Ark. 539; 73 Ark. 440; 75 Ark. 416; 83 Ark. 508; 90 Ark. 167. Illness of an attorney comes within the purview of section 4431, Kirby's Digest. 85 Ark. 386; 59 Ark. 162. If a party by negligence suffers judgment to go against him, it will not be set aside. 7 Mo. 6; 16 B. Mon. 582. The plaintiff was guilty of laches in applying for a vacation of the judgment. 7 N. Y. S. 490; 13 S. Dak. 648; 84 N. W. 199; 98 Ind. 165; 62 Minn. 18; 63 N. W. 1117; 18 Wash. 387; 51 Pac. 473; 71 Hun 519; 24 N. Y. S. 1031; 15 Ill. 140; 14 Md. 564; 61 Mich. 35; 27 N. W. 877; 18 N. J. L. 217; 95 N. Y. 135; 74 N. Y. S. 409; 1 Den. 268; 190 Pa. 355; 42 Atl. 706; 189 Pa. 474; 42 Atl. 45; 4 R. I. 489; 6 Wis. 164; 110 Wis. 185; 85 N. W. 646; 28 Minn. 132; 9 N. W. 633; 1 How. Pr. 120; 16 *Id.* 129; 100 Ky. 728; 39 S. W. 414; 61 Cal. 292; 20 Pa. Sup. Ct. 227; 39 Minn. 315; 40 N. W. 66; 7 Minn. 325; 47 Minn. 245; 49 N. W. 983; 46 Mo. App. 351; 7 Tex. Civ. App. 539; 27 S. W. 687. A party to a suit must give it the attention of a prudent man. 132 N. C. 312; 117 N. C. 482; 79 N. C. 40; 50 Atl. 537; 107 Ill. App. 175; 169 Ill. 295; 89 Ill. 113; 93 Ind. 583; 60 Minn. 117; 36 S. C. 578; 81 N. C. 293.

Ingram & Coleman and *Pettit & Pettit*, for appellee.

The record showing of notice is sufficient. 72 Ark. 265; 63 Ark. 513; Kirby's Dig., § 4425; 25 Ark. 60; 80 Ark. 74; 81 Ark. 427; 76 Ark. 534; 77 Ark. 303; 8 Tex. 295; 30 Tex. 53; 69 N. J. L. 343. The truth of record entries can not be

attacked by bill of exceptions. 72 Ark. 320; 85 Ark. 50. A record entry showing "continuance by consent" shows an appearance by defendant. 66 Ark. 458. The affidavit is sufficient. Kirby's Dig., § 3150; 162 Ill. 133; 7 Abb. Pr. 322; 57 N. Y. S. 975; 40 App. Div. 405; 29 Wash. 576; 70 Pac. 71; 1 Met. (Ky.) 158; 17 B. Mon. 320; 4 Kan. 104; 8 Colo. 144; 3 S. E. 458; 14 Kan. 463; 95 Pac. 391; 41 Ore. 518; 69 Pac. 460; 107 S. W. 605. A delay of thirteen months will not defeat the relief sought. 68 Ark. 205. Any former decision which would have barred appellee should have been pleaded and proved. 65 Ark. 84; 71 Ark. 601. Appellee did not waive his right to have the judgment set aside. 10 Abb. Pr. 448; 37 W. Va. 675; 17 S. E. 184; 93 U. S. 150; 15 Vt. 785; 53 N. Y. 445.

HART, J., (after stating the facts). It is first contended by counsel for appellant that the judgment in favor of Bilby vacating the former judgment is void because no service in the proceeding was had upon Foohs; but he is precluded from raising this question by the recitals of the record that "the attorney for said John Foohs has submitted a written argument or a statement to this court in this cause." "Any action on the part of a defendant, except to object to the jurisdiction, which recognizes the case as in court will amount to a general appearance." 3 Cyc. 504. "Any taking part in the proceedings will constitute a general appearance." 2 Enc. of Plead. & Prac., p. 639.

Counsel now insists that he only appeared for the purpose of objecting to the jurisdiction of the court over the person of Foohs; but the record does not show that he limited his appearance to that single question. On the contrary, it shows a general appearance. "A general or voluntary appearance is equivalent to service of process, and confers jurisdiction of the person on the court. Hence a defendant is estopped to object to want of such jurisdiction where he has appeared generally, and it is held to be immaterial whether he be a resident or nonresident." 3 Cyc. 515-517.

It is not contended by Foohs that the counsel referred to in the record had no authority to enter his appearance. Hence the question of unauthorized appearance does not arise in the case.

It is next insisted by counsel for appellant that, Bilby having appealed from the judgment of the circuit court and the judgment having been affirmed, he was precluded from instituting proceedings to vacate it. This objection is not tenable. The appeal was merely a continuation of the suit below. An appeal does not have the effect of vacating the judgment of the court below. Even where a supersedeas is granted, an appeal does not have the effect of vacating a judgment, but only stays proceedings thereunder. *Miller* v. *Nuckolls,* 76 Ark. 485. If no supersedeas is granted, the judgment of the court below is suspended pending the appeal; and if the cause is reversed, the rights of the parties stand as though no action had ever taken place in the court below. *Harrison* v. *Trader,* 29 Ark. 85. On the other hand, if the judgment is affirmed, the rights of the parties will stand as if no appeal had been taken. Therefore, we do not see how the rights of a party to have a judgment set aside for the grounds set out in section 4431 of Kirby's Digest can be affected by an appeal taken from the judgment. The appeal and the proceedings to set aside the judgment for the grounds mentioned in section 4431, *supra,* are wholly separate and independent proceedings, and are intended to effectuate different purposes. Therefore, it is difficult to perceive how the use of the one remedy will preclude the right to exercise the other.

Again, counsel for appellant urges a reversal on the ground that appellee had filed a prior application to vacate the judgment, but it is conceded that this was dismissed on his own motion without prejudice to a renewal of it, and we have no statute limiting the time within which the moving party must act to bring himself within the terms of section 4431 *supra.* In such cases there can be no objection to a second application. 23 Cyc. 975. Besides, the complaint herein was filed within one year after the former application was dismissed without prejudice on the motion of appellee.

We now come to the main question in the case. Appellee in his complaint to vacate the judgment rendered against him at the November term, 1907, of the Arkansas Circuit Court alleged that he was a nonresident of the State, and that his attendance at the trial was not necessary, and that he was not expected to be present. That the conduct of the case was wholly

in the hands of his attorney. That his attorney became ill and died a short time before the sitting of the court, and that he did not know of the illness and death of his attorney until after the judgment in question had been rendered, and the court had adjourned for the term. He alleged further facts which constituted a valid cause of action in his behalf. The record shows that evidence was heard on the trial of the case. No bill of exceptions was filed, and this was necessary in order to bring into the record the facts proved or admitted on the trial. *Hall* v. *Bonville,* 36 Ark. 491; *Berger* v. *Houghton,* 84 Ark. 342, and cases cited.

Counsel for appellant filed a motion to set aside the judgment obtained by appellee vacating the former judgment. This was done at the same term of the court, and in his motion counsel for appellant by exhibits and other papers filed therewith undertakes to supply a record upon which he bases his right to a reversal of this case. Manifestly, this can not be done. We must review the alleged errors on the record as presented to the lower court; otherwise we might not review the case passed upon by the trial court but a wholly different one.

In the case of *Hurlburt* v. *W. & W. Manufacturing Co.,* 38 Ark. at p. 597, the court said: "It is noted in the record that afterwards, during the same term, the defendants made two several motions, in effect to set aside the default, and tendered an answer. The motions and the answer tendered are set forth in the transcript, but are not incorporated in any bill of exceptions. Whilst it is proper for the record to show that motions of this class were made and acted upon, neither the grounds of the motions recited therein, nor the papers tendered with them, can be received as evidentiary of the facts therein stated. The grounds upon which the court based its discretion can not be known, nor can it be seen whether or not the court abused its discretion, without a bill of exceptions showing the matters set forth in the motions and papers tendered and the proof upon which they are based. It is not the office of the record proper to do that." And for like reason the court held in the case of *Cox* v. *Cooley,* 88 Ark. 350, that a motion for a new trial can not be used, and has never been used, to incorporate anything into the record. See also *Independence County* v. *Tomlinson,* 93 Ark. 382.

This is conclusive of the present case. The errors complained of do not appear from the record itself, and there is nothing presented for our review.

The motion to vacate the judgment under section 4431 *supra* was heard on evidence, and, the evidence which the court heard and on which it acted in setting aside the judgment in question not being brought into the record, we must presume that every fact necessary to sustain the finding and judgment of the court was proved that could have been proved. *Hempstead County* v. *Phillips,* 79 Ark. 263, and cases cited.

"In the absence of a bill of exceptions, it will be presumed that the court's findings of fact were based on the evidence, where there is nothing in the record to rebut that presumption." *Swing* v. *Brinkley Car Works & Manufacturing Co.,* 78 Ark. 198.

The judgment will therefore be affirmed.

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

Opinion delivered May 16, 1910.

1. DAMAGES FOR PERSONAL INJURIES—WHEN NOT EXCESSIVE.—Where the testimony in a personal injury suit tended to prove that by reason of defendant's negligence plaintiff suffered serious and permanent physical injuries described as traumatic neurasthenia and affecting his entire nervous system, whereby his capacity to earn a livelihood was greatly impaired and his chance of recovery rendered doubtful, a verdict awarding $16,000 as damages was not excessive. (Page 315.)
2. CARRIERS—INJURY TO PASSENGERS—PRESUMPTION.—Where a passenger is proved to have received injuries in a collision, the presumption arises that the carrier was negligent. (Page 315.)
3. EVIDENCE—PERSONAL INJURIES.—In a personal injury suit it was not error to permit the plaintiff, a merchant, to testify that since he was injured he has been unable to attend to business; that he spent most of his time around home and in bed; that he was pessimistic, and lacked patience in waiting on customers, and that in consequence he had lost trade, and his business had ceased to be profitable. (Page 316.)
4. APPEAL AND ERROR—INVITED ERROR.—Where the defendant in a personal damage suit on plaintiff's cross examination brought out the fact that plaintiff had recently taken advantage of the bankrupt law, it can not complain because plaintiff on re-examination was

permitted to testify that since he was discharged in bankruptcy he had, under a sense of moral obligation, paid a considerable portion of the discharged debts. (Page 316.)

5. EVIDENCE—NONEXPERT WITNESS.—Nonexpert witnesses may testify in a personal injury suit as to the plaintiff's physical condition before and after the alleged injury. (Page 317.)

6. APPEAL AND ERROR—HARMLESS ERROR.—One of the physicians who treated the plaintiff at his sanitarium testified that two local men of prominence were then patients in his sanitarium. Counsel for plaintiff argued that the patronage of these men was a certificate of the physician's good reputation. The latter's reputation was not questioned in the trial. *Held,* that the evidence and argument were not prejudicial. (Page 317.)

7. EVIDENCE—PROOF OF DEMEANOR OF WITNESS.—It was not error to refuse to permit a witness to prove the plaintiff's demeanor and appearance while on the witness stand, as the jurors could observe that for themselves. (Page 318.)

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

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

Appellee's testimony was incompetent, unreliable, and uncertain. 88 N. E. 1063; 121 Ky. 526; 123 Am. St. R. 205; 90 Ky. 369; 29 Am. St. R. 378; 27 S. W. 999; 119 N. W. 200; *Id.* 1061. Instruction number one requested by appellee was erroneous. 30 Ark. 362; 51 Ark. 88; 91 Am. Dec. 309; 55 Ark. 393; 57 Ark. 203; 25 Ark. 490. It must appear to this court that error and misconduct in the argument of counsel was harmless, otherwise the case will be reversed. 58 Ark. 368; *Id.* 473; 61 Ark. 130; 63 Ark. 176; 69 Ark. 486; 65 Ark. 625; 70 Ark. 305; 72 Ark. 427. The verdict was the result of passion and prejudice, and is excessive. 57 Ark. 402; 194 Mo. 367; 178 Mo. 134; 113 Mo. App. 640; 27 S. W. 999; 101 Minn. 40; 100 Minn. 236; 82 Minn. 123.

Joseph W. Phillips, W. V. Tompkins and *John W. & Joseph M. Stayton,* for appellee.

Where injuries are permanent, mortality tables can be shown. 63 Ark. 491; 76 Ark. 233; 80 Ark. 551; 88 Ark. 229; 13 Cyc. 198. Carriers of passengers by steam are held to the highest degree of care. 34 Ark. 613; 40 Ark. 298; 51 Ark. 459; 57 Ark.

418; 59 Ark. 180; 60 Ark. 550. When an instruction is objected to, the vice must be pointed out. 87 Ark. 454. As to the meaning of the word "permanent," see 20 N. Y. S. 157; 65 Hun 94; 33 Atl. 399; 53 N. J. Eq. 370; 51 Am. St. 628; 2 N. J. Eq. 154; 26 S. E. 703; 120 N. C. 498; 9 App. Cas. (D. C.) 435; 69 Wis. 315; 187 Pa. St. 333; 15 L. R. A. 579. Appellate courts are little inclined to interfere on the ground of excessive damages where it appears the injury is permanent. 56 Ark. 594; 48 Ark. 396; 13 Cyc. 132, 133, 139, 129.

McCULLOCH, C. J. Plaintiff, Wm. F. Osborne, was a passenger on one of the passenger trains of the defendant, which collided with a freight train about a mile distant from the city of Little Rock on the first day of October, 1907, and he sues to recover damages on account of physical injuries alleged to have resulted from the collision. Negligence of defendant's servants is alleged to have caused the collision.

Plaintiff took passage on the train at Gurdon, Arkansas, where he resided; Little Rock being his destination. Just as the train reached the outskirts of this city, it ran into the caboose of a freight train. Plaintiff was sitting in the smoking car at the time, and was, by the force of the shock, thrown and pitched forward so that his head and shoulder hit against the back or arm of the seat. He describes his injury in the following language:

"I fell sideways, and struck my left shoulder right back there (indicating), as well as I have been able to ascertain from the soreness on that part. When that seat was thrown over, there was an exposed part that comes over, and my head hit on that, and left shoulder. Back part of head, back of my ear, struck this part of seat (indicating) and back of my neck; then got up feeling stunned and dazed; was confused; had pain in the back of my neck at two places a short distance apart, just a few seconds after I got to my seat. The pain was very acute and sharp, like there had been a sprain or wrenching of head and neck." He described his sensation immediately after receiving the injury as that of fullness in the chest, which continued, and pain in the shoulder, neck and head, and dizziness; couldn't hold his head up; "head seemed to go forward."

He walked up to the station, and took a car up town, where he got lunch, and then went to a hotel and retired for the night,

but couldn't sleep. The next day he attended to some business in Little Rock, and took the train for Newport, Ark., where he was engaged in business. The next night he suffered considerable pain in his head and shoulder, and consulted a physician. He continued his attention to business, but in a few days took suddenly sick and called in physicians. He was under treatment of physicians almost continuously from the date of his injury up to the time of the trial, which occurred February 20, 1909. He remained at Newport under the treatment of physicians until October 13, 1907, when he returned to his home at Gurdon, and was there treated by his regular physician until December 20, 1907, when the latter died. He was also treated by several physicians in Little Rock at different times, and spent considerable time in a sanitorium, but has never recovered. He described his physical condition at the time of the trial as follows: "Before accident I was a pretty good mixer with my fellow man, enjoying a joke, and weighed about 220 pounds, and wasn't irritable; went down to about 200 pounds; now I am easily worried; can't stand any sharp noises; remember instances at Gurdon, my place of business being near the railroad, the blowing of whistles would affect me considerably; shooting of firecrackers makes me nervous and irritable; have very little to do with anybody on account of my affliction, and that is the first thing I want to talk about; I have a number of small children at home, and have to stay away from them on account of the noise; light affects my eyes, and I keep my room darkened; don't read anything but newspapers, and then only fifteen or twenty minutes at a time; don't sleep well; am nervous; something will get on my mind, and I can't shut it out, and the next morning usually feel tired; can't walk but a short distance now; week or two after getting hurt I had a very acute pain that seemed to be where I believe the base of the brain is; couldn't move my head, and couldn't stand a jar; my walking was retarded perhaps soon afterwards, but I got worse three or four months after I was hurt; walk with difficulty, and have had to carry a cane about twelve months; my back hurts me, and walking increases it; have very severe scalding pain, burning pain, in my head, but the trouble seems to be a strain or tearing or some dislocation in the neck. This bothers me the most. At times my hands and feet are cold and clammy; hands are

numb, and have lost my grip; can think for only a limited time without becoming tired; can't work any, and haven't worked much since fourteen months ago; reading increases trouble; have spots before my eyes; when I stand straight up and close my eyes, have a falling sensation; have to use a cane; my appetite is fair at times; have taken a great deal of tonic; have to have specially prepared food now, and for that reason eat at a restaurant; suffer some from dyspepsia and indigestion; can't stand excitement; have sweating of the hands. I have been in the hardware and furniture business at Gurdon for a number of years; very small business now, less than it was a year ago when I had a stock of about $3,500. I am closing the furniture out of my Gurdon store. It was hardware and furniture at the time of the accident, and I had two clerks then; have only one now; have not been able to conduct that business as it was at time of accident, but have kept it open; can not think connectedly. Since the accident have been able to give my business very little attention. I have spent about one-half my time in bed around home, and the greater part of the time I did spend around my business I spent on a cot in my store; got a cot in each of my stores on which I spent most of the time while I was in my places of business."

Three physicians, who treated plaintiff, were introduced as witnesses, and the testimony of each tended to substantiate his claim that he had sustained serious injury. Each stated his opinion concerning plaintiff's condition, and the extent of the injury which he claimed to have received. They diagnosed the trouble as traumatic neurasthenia, that is to say, weakness of the nerves caused or aggravated by a wound or physical shock or injury, and they gave opinions that the disease is generally, but not certainly, curable; that recovery is uncertain and always doubtful, even under favorable conditions. They said that plaintiff's condition had constantly grown worse since they knew of the case. Eminent medical text writers are quoted to the effect that in a majority of cases of traumatic neurasthenia or hysteria, the patient recovers, but that some do not recover, the disease persisting "until psychoses develop, such as melancholia, dementia, or occasionally progressive paresis." The physicians who examined plaintiff did not find any cuts, bruises or other external signs of injury on his body, but medical authorities

seem to agree that the disease may be produced by the shock of a railway accident, without there being any external signs of the injury.

Defendant introduced considerable testimony, experts and others, rebutting the plaintiff's claim. It undertook to show that plaintiff had received no substantial injury at all, but was shamming or feigning injury—malingering, as the medical men term it. People living in the same town with plaintiff testified that he would appear to walk and otherwise deport himself as a perfectly well man when he thought he was unobserved, but that when he saw any one watching he would assume an attitude of suffering and physical disability. A physician who examined him at defendant's instance testified that he found nothing the matter with him. But the testimony was conflicting, and that introduced by plaintiff was sufficient to warrant a finding that he was severely injured, and that the injury resulted from the collision while he was a passenger on the train.

The trial jury returned a verdict in plaintiff's favor, and assessed his damages at the sum of $16,000, which is alleged to be excessive. We are of the opinion, however, that, if full credit be given to all of plaintiff's witnesses, as the jury had the right to do, the verdict is not excessive. Plaintiff is, according to the testimony, seriously injured, and his recovery is doubtful. It is not greatly improbable that his condition will grow worse. He suffers constant pain, and his capacity to earn a livelihood is considerably impaired, if not entirely destroyed. If his condition is such as that described by him and his witnesses, his life is ruined, though yet a young man, so far as comfort and enjoyment is concerned. We are unwilling to say that under those circumstances the verdict is excessive.

It is undisputed that the collision occurred, and that plaintiff was a passenger. No attempt was made by defendant to exculpate itself from the charge of negligence; so, if the plaintiff's injuries are proved to have resulted from the collision, the presumption of negligence arises and fixes defendant's liability. As to negligence, the occurrence speaks for itself. Assignments of error in the giving of instructions on the degree of care which a carrier owes to passengers need not, therefore, be considered, for, according to the undisputed evidence, the defendant is responsible for any injuries which plaintiff received

in the collision, and no error in the instructions on that point could have been prejudicial.

Numerous errors of the court are assigned in admitting testimony adduced by plaintiff. The first is as to plaintiff's own testimony. He was allowed to testify, over the defendant's objection, that since he was injured he had been unable, on account thereof, to give attention to his business; that he spent most of the time around home and in bed; that he was pessimistic, and lacked patience in waiting on customers, and that in consequence of these things he had lost his trade, and that his business had ceased to be profitable. We see no reason why these matters were not proper to prove. They came within the allegations of the complaint as to the nature, extent and result of his injuries. It was necessary to show these things in order to prove the amount of his damages.

It is especially urged that an error was committed in permitting plaintiff to say that he was pessimistic since he received the injury, and took a gloomy view of life; thus, it is claimed, passing on his own disposition and stating a conclusion. Who can state the feeling and changed disposition better than one's own self? These are things from which the jury is left to draw conclusions in the light of the other testimony, the jury being, of course, the judges of its weight.

Objection is also made that the court permitted plaintiff to testify that since he was discharged in bankruptcy he had, under a sense of moral obligation, paid a considerable portion of the discharged debts. This testimony was brought out on re-direct examination, after defendant's counsel had drawn from him on cross examination the statement that he had taken advantage of the bankrupt law in the year 1905, which was two years before he received the jury. If error was committed, it was invited by defendant in entering upon this subject in the examination of the plaintiff. The fact that plaintiff had, prior to the injury, taken advantage of the bankrupt law had no legitimate place in the case, and its only effect was to degrade plaintiff before the jury by showing that he was either unable or unwilling to pay his debts, and defendant can not complain that plaintiff was allowed to rebut this by showing that he paid the debts, notwithstanding the discharge in bankruptcy.

Nonexpert witnesses were permitted, over defendant's objection, to testify as to plaintiff's physical condition before and after the date of the alleged injury. The objection is based on the fact that the witnesses were not experts. They did not profess to be experts, but were allowed to state facts within their knowledge and observation as to plaintiff's physical condition, habits, etc. This was proper.

One of the physicians introduced by plaintiff as a witness, and who treated plaintiff in his sanatorium in the city of Little Rock, testified that two local men of prominence in Newport, Ark., where the case was tried, were then patients in his sanatorium at the time of the trial. This is assigned as error, and it is contended that its prejudicial effect was emphasized by a statement of counsel for plaintiff in his closing argument in substance that the patronage of those gentlemen was a certificate of the physician's good reputation, qualifications, etc. This physician's reputation and professional standing were not questioned, and we can not see how the testimony or the statement of counsel could have had any effect either one way or the other.

There are several other assignments of error in admitting improper testimony, but they are not of sufficient importance to discuss.

Another assignment of error is as to the refusal of the court to permit Dr. R. C. Dorr to answer certain questions eliciting his opinion concerning plaintiff's conduct and appearance while on the witness stand. Dr. Dorr had never examined the plaintiff, and was not personally acquainted with him, but saw him on the witness stand and heard him testify. He (Dr. Dorr) testified as an expert in the case as to the causes, effects, etc., of traumatic neurasthenia. Defendant's counsel offered to propound to him the following questions:

"Doctor, did you observe Mr. Osborne while he was here the past week in attendance upon the court, and while he was on the witness stand?

"And did you observe his manner of testifying on cross examination, and observe any difference as to his demeanor upon the witness stand while he was being cross examined?"

The court refused to allow the questions, and counsel then made the following statement as to what was expected to be

proved: "It is expected by the defendant that the witness will testify that he has observed the difference between the plaintiff's demeanor on the witness stand on direct examination and on cross examination, and that while the plaintiff, Osborne, was on the witness stand he held his head downward, frequently passed his hand over his eyes and drooped his eyes, and that on cross examination he straightened up, became apparently more interested and ceased bowing his head, and ceased throwing his hand over his eyes, and ceased drooping his eyes—that question is a foundation, and the defendant proposes to then propound to witness the following question."

The following question was also offered and disallowed:

"Would this manner and conduct, which you have observed in the witness, be an indication of impaired memory or lack of concentration, and what have you to say as to it being an indication, from a medical standpoint, as to malingering?" And counsel made the following statement: "It is expected by defendant that the witness will testify that such manner and conduct indicates no impaired memory and no lack of concentration, but indicates that plaintiff is malingering."

The contention is, in support of these assignments of error, that defendant had the right to have Dr. Dorr state his opinion, based on his observation of the plaintiff while on the witness stand, to the effect that plaintiff was malingering or shamming, and was not a sufferer from neurasthenia. In another part of this witness' testimony he was permitted to state that he had observed the plaintiff for five hours while the latter was on the witness stand, and that from such observation he had discovered nothing to indicate any loss of memory or lack of concentration of ideas on the part of plaintiff, and that plaintiff's capacity in this regard, as indicated by his appearance and demeanor on the witness stand, was free of defects and about the same as that of any other average man.

So it is seen that defendant was allowed to prove everything by this witness that he attempted to prove except the description of the plaintiff's demeanor and appearance while on the witness stand. This, of course, was not competent, for the jurors observed this as clearly as the doctor did. The latter as an expert could, at most, be permitted to give his opinion as to what the conduct indicated, and he was permitted to do

that. The question whether or not plaintiff was, in the opinion of the doctor, a malingerer, is settled by a subsequent statement of Dr. Dorr, made on cross examination. He stated that he had not examined plaintiff, and could not attempt a diagnosis of his particular case.

Objection is made to that part of an instruction on the measure of damages which submits the question of damages for permanent injury. It is insisted that the evidence did not warrant a finding of the existence of a permanent injury, but we conclude that there was sufficient evidence to warrant such finding, and that the question was properly submitted. The experts who testified as to the prognosis of plaintiff's case did not say positively that the injury is permanent, but they do state that his chances of recovery are very doubtful and uncertain, and that he is growing worse all the time, instead of improving.

Error of the court is assigned in modifying the defendant's questions to be propounded to the jury for special finding thereon, but we are of the opinion that the modifications were within the pleadings and proof in the case, and that they were not erroneous.

Judgment affirmed.

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

Opinion delivered May 23, 1910.

RAILROADS—TRAVELLER ON TRACK—CONTRIBUTORY NEGLIGENCE.—One who goes upon a railway track in front of a train without looking or listening and is struck by the train and killed is guilty of contributory negligence which will preclude a recovery by him, in the absence of proof that the trainmen were negligent after they had discovered his peril in time to have avoided killing him.

Appeal from White Circuit Court; *Hance N. Hutton,* Judge; affirmed.

J. N. Rachels, for appellant.

Where there is any evidence tending to establish an issue in favor of the party against whom a verdict is directed, it is error to take the case from the jury. 89 Ark. 368. Persons

moving a train through a city must use ordinary care to avoid injuring persons on the track, even though they are trespassers. 108 S. W. 305; *St. Louis, I. M. & S. Ry. Co.* v. *Shaw,* 94 Ark. 15. The deceased was a licensee, and was entitled to protection as such. 94 Fed. 323; 85 Ark. 326; 86 Ark. 183; 30 Am. & Eng. R. Cas. (N. S.) 132; 36 *Id.* 151; 49 *Id.* (O. S.) 468; 10 L. R. A. (N. S.) 486. The defendant was guilty of negligence in not keeping a lookout. 78 Ark. 22; 80 Ark. 535; 83 Ark. 61; 85 Ark. 326; 86 Ark. 183. Deceased was justified in walking upon the track. 24 L. R. A. 531; 43 S. E. 589; 30 Am. & Eng. R. Cas. (N. S.) 132. The trial court erred in directing a verdict for defendant. 86 Ark. 289; 20 S. W. 490; 26 S. W. 20; 20 S. W. 163; 88 Am. Dec. 353; 79 Ark. 137; 85 Ark. 326; 86 Ark. 183.

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews and *James H. Stevenson,* for appellee.

An *ex parte* abstract of the testimony is not sufficient under the rules of this court. 76 Ark. 139. A railway track is not a public highway, and one who uses it as such is a trespasser. 46 Ark. 513; 82 Ark. 267; 83 Ark. 300.

BATTLE, J. This is an action by M. D. Moody, as administrator of W. B. Moody, deceased, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for the injury and death of the latter, caused by the engine of the defendant pushing four cars against him. After the jury impaneled in the case had heard the evidence adduced by the parties, the court instructed them to return a verdict in favor of the defendant, which they did, and plaintiff appealed.

On the 7th of March, 1908, W. B. Moody arrived at Bald Knob, in this State, on board of a train of the defendant on a visit to his son, who resided at that place about a quarter of a mile from the depot. He undertook to walk to his son's residence. On his way lay the main railway and five switches of the defendant. Between what is called the main and passing lines was a pathway on which he, in part, undertook to go to his son's. The train on which he had arrived, and an engine with four cars in front of it, were moving on one or more of these tracks preparing to depart. After the passenger train had passed him, without looking or listening, he stepped on the main line, and soon the engine, pushing four cars in front of

it and moving at the rate of three miles an hour, struck him, inflicting severe injuries. The engine and four cars were in plain view, and there was nothing between him and them to obstruct his view. The switches there were sufficient to put him on his guard against more than one engine. There was no necessity for him to walk upon the railway track; the path between the tracks furnished a safe and sufficient footway for that time and occasion. He was guilty of contributory negligence. There was no evidence that the trainmen actually discovered his peril in time to avoid injuring him. He is not entitled to recover damages. *Tucka* v. *St. Louis, I. M. & S. Ry. Co., ante* p. 190, and cases cited.

Judgment affirmed.

CRAVENS *v.* STATE.

Opinion delivered May 23, 1910.

1. LARCENY—INTENT.—Where one accused of larceny was found to be in possession of the property alleged to have been stolen, claiming to own it, the question of his guilt or innocence will depend upon whether such claim was made in bad faith or not. (Page 324.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—Where a verdict of conviction in a felony case is supported by substantial testimony, it will not be set aside on appeal for want of evidence. (Page 324.)
3. SAME—FUNCTION OF MOTION FOR NEW TRIAL.—Motions for new trial can not be used to bring upon the record matters which should appear in the bill of exceptions. (Page 325.)
4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.—A motion for new trial for newly discovered evidence is addressed to the sound discretion of the court; and where the new evidence is merely cumulative, it will not be held an abuse of discretion to grant it. (Page 325.)
5. TRIAL—ARGUMENT OF ATTORNEY.—The prosecuting attorney in his argument in a felony case said: "I have seen defendants convicted on weaker testimony, and never knew but one to be acquitted on as strong testimony, and that man walked out of this court room a free man, released by a jury, and the people said they did not see how they did it." *Held,* not to be an improper argument. (Page 326.)

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

L. Hunter and *W. W. Bandy,* for appellant.

The verdict is not supported by the evidence. 34 Ark. 632; 70 Ark. 385. It is error for the court to charge the jury on matters outside the record. 72 Ark. 139; 44 Wis. 282; 74 Ark. 210; *Id.* 256. Why should the same rule not be applied to prosecuting attorneys?

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

The remarks of the prosecuting attorney were not prejudicial. Newly discovered evidence which is merely cumulative is no ground for a new trial. 66 Ark. 523; 74 Ark. 377. The acts constituting due diligence must be specifically shown. 66 Ark. 314; 73 Ark. 528. Motions for a new trial on the ground of newly discovered evidence are addressed to the sound discretion of the trial court, and unless that discretion has been abused this court will not interfere. 34 Ark. 659; 41 Ark. 229. It must appear that appellant could not have learned of the additional evidence by the exercise of due diligence. 28 Ark. 121.

HART, J. This case is brought to this court by appeal on the part of the defendant, Deb Cravens, from a judgment of conviction in the Clay Circuit Court for the Eastern District of the offense of grand larceny, charged to have been committed by stealing a cow.

Will Crittenden for the State testified that the defendant, Deb Cravens, came to his house to purchase cattle and hogs, and that, while there, he asked defendant if he knew who had a stray cow. The defendant at first replied that he did not, but after studying a while said that some one had asked him about a stray cow. Crittenden gave defendant as good a description of the cow as he could. After four or five days the defendant came back with the description of the cow just as witness had given it to him on a piece of paper, which was signed by some one. That defendant consulted with him about taking the cow, saying that he had bought her from a man living down near Rector. Witness told defendant that the cow did not belong to him and that he did not know to whom she did belong. That, after some hesitation, the defendant carried the cow away with him. That the cow was what witness called red speckled, and her "other color dirty looking white."

E. P. Longley, for the State, testified that he was guardian for the Byrd children, minors; that among their property inventoried by him was a cow; that he would call the cow a spotted one, there being about as much red as white on her; that the cow was running out; that he inquired about her, and finally heard that the defendant, Deb Cravens, had a cow in his possession answering the description of the cow belonging to his wards; that he went to see Cravens and described the cow to him, when Cravens said: "I guess that cow is in my lot right now. You go look at her; and if she is yours, you can take her." Cravens was busy moving that day, and did not go back with witness. Langley found the cow in Cravens's lot and carried her home. He came up with Cravens, and he helped drive her a part of the way. The cow had been marked and dehorned. She was marked by one of her ears being cut sloping down from the head to the point, and the other sloping up from the head to the point. Witness could not say how much of either part was left. The thick part of the ear was left.

The defendant testified in his own behalf. He said that he had bought the cow from one Maury Keller down in the bottoms, and had driven her along the public highway to his home in town, where he kept her. He said that she jumped into his horse lot and hooked one of his colts, and for that reason he got one of his neighbors to dehorn her; that at the same time another of his neighbors marked her, she being unmarked at the time.

Other witnesses were introduced by the defendant who testified that they were present when he bought the cow. Other witnesses corroborated his statement about the cow being unmarked when he brought her home, and also about the marking and dehorning her.

In rebuttal the State introduced Ed Neely, who testified that defendant, after he was indicted for the larceny of the cow, said that he had done wrong in dehorning and remarking the cow. His brother, who was present, said that he understood the defendant to say the same thing about dehorning and remarking the cow, but that he might have been mistaken. That he and his brother, at the time, were riding in a wagon, which made a great deal of noise, and that defendant was on horseback alongside of the wagon.

The defendant denied this, and said: "I told them I was getting into a little trouble over the cow, and I guessed what the court would hold against me the hardest was for dehorning and marking her, but I thought she was mine then." He further stated that he did not tell them that he had remarked her. The State also adduced evidence tending to show that Maury Kellar was not in the country at the time the defendant claims to have purchased the cow from him. The defendant adduced other testimony which strongly corroborates his testimony, but it is not necessary to abstract it, for the principal contention of the defendant is that the testimony does not support the verdict. That is to say, he contends that the evidence adduced by the State, when considered in its strongest light, did not warrant the jury in finding him guilty of the larceny of the cow. While the evidence for the State is weak, we think it was sufficient to support the verdict. The defendant gave up the cow, and thereby admitted that she was the property of the prosecuting witness; but he claims to have purchased her, and this brings up the question of his good faith in that respect. The contention made by the defendant in this case is very similar to that made in the case of *Douglass* v. *State,* 91 Ark. 492, where a judgment of conviction was affirmed. In that case the court said: "When the stolen property is found in the possession of the accused, and he makes a distinct assertion of title and ownership thereto, it is evidence that he intended to convert the same to his own use, and to deprive the owner thereof. If he makes an explanation of his possession by claiming to be the owner thereof, then the question to be determined is whether such claim of ownership is made honestly and in good faith. If it is made honestly and in good faith, then no matter how mistaken the accused may be, he would not have that felonious intent from which larceny could be inferred. But, on the contrary, if the explanation of the possession and the claim of ownership of the property 'involve a falsely disputed identity or are based on fabricated testimony, then the inference of his guilt is strengthened,' and his complicity in the larceny is sufficiently established."

Counsel for defendant also claim that the cow was over 12 months old when she came into defendant's possession, and that she was not marked or branded. Therefore they urge that

she was not the subject of larceny. This defense is by virtue of section 1898 of Kirby's Digest, which provides that cattle, if over 12 months old, must be marked or branded; otherwise they are not the subject of larceny. It is sufficient answer to this contention to say that the evidence on this point is conflicting, and the jury by their verdict have found against the defendant on this question. As we have already said, even though the State's testimony is weak, we can not invade the province of the jury; and their verdict is binding upon us, if there is substantial evidence to support it.

Again, it is contended by counsel for the defendant that the court erred in not permitting him to introduce certain papers purported to have been executed by Maury Kellar, which would have tended to show that he was in the country at the time defendant claims to have purchased the cow from him. This testimony the defendant claims to have been offered by him after the prosecuting attorney had made his opening argument. We can not consider this alleged assignment of error. The bill of exceptions does not show that such testimony was offered to be introduced by the defendant. It is true that such appears to be the case from the motion for a new trial, but motions for new trials can not be used to bring into the record that which does not otherwise appear of record. It is the office of a bill of exceptions to bring upon the record matters which do not appear upon the judgment roll or record proper, and motions for new trials have never been used for that purpose. *Foohs* v. *Bilby, ante* p. 302; *Cox* v. *Cooley,* 88 Ark. 350. In the latter case the court said: "The motion for new trial can not be used, and has never been used, to incorporate anything into the record or any exceptions to anything done by the court. Its sole use is to assign errors already committed by the court, except for newly discovered evidence as provided in the sixth paragraph of section 6215, Kirby's Digest."

Counsel for the defendant also asks for a reversal because the court refused him a new trial for newly discovered evidence which tended to show that Maury Keller was in the country at the time defendant claimed to have bought the cow from him. This testimony was cumulative, and motions for a new trial for newly discovered evidence are addressed to the sound discretion of the court. We can not say that the court abused

its discretion in refusing to grant defendant's motion for a new trial on this account. *Ward* v. *State,* 85 Ark. 179.

It is also urged that the judgment should be reversed because N. A. Kellar, an uncle of Maury Kellar, was on the jury, which tried the defendant. The fact of his relationship to Maury Kellar did not disqualify him from serving as a juror to try Cravens; and if the defendant believed that Kellar was prejudiced against him, or if for any reason he did not wish him to sit on the jury that tried him, he should have exercised his right to peremptorily challenge him.

In his closing argument to the jury, the prosecuting attorney used the following language:

"I have seen defendants convicted on weaker testimony, and never knew but one to be acquitted on as strong testimony, and that man walked out of this court room a free man, released by a jury, and the people said they did not see how they did it." A majority of the court thinks the judgment should not be reversed on this account.

In the case of *Kansas City So. Ry. Co.* v. *Murphy,* 74 Ark. 253, this question was discussed at length, and most of our former decisions reviewed. In summing up the court said:

"However, a wide range of discretion must be allowed the circuit judges in dealing with the subject, for they can best determine at the time the effect of unwarranted argument; but that discretion is not an arbitrary one, but that sound judicial discretion, the exercise of which is a matter of review." In the interest of ending litigation a wide range must be given to the arguments of counsel; and much must be left to the good sense and sound judgment of the jury. A majority of the court think the remarks of the prosecuting attorney were merely the general expression of an opinion by him as to what would or would not meet the approval of all good citizens. Tested by this rule, the majority believe that no prejudice resulted to the defendant from the remarks of the prosecuting attorney, and his remarks present no ground for reversal.

The writer does not agree with this view. The usual admonition to the jury by the court precludes any one from talking to them about the case, and to do so is a grave contempt of court. It seems to me that the principal reason for giving this admonition is lost if the prosecuting attorney, who is a *quasi*

judicial officer, is permitted to tell the jury of the expressed disapproval by the citizens of the county of the verdict of the jury in another case tried in the same court under a state of facts stated by him to be no stronger than those in the case on trial. I believe that such language calls for a reversal for the same reason that a statement of facts not in evidence by an attorney calls for a reversal. That is to say, that it is a statement of a substantive fact not pertinent to the issues, rather than the general expression of opinion. This applies with especial force in a case like the present one where the testimony relied upon for a conviction is weak and barely sufficient to sustain the verdict.

The judgment is affirmed.

Mr. Justice WOOD concurs in the dissent expressed in the opinion.

HUGHES v. KELLEY.

Opinion delivered May 30, 1910.

1. ACTIONS—STATUTORY LIABILITY—SURVIVORSHIP.—An action against the president of a bank to hold him liable under Kirby's Digest, § 859, for the debts of the bank during the time he was in default in failing to file the annual certificate showing the condition of the bank's affairs as required by Kirby's Digest, § 848, is an action on contract and survives the death of the defendant. (Page 329.)
2. STATUTES—CLERICAL MISPRISION.—The act of February 14, 1891 (Kirby's Digest, § 859), entitled "An act to amend section 980 of Mansfield's Digest," which provides "that section 980 of the Revised Statutes of the State of Arkansas be amended so as to read as follows," should be construed to refer to Mansfield's Digest, and not to the Revised Statutes published in 1838. (Page 330.)
3. CORPORATIONS—ANNUAL STATEMENT—LIABILITY OF OFFICERS.—The liability of the president and secretary of a corporation for neglect to file the annual certificate required by Kirby's Digest, § 859, does not depend upon whether such neglect was intentional or not. (Page 331.)

Appeal from Saline Circuit Court; *W. H. Evans,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellees brought this suit and alleged that they are partners doing business under the firm name of Kelley Brothers.

That in the year 1908, and prior thereto, plaintiffs deposited money in the Saline County Bank, and on September 1, 1908, had in said bank $339.97, and that about that time said bank suspended business, and the assets were placed in the hands of a receiver; that the receiver had since then paid plaintiffs $142.87, leaving a balance due them of $197.10. That said bank was a corporation engaged in the banking business, and that John L. Hughes was the president and John G. Steele, secretary. That said John L. Hughes and John G. Steele, president and secretary, intentionally refused and neglected to file a certificate with the clerk of Saline County, as required by section 848 of Kirby's Digest, showing condition of said bank. That John L. Hughes died about September 1, 1908. and that George Hughes qualified as executor of his estate. That on the 13th of August, 1909, plaintiffs made out and presented their demand against said estate to George Hughes, the executor, for allowance, and that he refused either to allow or disallow said claim. And prayed for judgment for $197.10.

There was a demurrer, on the ground that "if any action existed against John L. Hughes, it did not survive his death." The demurrer was overruled. Then an answer was filed, denying the allegations of the complaint, except the death of John L. Hughes, which was admitted. The answer also set up that the alleged cause of action would not survive the death of John L. Hughes.

The court directed a verdict in favor of appellees for $197.10. From a judgment in favor of appellees for that sum this appeal has been duly prosecuted.

Mehaffy & Williams, for appellant.

The cause of action did not survive the death of Hughes. Blackstone's Comm., vol. 2, book 3, p. 302; 17 L. R. A. (N. S.) 570; 15 *Id.* 1003; 14 *Id.* 893. The cause of action for default by wrongful act does not survive the death of the wrongdoer. 35 S. W. 1062; 18 S. W. 578. An action against trustees for failure to make and file an annual report does not survive the death of the defendant. 96 N. Y. 93. Such cause of action does not survive against the executor of a defaulting party. 80 Fed. 588; 19 Pick. 47; 45 Vt. 566; 40 Am. R. 146; 42 Am. R. 14; 5 Hun 209; 23 N. E. 296; 87 N. E. 860; 54 Ark. 358;

84 Ark. 617; 26 Fed. 737; 51 N. H. 71; 70 Md. 319; 19 N. Y. 252; 61 N. E. 221; 29 S. W. 370; 23 Wis. 400; 50 La. Ann. 477; 111 Fed. 708; 151 U. S. 473; 28 S. E. 662; 46 S. W. 63; 74 N. W. 797; 75 S. W. 868; 23 So. 100.

W. D. Brouse and *D. M. Cloud,* for appellee.

The cause of action did survive. 68 Ark. 433; 78 Ark. 517; 90 Ark. 51. The failure to file the statement is presumed to be wilful. 114 Mich. 64.

WOOD, J., (after stating the facts). 1. The principal question is, does the cause of action arising under section 859 of Kirby's Digest survive? That section is as follows:

"If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action, founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

Section 848 requires the president and secretary of certain corporations to make an annual certificate showing the condition of the affairs of such corporations, etc. In view of the above statute the president of a banking corporation when he accepts the office and enters upon his duties, impliedly undertakes, if he neglects or refuses to make the annual statement, to pay all debts of the corporation contracted during the period of such neglect or refusal. The law raises the promise on his part to the creditors of the corporation that he will pay the debts of the corporation to them contracted during the period of his neglect or refusal to comply with the statute.

Mr. Blackstone says: "Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." 2 Cooley's Blackstone, Book III, p. 158; see also p. 157.

Mr. Bishop states the principle thus: "The law by placing its command in whatever form upon one to do a thing for the benefit of another, or the State, creates the promise from the former to the latter to do it." Bish., Cont. (2 ed.), § § 184, 204, 205.

This court, in *Nebraska National Bank* v. *Walsh*, 68 Ark. 433, has heretofore held that the liability created under the above statute is not in the nature of a penalty, but of a contractual obligation. In that case we said: "Having reached the conclusion that this is a statutory liability, and not a penalty, the statute of limitations would be that applicable to all actions founded upon any contract of liability, expressed or implied not in writing; for, before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration." While the precise question here involved was not before the court in the above case, yet the principle was the same, and it must follow from the reasoning of that case that the rule of survivor is that applicable to obligations in the nature of a contract, and not to those imposed as a penalty. See also *Huntington* v. *Attrill*, 146 U. S. 657; *Arkansas Stables* v. *Samstag*, 78 Ark. 517; *Jones* v. *Harris*, 90 Ark. 51. To be sure, in jurisdictions where liabilities of this kind are held to be penalties, the rule is different. Such are the cases cited in the brief of learned counsel for appellant. The liability created by this statute is in the nature of an ordinary contract, *indebitatus*, for the amounts due creditors of the bank during the period of dereliction of its president.

2. There is no merit in the contention that the act of February 14, 1891 (Acts of 1891, p. 12), did not amend the former law upon the same subject as contained in section 980 of Mansfield's Digest. True, the Legislature of 1901 designated section 980 of Mansfield's Digest as "section 980 of the Revised Statutes." But it is obvious, when the whole act and its title is examined, that the term "Revised Statutes" meant the statutes as revised by the Digester, Judge Mansfield. For the act was an amendment of a prior law on the same subject. That law was contained in section 980 of Mansfield's Digest. There was no such section as 980 in what is technically known, among lawyers, as the "Revised Statutes," revised under the authority of an act approved October 6, 1836, and adopted at the October session of the General Assembly of 1837 and supervised and rearranged by Albert Pike under authority of law and finally published in book form in 1838. There was, however, a section designated 980 in Mansfield's Digest, and that section had reference to the subject-matter that the Legislature of 1891

had in mind when it passed the act of February 14, 1891. The title of this latter act is: "An act to amend section 980 of Mansfield's Digest." This with the subject-matter shows plainly that the Legislature meant to amend section 980 of Mansfield's Digest, or section 980 of the statutes as revised by Mansfield. Designating the section as "Revised Statutes" was an obvious clerical misprision.

3. There was no prejudicial error therefore in the admission of testimony tending to prove that John L. Hughes, the president of the bank, intentionally neglected or refused to make the annual report. For, under the law, it was wholly immaterial whether the delinquency was intentional or not.

The judgment is affirmed.

PEKIN STAVE COMPANY v. WATTS.

Opinion delivered June 6, 1910.

APPEAL AND ERROR—TIME FOR FILING BILL OF EXCEPTIONS.—Where time is allowed for filing a bill of exceptions, the bill should not only be signed within time, but should be filed with the clerk within the time so allowed.

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

J. B. Baker, for appellant.

Samuel M. Casey, for appellee.

PER CURIAM. This is an action instituted before a justice of the peace to recover a sum of money, within the jurisdiction of that court, alleged to be due on account for the price of a lot of staves and cord-bolts. On appeal to the circuit court, plaintiff recovered judgment for a portion of his demand, and the defendant appealed to this court.

The motion for new trial was overruled, and an order was made by the court granting defendant ninety days from that date within which to file his bill of exceptions. The bill of exceptions was signed by the judge within the time allowed, but was not filed with the clerk until after the expiration of that time.

Where time is allowed by the court, the bill of exceptions must not only be signed by the judge, but must be filed with the clerk and become a part of the record, before the expiration of the time allowed; otherwise it does not become a part of the record at all.

There is nothing before this court for review, as the exceptions were not properly preserved.

Judgment affirmed.

PEARSON v. GOODWYN.

Opinion delivered June 6, 1910.

PUBLIC LANDS—TITLE OF WIDOW OF DECEASED DONEE.—Where a donee of land forfeited for taxes died before the time to submit final proof, and his widow made final proof and took title in herself, under Kirby's Digest, § 4832, she became entitled in her own right, and the property at her death would descend to her heirs.

Appeal from Lee Chancery Court; *C. F. Greenlee,* Special Chancellor; affirmed.

Daggett & Daggett, for appellant.

Citing 87 Ark. 490; 15 Ark. 555; Kirby's Dig., § 4832; 76 Ark. 443.

H. F. Roleson, for appellee.

The judgment should be affirmed. Kirby's Dig., § 4832; 121 S. W. 725.

Daggett & Daggett, in reply.

Title to the soil does not vest in the settler before the conditions have been fully performed. 101 U. S. 503.

BATTLE, J. On the 24th day of June, 1892, the State of Arkansas donated to James P. Pearson certain lands. On the 27th day of July, 1895, he died intestate, leaving Francis Pearson, his widow, and Sherman Pearson, his only heir, him surviving. On the 30th day of July, 1895, his widow made proof of the performance of the conditions of the donation as required by the statutes, and the Commissioner of State Lands conveyed the land to her. She married William Goodwyn, and died intestate on the 23d day of February, 1898, leaving Sherman Pearson and Joe Goodwyn her only heirs surviving her.

The only question in the case presented to us for decision is, was the widow intitled to the lands donated on the death of her husband? The circuit court decided that she was.

Section 4832 of Kirby's Digest provides: "In case the donee should die before the time herein required to submit final proof of the right to perfect, the same shall extend first to the widow of the donee, and, if she is dead, then to the children of such donee, and, should they be minors, their duly appointed guardian or administrator of the estate of the deceased donee may make such final proof for the benefit of such minor heirs, and, should there be neither widow nor children surviving such donee, such right shall in such case descend to the father of the donee, and, if he be dead, then to the mother of such donee; and, if she be dead, then to the brothers and sisters of the deceased donee, any adult of which shall be competent to make final proof," etc.

Section 4819 provides that the proof required by law shall be filed in the office of the Commissioner of State Lands within sixty days from the expiration of three years from the date of actual settlement. Within that time and after the death of the donee his widow made the final proof in this case and was entitled to a deed to the land from the State in her own right and as her individual property. *McCracken* v. *Sisk,* 91 Ark. 452.

Judgment affirmed.

MERCANTILE TRUST COMPANY *v.* ADAMS.

Opinion delivered June 6, 1910.

1. WILLS—ESTATE CONVEYED.—At common law, a devise of land to A upon condition that it should not be disposed of by her during her lifetime, and, if she dies without heirs of her body, then the property should go to her sister, creates an estate tail by construction. (Page 339.)
2. WILLS—ESTATE UPON CONDITION—WHO MAY ENTER.—If an estate be devised upon condition subsequent, no one except the heirs of the devisor can take advantage of a breach of such condition. (Page 340.)
3. WILLS—FEE TAIL—EFFECT UNDER STATUTE.—Under Kirby's Digest, § 735, where a person becomes seized in fee tail of any land by virtue of a devise, the land vests in such person for his natural life only with remainder in fee simple in his children. (Page 340.)

4. STATUTE—CONSTRUCTION.—Kirby's Digest, § 738, providing that "this act (referring to § § 731-7, *Id.*), shall not be construed so as to embrace last wills and testaments," means that such sections shall not be interpreted to include last wills and testaments in any section where they are not mentioned. (Page 340.)

5. LIFE ESTATE—FORFEITURE FOR TAXES—EFFECT.—Under Kirby's Digest, § 7132, providing that if any person seized of lands for life shall neglect to pay the taxes thereon so long that such lands shall be sold for the taxes, and shall not redeem the same according to law he shall forfeit his estate to the remainderman, etc., *held,* that a life tenant does not forfeit her estate where she procures another to purchase the land at tax sale for her benefit. (Page 341.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Wills should be so construed as to carry out the intention of the testator. 75 Ark. 19. The first taker under the will took only a life estate, and the fee passes to the person who would take as heir of the first taker. 44 Ark. 458; 58 Ark. 403; 67 Ark. 517; 72 Ark. 336; 49 Ark. 125. Mrs. Bard's life estate was forfeited by the tax sale to Mercer. Kirby's Dig., § 7132; 59 Ark. 364; 80 Ark. 583.

Bradshaw, Rhoton & Helm, for appellees.

Section 735, Kirby's Digest, does not apply to wills. *Id.* § 738. Courts will, on discovering that they have rendered an opinion in conflict with a valid statute, correct the error. 59 Ark. 326; 33 Ark. 517; 35 Ark. 395; 37 Ark. 370. Alice Bard took the estate upon conditions subsequent. Tied. on Real Prop., § § 451, 272; 1 Warv. on Ven. 451; 2 Ping., Real Prop. 739, 740. When the conditions are subsequent, the estate vests subject to be defeated. 26 Ark. 617; 3 Ark. 252; 50 Ark. 141. The word "heirs" is not necessary to convey a fee simple. Kirby's Dig., § 733. The gift is absolute, and the limitation over is void. 81 Ark. 480; 3 Ark. 187; 82 Ark. 209; Underhill on Wills, vol. 2, § 689; Page on Wills, § 684; 72 Ark. 296. The will did not create an estate tail. 51 Ark. 61; 52 Ark. 113; 61 Ark. 366; 58 Ark. 306; 67 Ark. 521.

BATTLE, J. We adopt appellant's abstract of the pleadings in this case, which is as follows:

"Howard Adams, as trustee of the People's Savings Bank, commenced suit on March 18, 1908, in the Pulaski Chancery Court against W. D. Bard, Alice R. Bard, his wife, R. W. Porter, trustee for the Citizens' Investment & Security Company, as agents, P. H. Fullinwider and ——— Smith, seeking to foreclose a mortgage executed by W. D. Bard and Alice R. Bard, his wife, to Howard Adams, as trustee, on the 21st of April, 1903. The property is described as lot 6 and the south half of lot 5, in block 23, city of Little Rock. The amount of the indebtedness was $2,300, due five years after date, with interest at the rate of 8 per cent. per annum. Service was had on the defendants.

"On April 1, 1908, the Mercantile Trust Company, as curator of the estate of William D. Bard, Jr., Mary Frances Bard, and Nancy Nichol Bard, children of W. D. and Alice R. Bard, filed its intervention and cross complaint in the cause against Howard Adams, as trustee for People's Savings Bank, W. D. Bard, Alice R. Bard and others, alleging that said William D. Bard, Jr., Mary Frances Bard and Nancy Nichol Bard were minors under the age of fourteen years, and heirs of the body of Alice R. Bard; that said minors were the owners in fee of lot 6 and the south half of lot 5 aforesaid, and that their mother, Alice R. Bard, was at one time the owner of a life estate therein; that said minors became seized of the fee by virtue of the provisions of the will of Elizabeth A. Crisman, which was executed by her on the 6th of August, 1896, and duly admitted to probate on the 3d day of December, 1896; that said will, among other things, provided as follows:

"'First. I give and bequeath to Alice R. Bard my residence in Little Rock, lot number 6 and the south half of lot number 5, in block 23, upon the following conditions: Said lots are not to be disposed of by the said Alice during her lifetime; and if she dies without heirs of her body, then said property shall go to my sister, Alice B Reid, if living, and, if dead, then to her two daughters, Maude and Alice; and I bequeath to said Alice R. Bard my piano, and if she die without heirs of her body said piano shall go to the said Maude and Alice Reid.'

"That on the 21st day of April, 1903, Alice R. Bard and her husband, W. D. Bard, executed a deed of trust to Howard

Adams, as trustee, wherein they mortgaged only the life estate of the said Alice R. Bard in said property; that on the 25th day of May, 1904, Alice R. Bard and her husband executed a deed of trust to R. W. Porter, as trustee for the Citizens' Investment & Security Company for $500, and again on September 6, 1906, they executed a deed of trust to Porter, as trustee, for $318; that at the time of the execution of the deeds of trust Alice R. Bard was in possession of the property, collecting the rents thereon, and was at the time of the filing of the intervention herein in possession of the same; that she suffered the property to forfeit for the nonpayment of taxes for the year 1904, and on the 20th of June, 1907, the property was sold by the clerk of Pulaski County to A. J. Mercer, who now holds a tax deed for the same; that Mercer was an employee of the People's Savings Bank, and through an agreement between him and the People's Savings Bank the property was permitted to forfeit for taxes and to be bought in by him in his own name, but that he was in truth acting as agent and in the interest of the People's Savings Bank; that the bank and Mercer intended thereby to acquire the fee simple to the lots and to hold the title to the same and thereby to defraud William D. Bard, Jr., Mary Frances Bard and Nancy Nichol Bard of their interest in the lots; that by reason of the forfeiture for the taxes of 1904, the sale and the deed of the clerk to Mercer, Alice R. Bard had forfeited her life estate to the property, and that the minors were then entitled to the immediate possession of the property and to redeem from the tax sale." Prayer "that the intervention be taken as a cross complaint against all of the plaintiffs and defendants; that the will of Elizabeth S. Crisman be construed, and that Alice R. Bard be decreed to have taken thereunder a life estate only, with a remainder in fee to the minor heirs; that the life estate be decreed to be forfeited and terminated by reason of the tax forfeiture and sale, and the minors be given immediate possession of the property and be permitted to redeem from the tax sale; that the deed to Mercer from the clerk of Pulaski County be set aside, and that the deeds of trust from Alice R. Bard and her husband to Howard Adams, as trustee, and to R. W. Porter, as trustee, be declared to be void as liens upon the property, and that they be removed as clouds upon the title," etc.

The appearance of all parties to this intervention and cross complaint was duly entered or service of summons had in the manner required by law.

Howard Adams, as trustee, demurred to this intervention and cross-bill upon two grounds: First, because he alleged that there was a defect of parties defendant made by the intervention, in that the minors had no interest whatever in the controversy. Second, because the intervention did not state facts sufficient to constitute a cause of action in favor of the Mercantile Trust Company as curator of the estate of the minors, in that the minors are shown by the intervention to have no interest whatever in the land in controversy under the will of Elizabeth A. Crisman.

Ruling upon the demurrer was reserved by the chancellor until final decision of the cause.

On the 13th of November, 1909, Howard Adams, as trustee, filed an answer to the intervention and cross complaint of the Mercantile Trust Company as curator, by which he denied that the minors were the owners in fee of the property, and that the minors became vested with any estate by virtue of the provisions of the will of Elizabeth A. Crisman; he admitted that Alice R. Bard was in possession of the property at the time of the making of the deeds of trust, and that Mercer held a tax deed to the property. He denied that the property was permitted to forfeit for taxes and to be bought in by Mercer by reason of the alleged agreement between him and the People's Savings Bank. He denied that by reason of the forfeiture of the property for taxes Alice R. Bard had forfeited her life estate in the property, and that the minors were entitled to the immediate possession thereof. He alleged that Alice R. Bard was not able to pay the taxes on the land, and suffered the same to become delinquent, and that the lands were about to be sold for taxes; that she asked the plaintiff to purchase the land at tax sale for her use and benefit in order to prevent the land from getting into alien hands; that said bank agreed to and did become the purchaser of the lands at tax sale, and directed that the deed be made to Mercer, its agent and representative; that Mercer holds the tax deed for the use and benefit of the plaintiff and Alice R. Bard; that the purchase at the tax

sale was in fact a payment of the taxes by Alice R. Bard, and hence no forfeiture occurred.

On November 13, 1909, the Mercantile Trust Company filed an amendment to its intervention and cross complaint, by which it charged that it was provided in the will of Elizabeth A. Crisman that "said lot is not to be sold or disposed of by the said Alice during her lifetime," and that Alice R. Bard had no power to sell or to mortgage the same to Howard Adams, as trustee, or to any one else, and that the mortgagees acquired no right or interest in any estate which Alice R. Bard had in or to the property, and were not entitled to foreclose the mortgage.

On September 29, 1909, Howard Adams, as trustee, filed an amendment to his answer to the intervention and cross-complaint in which he set up that the rents and proceeds from the property were being collected by the Mercantile Trust Company as curator upon the theory that, if the court should hold that the plaintiff had no right, title or interest in the lands, the moneys so received should be paid to the minors; but alleged that said minors had no interest in said fund, and that the rents should be appropriated towards the paying of insurance and taxes upon the place; that the rents in truth belonged to the defendant Alice R. Bard, who executed the note sued upon, and that she had not sufficient security to pay the mortgage. He therefore prayed a garnishment against the Mercantile Trust Company for the sum of money now held by it, which he charged was more than $200. He propounded to the Mercantile Trust Company the following interrogatory:

"What sum do you hold in your hands as the proceeds from the collection of the rents and profits from the property in controversy?"

Elizabeth A. Crisman by a will executed by her on the 6th day of August, 1896, and duly admitted to probate on the 3d day of December, 1896, devised as follows: First. I give and bequeath to Alice R. Bard my residence in Little Rock, lot number 6 and the south half of lot number 5, in block 23, upon the following conditions: Said lots are not to be disposed of by the said Alice during her lifetime; and if she dies without heirs of her body, then said property shall go to my sister,

Alice B. Reid, if living, and, if dead, then to her two daughters, Maude and Alice; and I bequeath to Alice R. Bard my piano, and, if she die without heirs of her body, said piano shall go to the said Maude and Alice Reid."

The land was forfeited for the nonpayment of the taxes of 1904, and was thereafter conveyed to A. J. Mercer; and he continuously paid the taxes on the property since then. We think the preponderance of the evidence shows that he purchased the property and paid the taxes on it for Mrs. Bard.

"On November 13, 1909, the court below heard the case and entered a decree overruling the demurrer of the plaintiffs to the intervention and cross-complaint, and finding that Alice R. Bard had a life estate in the lands described, with the fee in her children and such children as might thereafter be born to her; also holding that the tax deed acquired by A. J. Mercer was not in conflict with the title of Alice R. Bard or her minor children, but that the acquisition of the tax deed by him was in effect a payment of the taxes by Alice R. Bard. Thereupon the court further decreed that the plaintiff have and recover of the defendants W. D. and Alice R. Bard the sum of $3,514.80, and that said sum be a lien upon the property described, prior and paramount to any right, title or interest of W. D. or Alice R. Bard. Ordered a sale of the interest of W. D. and Alice R. Bard in the property for the purpose of paying the debt. From this decree the Mercantile Trust Company, as curator, has appealed."

The effect of the will in question is a devise to Alice R. Bard for life and an estate tail to the heirs of her body. There was no direct limitation to the heirs of Alice R. Bard, but it is obvious that the testatrix intended that the heirs of her body should take it at her death, for the testatrix devised it to her sister, Alice B. Reid, if living, and if dead, then to her two daughters, Maude and Alice, in case she has no such heirs, and only in that contingency. The heirs of the body of Alice R. Bard would take under the statute *de donis conditionalibus* an estate tail by construction. *Hayward* v. *Howe,* 12 Gray 49; *Allen* v. *Trustees,* 102 Mass. 262; 1 Washburn on Real Property (6 ed.), § 192; Tiedeman on Real Property (3 ed.), § § 39, 41, and cases cited.

Appellees contend that the lots in controversy were devised to Alice R. Bard in fee simple, and that any limitation in the will of that estate was void, and cite *Bernstein* v. *Bramble,* 81 Ark. 480, to support this contention. Such construction would make it necessary to strike out more than one-half of the sentence by which the devise was made, that is to say, the words: "Upon the following conditions: Said lots are not to be disposed of by the said Alice during her lifetime; and if she dies without heirs of her body, then said property shall go to my sister, Alice B. Reid, if living, and, if dead, then to her two daughters, Maude and Alice," and leave the idea intended to be conveyed unexpressed. The whole sentence expresses one consistent thought, and every part of it is necessary to do so, and must be so construed, and, construed in this manner, a life estate, and no other, was devised to Alice R. Bard. *Hayward* v. *Howe,* 12 Gray 49. *Bernstein* v. *Bramble, supra,* does not support the contention of appellees.

If the estate devised to Alice R. Bard be an estate upon condition, no one except the heirs of the testatrix can take advantage of the condition, it being subsequent. 2 Washburn on Real Property (6 ed.), § 954; 4 Kent's Commentaries (12 ed.), § 122. And they have not done so.

Under the statutes of this State the lots in question vested in Alice R. Bard for life and in her children, living at her death, in remainder in fee simple. Kirby's Digest, § 735.

But appellees say the statute cited does not embrace wills; for section 738 of the same digest says: "This act shall not be construed so as to embrace last will and testaments."

Sections 735, 738 and 739 of Kirby's Digest were taken from the Revised Statutes, and are sections 5, 8 and 9 of chapter 31 of those statutes. Sections 5 of chapter 31 and 735 of Kirby's Digest provide: "In cases when by common law any person may hereafter become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee simple absolutely to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance."

Sections 8 of chapter 31 and 738 of Kirby's Digest provide: "This act shall not be construed so as to embrace last will and testaments."

Sections 9 of chapter 31 and 739 of Kirby's Digest provide: "Every interest in real estate, granted or devised to two or more persons (other than executors and trustees as such) shall be in tenancy in common, unless expressly declared in such grant or devise to be a joint tenancy."

In two of these sections 5 and 735, and 9 and 739, wills and testaments are expressly embraced by the use of the word "devise." Do 9 and 739 mean to say they shall not be included in those sections? They do not. The language of it is, this act (chapter 31 of Revised Statutes) "shall not be construed so as to embrace last wills and testaments." "Shall not be construed." Dr. Lieber, in his work on Hermeneutics, says: "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions which are in the spirit, though not within the letter, of the text." Lieber's Hermeneutics (Hammond's ed.), 44.

Black on Interpretation of Laws says: "Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, when that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law." (Page 1, § 2). See also *Terre Haute & Logansport Rd. Co.* v. *Erdel,* 158 Ind. 344, 347. Many other authorities to the same effect might be added, but need not be.

Section 8 of the Revised Statutes (738 of Kirby's Digest) means that chapter 31 of Revised Statutes shall not be interpreted to include last wills and testaments in any section where they are not mentioned.

Appellants contend that Mrs. Bard's life estate was forfeited by the sale of the lots in controversy for taxes, under section 7132 of Kirby's Digest, which provides:

"If any person who shall be seized of lands for life, or in right of his wife, shall neglect to pay the taxes thereon so long that such lands shall be sold for the payment of the taxes, and

shall not, within one year after such sale, redeem the same according to law, such person shall forfeit to the person or persons next entitled to such land in remainder or reversion all the estate which he or she, so neglecting as aforesaid, may have in said lands, and the remainderman or reversioner may redeem the lands in the same manner that other lands may be redeemed after being sold for taxes; and, moreover, the person so neglecting as aforesaid shall be liable in an action to the next entitled to the estate for all damages such person may have sustained by such neglect."

The preponderance of the evidence shows that Mercer purchased the lots for Mrs. Bard. That was a payment of the taxes for which they were sold; and no forfeiture thereby accrued. *Swan* v. *Rainey*, 59 Ark. 364.

Decree affirmed.

SHEMWELL v. FINLEY.

Opinion delivered June 13, 1910.

1. APPEAL AND ERROR—HARMLESS ERROR.—Where, on appeal *de novo* from the county court, the circuit court affirmed the judgment of the former court, instead of entering judgment for the appellee, the appellant could not complain. (Page 343.)
2. FERRIES—POWER OF COUNTY COURT TO DISCONTINUE LICENSE.—The county court, when the public welfare requires it, may discontinue a ferry franchise by refusing the annual license for its further exercise. (Page 344.)

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

G. B. Oliver, for appellant.

F. G. Taylor; for appellee.

The circuit court tried the case *de novo*. 53 S. W. 107. It is for the county court to determine the place for the establishment of a ferry that will best promote the public convenience. 41 Ark. 209; 20 Ark. 573. The court shall also determine what tax shall be paid for the privilege, and what toll shall be paid by the public for the use of said ferry. Kirby's Dig., § § 3562, 3564 and 3565. The court could grant license to only one of the parties applying therefor. 126 S. W. 717.

BATTLE, J. In December, 1908, William Finley filed in the Clay County Court a petition, in which he asked the court to grant him the privilege of operating a ferry across Current River at a certain place where he owned both banks on opposite sides of the river in that county. He stated that C. R. Shemwell had at one time procured license to operate a ferry across Current River about one mile north of where petitioner's ferry is, and has annoyed him with lawsuits, contesting his right to maintain a ferry when and where he has endeavored to do so, and now claims that he "has no right to have a ferry at the place where there has been a regular ferry for many years and before defendant ever undertook to establish a ferry." He made Shemwell a party defendant to his petition, and asked that the court grant to him the aforesaid privilege and deny to the defendant the privilege of maintaining a ferry within one mile of the ferry sought by petitioner.

Plaintiff gave notice to the defendant of the filing of his petition, and that he would object to the court granting him (Shemwell) license to operate a ferry across Current River within one mile of the place where he was asking to establish a ferry. In response to this notice the defendant appeared and answered. Both parties asked for license to operate a ferry across Current River at places within a distance of three-fourths of a mile. Shemwell had previously established a ferry in such distance. Under the statute more than one ferry could not be established within that distance, it not being at or near a city or town (Kirby's Digest, § 3575). The question was to whom should the license be granted. Each adduced evidence to prove that his ferry would better accommodate and conserve the interest and convenience of the public than the other. The county court granted license to the petitioner, and denied it to the defendant, and Shemwell appealed to the circuit court for the Eastern District of Clay County, and the cause was transferred to the Greene Circuit Court.

In the circuit court the issues were tried *de novo*; evidence was adduced by both parties; and the circuit court rendered judgment in favor of the petitioner, and the defendant appealed to this court.

Appellant complains of the judgment of the circuit court, It affirmed the judgment of the county court. The form of

the judgment is improper. But the circuit court heard the cause *de novo*, and reached the same conclusion the county court did, and in doing so gave great weight to the decision and judgment of the county court. The obvious intent of the circuit court was to render the same judgment the county court did, and did so by affirming it. This was not prejudicial to the defendant.

Did the Clay County Court have the right to discontinue the ferry of appellant? In *Bell* v. *Clegg*, 25 Ark. 26, 29, Mr. Justice COMPTON, speaking for the court, said: "In *Lindsay* v. *Lindley*, 20 Ark. 573, it was decided that where two public ferries had been established at the same place, the question of public convenience was no longer an open one between the owners of the respective ferries, subject to investigation on the occasion of each annual grant of license therefor; or, in other words, that the one owner could not afterwards insist that the ferry of the other should be discontinued because the public convenience did not require both. But in that case the court distinctly waived any expression of opinion as to whether the county court, from considerations affecting the general good alone, had the power, under the statute, to discontinue one or both of the ferries, no such question being then before the court. The question, however, is now presented, and we do not hesitate to hold that the county court, when the public welfare requires it, undoubtedly has the power to discontinue a ferry franchise, by refusing the annual license for its further exercise." *Finley* v. *Shemwell*, 94 Ark. 190.

The question was presented to the county court in this case. The issue was made, and both parties adduced evidence to sustain his ferry. The testimony was conflicting, and opinions differed. In the circuit court evidence was adduced by the parties with the same results. We think the evidence was sufficient to sustain the judgments of both courts.

Judgment affirmed.

McCOY v. BOARD OF DIRECTORS OF PLUM BAYOU LEVEE DISTRICT.

Opinion delivered June 13, 1910.

1. WATERS—RIGHT TO DEFEND AGAINST FLOOD WATERS.—The flood waters of a river are a common enemy which any landowner may defend against without incurring liability for damages unless injury is unnecessarily inflicted upon another which by reasonable effort and expense could be avoided. (Page 349.)
2. LEVEES—LIABILITY FOR CAUSING OVERFLOW OF ADJACENT LAND.—A levee district may rightfully build its levee across depressions, swales and low places so as to prevent the escape of flood water from a river into surrounding low lands sought to be protected, though it has the effect of raising the water higher on lands between the levee and river, without becoming liable to the owner of such intervening lands so damaged. (Page 351.)
3. SAME—DAMAGE TO PRIVATE PROPERTY—LIABILITY.—A levee district, which builds a levee so as to protect lands from overflow of the waters of a stream at floodtime, will not, under Const. 1874, art. 2, § 22, providing that private property shall not be "damaged for public use without just compensation therefor," become liable for injuries to land lying between the levee and the river resulting from the flood water being raised higher between the levee and the river than before the levee was constructed. (Page 352.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace*, Judge; affirmed.

Crawford & Hooker and *Austin & Danaher*, for appellant.

Private property shall not be taken, appropriated or *damaged* for public use without just compensation therefor. Const., art. 2, § 22. The construction of the levee was virtually a condemnation of appellant's land to public use. 13 Ark. 198; 80 U. S. 166; 188 U. S. 445. River water in times of ordinary floods is not surface water. 25 L. R. A. 527; 44 O. St. 279; 8 Barn. & C. 355. It is still a part of the river. 87 Ga. 246; 13 L. R. A. 397; 3 Bligh (N. S.) 414; 12 Gratt. 322; 65 Am. Dec. 247. Appellee had no right to erect a levee that would injure appellant. 55 Mo. 462; 84 Ia. 107; 15 L. R. A. 630; 48 N. H. 9; 97 Am. Dec. 561; 2 Am. R. 165; 135 N. Y. 116; 17 L. R. A. 426; 38 Minn. 212; 59 Barb. 413; 66 Hun 569; *Id.* 835; 7 Lea 388; 16 Ore. 165.

W. F. Coleman, for appellee.

The damages to appellant's land are too remote to constitute a cause of action. 73 Cal. 125; 2 Am. St. R. 775; 8 Barn.

& C. 355; 62 Ia. 326; 99 Ind. 205; 73 Ind. 283; 11 La. Ann. 165; 34 *Id.* 494; 11 *Id.* 370; 90 Pa. St. 85; 35 Am. R. 632. There is no common-law liability in such cases. 39 Ark. 472; 66 Ark. 271; 27 L. R. A. 762.

McCULLOCH, C. J. Plum Bayou Levee District was created by an act of the General Assembly in 1905 for the purpose of constructing a levee along or near the east bank of the Arkansas River, in the counties of Pulaski, Lonoke and Jefferson, to protect the lands embraced in the specified territory from inundation of waters of that river. The levee constructed pursuant to the creation of the district is 42 miles long, commencing in Pulaski County about the head of Plum Bayou, and extending into Jefferson County, within two miles and a half of what is known as Rob Roy bridge. The levee is a solid, continuous embankment, of sufficient height and width to prevent the spread of waters overflowing from the Arkansas River. It protects from overflow about 270,000 acres of fertile land, a considerable portion of which is improved and in a high state of cultivation. The general direction of the river course in front of the levee is south, but there is a wide reverse bend which changes the local course east and west, and the levee is constructed across the bend instead of following it. Plaintiff, Mrs. Sallie E. McCoy, owns land embracing three hundred acres in cultivation, fronting on the east bank of the Arkansas River, and situated at the lower end of the reverse bend and in front of the levee—that is to say, between the river and the levee.

After the levee was constructed, and after the overflow of 1908, plaintiff instituted this action against Plum Bayou Levee District to recover damages for alleged injuries done to her land by reason of the construction of the levee. She alleged in the complaint that the levee was constructed across two streams, known as Gar Slough and Plum Bayou, and stopped up said streams so that no water can pass from them into the Arkansas River, or from the river into those streams; that said streams are well-defined, natural streams, with clearly marked banks and beds, and carry well-defined and constant flow of water; that, until the levee was constructed by defendant, when the river reached flood stage Gar Slough and Plum Bayou would drain the water from the Arkansas River, thus relieving the river from a vast volume of water at flood stage at points above plain-

tiff's land, thereby relieving the main channel of the river to such an extent that, even in the highest flood ever known, plaintiff's land was secure from overflow; that after the construction of the levee, the natural outlet of flood water through Gar Slough and Plum Bayou being obstructed as aforesaid, so that all the water coming down the Arkansas River was confined to the main channel of the river and the lands lying between the river and the levee, it thereby caused the water to rise at least six feet higher on those lands than it would have risen if the escape of water through Gar Slough and Plum Bayou had not been obstructed; that, on account of said raising of the waters at flood stage, the lands of plaintiff during the overflow of 1908 were permanently damaged, and the crops thereon destroyed.

Defendant in its answer denied that Gar Slough is a well-defined, natural stream with clearly marked banks and beds, or that it carries a well-defined and constant flow of water, but that said slough is a depression or swag about one and one-fourth miles in width, about 15 or 16 miles north of plaintiff's land, and carries no water except in wet seasons, and has no natural flow or outlet except the common territory comprising the Plum Bayou Levee District; that, since the construction of the levee, said slough is in as high a state of cultivation as is common to the remaining vast territory situated behind the levee. Defendant admitted that Plum Bayou is a natural stream with natural banks, and in most seasons contains water, said stream having its source many miles north of plaintiff's land and running generally in a southeasterly direction from the Plum Bayou Levee District community into the Arkansas River several miles below the end of the levee. It denied that it has constructed its levee across Plum Bayou, but that the levee at the point mentioned in the complaint is constructed about 500 feet west of Plum Bayou, across a cut-off extending from the Arkansas River to said bayou, which cut-off, prior to the construction of the levee, contained water only in very wet weather, and the bayou, which is a sluggish stream, was unable to hold within its banks the increasing volume of water, thereby causing water from the bayou to overflow into and through the cut-off into the Arkansas River. Said cut-off is situated about four miles north of plaintiff's lands. It denied that when the river reached

a flood stage the said two streams, or either of them, was sufficient for and did in fact drain the water from the Arkansas River, or that such so-called streams were the natural drainage for water from the Arkansas River, or that they or either of them relieved the Arkansas River at flood stage from the vast volume of water at points above plaintiff's land, thereby so relieving the main channel of the river as to secure the plaintiff's land from overflow, as alleged, or that the construction of the levee, as alleged, has so stopped up and cut off the flood waters of the river as to cause the water in the river to rise not less than six feet higher than it would have risen had the levee not stopped up and cut off the said so-called streams.

There was another issue in the case, as to the damage to plaintiff's land actually used in the construction of the levee, but that was settled by the verdict of the jury awarding a certain amount to plaintiff, and it passed out of the case, so far as concerns its consideration here. The verdict was in favor of defendant on the issue of damage for raising the flood water on the land.

The testimony was conflicting, but there was sufficient to sustain defendant's contention as to the situation of Gar Slough and Plum Bayou and the effect of the construction of the levee upon the flow of water. It shows, too, that, in order to protect the land within the bounds of the district, it was necessary to build the levee across the depressions which permitted flood water to pass through to the surrounding low lands of the district. Plaintiff's land was, according to the evidence, subject to overflow before the construction of the levee. But the water rose higher on it in 1908 after the construction of the levee; and the evidence establishes the fact that the land was seriously and permanently injured by the overflow of 1908.

Plaintiff requested the court to give instructions which in substance stated the law broadly to be that she would be entitled to compensation for damages done to her land by reason of the levee having been built so as to prevent the escape of flood water through Gar Slough and Plum Bayou, and confine its flow to the channel of the river and to the space between the levee and the river. The court refused to so instruct the jury, but instructed that defendant was not liable for the construction of the levee unless it be found that the slough and bay-

ous obstructed were natural outlets of the river, and were of sufficient capacity to have relieved the river from the increased flood water which caused the injury to plaintiff's land. The question is therefore presented whether or not, for the protection of lands from inundation by the flood waters of a river, a levee may rightfully be built across depressions, swales and low places so as to prevent the escape of the flood water into surrounding low lands sought to be protected; and also whether or not, in order to prevent the spread of flood water and to protect lands which would otherwise overflow, the building of a levee which has the effect of raising the water higher on the lands between the levee and the river calls for compensation to the owner of such lands thereby damaged.

The solution of these questions is not free of difficulty, and there are but few decisions of the court which shed much light on them. The first inquiry would seem to be as to the characterization of flood waters overflowing a stream, to return again as they recede—whether they should be treated as surface water or as running water of the stream. But we are not sure that such an inquiry is essential to a solution of the question now presented, for, without calling it surface water, we may treat it, like surface water or the waters of the sea, as a common enemy which any landowner or body of landowners or public agency may defend against without incurring liability for damages unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense, could be avoided. *Little Rock & Ft. S. Ry. Co.* v. *Chapman,* 39 Ark. 463; *Baker* v. *Allen,* 66 Ark. 271.

The rule established by the English cases is that waters of the sea are a common enemy and may be warded off by artificial mthods without incurring liability for damages to another. In *Rex* v. *Commissioners,* 8 Barnewall & Cresswell, 355, commissioners had, for the purpose of protection of property entrusted to their care, erected works which cause the sea water to flow with greater force against and injure the land of another which fronted on the sea. Lord Tenterden, delivering the opinion, said: "But the sea is a common enemy to all proprietors on that part of the coast, and I can not see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any in-

dividual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. * * * I am, therefore, of opinion that the only safe rule to lay down is this: that each landowner for himself, or the commissioners acting for several landowners, may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others in like manner to protect themselves against the common enemy."

The Supreme Court of Mississippi had this to say, which we think is pertinent in the present case: "It is not of controlling importance to hold that the flood water from which the plaintiff claims to have suffered be dealt with as surface water, or as the water of a stream, or as a separate and distinct sort. It can not be the law, however, in this State that the flood waters of the large streams which are within or along the borders of this State are to be dealt with as the waters of a stream, not to be obstructed, impeded or turned aside under any circumstances, except upon condition that the persons so doing shall respond in damages for all injury sustained by another riparian owner, and be liable for nominal damages as for the infringement of the legal rights of adjacent proprietors who in truth suffer no real injury. * * * If the waters of the Mississippi River, which at flood sometimes spread in width from twenty to forty miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a stream, and the whole valley is to be given up as the course way of the stream, the most fertile portion of our State may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law, and as an undisputable fact, that which is not true, and which, if put into practical operation, would relegate prosperous and fertile districts to the condition of a wilderness.

There are farms innumerable, and railroads, villages, towns and cities situated in a watercourse, if the usual flow of the flood waters of the Mississippi River mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams and the obstructions thereof to such river and such conditions is, in the very nature of things, impracticable and impossible. Calling these overwhelming floods 'surface' or 'channel' water for the purpose of dealing with them under rules applicable to entirely different conditions, advances us no step in the solution of the questions involved. We must deal with things, and not names, and conditions inherently and radically different can not be assimilated by mere terminology." *Kansas City, M. & B. Rd. Co.* v. *Smith,* 72 Miss. 677, 27 L. R. A. 762.

There is a decision of the Supreme Court of California which is directly in point, the facts of the case and conclusion of law reached by the court in the case being stated in the syllabi as follows: "A reclamation district, organized and existing under the laws of the State for the purpose of reclaiming certain swamp and overflowed lands situated upon the Sacramento River, has a right to erect and maintain a levee along the bank of the river so as to prevent the inundation of the land sought to be reclaimed, notwithstanding the possible or probable effect of the levee would be to cause the waters of the stream to overflow other lands situated upon the river. Damages so caused by the levee several years after its erection, on land situated upon the opposite bank of the river two miles farther down the stream, are *damnum absque injuria,* for which the reclamation district is not liable. * * * The reclamation district has a right to construct and maintain the levee across the mouth of a slough through which, in times of flood, a part of the waters of the river was accustomed to flow and escape upon the adjoining low lands." *Lamb* v. *Reclamation District,* 73 Cal. 125.

The Supreme Court of Iowa, in the case of *Hoard* v. *Des Moines,* 62 Iowa 326, held that (quoting from the syllabus) "every owner of land has a right to protect himself from overflow in times of flood by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river; and, on the same principle, a city may protect its territory from overflow by the construction

of a levee, and, in the absence of negligence, will not be liable to one who owns a lot between the levee and the river." See also *Cairo & V. Rd. Co.* v. *Stevens,* 73 Ind. 278, and other Indiana cases therein cited. 2 Farnham on Waters, § 1340.

We conclude that, upon the state of facts which the jury could have found under the instructions of the court to exist, the defendant could rightfully construct the levee in the manner described without liability to plaintiff for damages. It is insisted, however, that a distinction should be made because of the provision of our Constitution that "private property shall not be taken, appropriated or *damaged* for public use without just compensation therefor." Art. 2, § 22, Constitution of 1874. In reaching the conclusion above announced, we are not unmindful of the Constitutional provision; but where no right has been violated, there is no injury for which the law affords compensation. It is a case of an injury without damages. *Lamb* v. *Reclamation District, supra.*

The judgment of the circuit court is affirmed.

INDEPENDENCE COUNTY *v.* DUFFEY.

Opinion delivered June 13, 1910.

FERRIES—LEVY OF TAX.—Under Kirby's Digest, § 3570 *et seq.*, whenever a license to operate a ferry is granted, it is the duty of the county court to levy an annual tax on such privilege, without giving notice to the licensee.

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

Sam. A. Moore, for appellant.

Appellee failed to make his case. 72 Ark. 395; 30 Ark. 533; 58 Ark. 250; 21 Ark. 265. The writ should be issued and regularly returned. 33 Ark. 117; 58 Ark. 250. It must be addressed to the clerk. 21 Ark. 265; 58 Ark. 250. The circuit court could not look beyond the record certified. 18 Ark. 449; 25 Ark. 32; 23 Ark. 107. A statute should be construed with reference to its purpose and object. 71 Ark. 556. The words of a statute are to be given their obvious and natural meaning if possible. 67 Ark. 566. The intention of the law

makers, when ascertained, should be followed. 65 Ark. 521; 69 Ark. 376. A license fee is a regulation, and not a tax. 56 Ark. 370.

McCaleb & Reeder, for appellee.

Where the transcript fails to show a return of the writ, the presumption is that it was omitted by the clerk's neglect. 18 Ark. 449; 9 Ark. 535. It can not be contended here for the first time that the copy of the order of the county court sought to be quashed is not a true and complete copy. 49 Ark. 253; 54 Ark. 216; 59 Ark. 312; 46 Ark. 96. This court has nothing to do with the wisdom or expediency of a statute. 70 Ark. 549. It does not sit to supervise legislation. 72 Ark. 195; 65 Ark. 559; 69 Ark. 521.

BATTLE, J. G. O. Duffey and others sought to quash an order of the Independence County Court, made on the 18th day of January, 1909, levying a tax or license fee on the public ferries of Independence County. The circuit court quashed the order, and the county appealed.

The grounds upon which the appellee asked the court to quash the order are as follows: First: "That said order and judgment * * * was rendered without notice to petitioners, and without giving them an opportunity to be present, or to be heard in said matter;" and, second, "that said county court had no jurisdiction to change, alter or levy the tax to be paid by petitioners for the privilege of operating such ferries, said ferries having been established and the annual tax therefor fixed by proper orders of court many years prior to the date of January 18, 1909; and in making said order of January 18, 1909, as aforesaid, said county court of Independence County assumed jurisdiction of the subject-matter without authority of law."

The statutes of this State do not sustain the contention of appellees. Section 3562 of Kirby's Digest provides: "Before any ferry shall be established, the court shall determine what tax shall be paid by such applicant for the privilege of such ferry, which shall not be less than $1 nor more than $100." And section 3566 of the same digest provides: "Upon the payment of the tax levied by the county court for the privilege of such ferry, and executing the bond required by law, such court

shall grant a license to such applicant for the term of *one year* from the date of such license."

Section 3570 provides: "It shall be the duty of the county courts to levy a tax on all ferry privileges in their respective counties, whether application be made by any person for the same or not."

Section 3571 provides: "It shall be the duty of the clerk of the county court, immediately after the assessment of any tax for ferry privileges by the court, to issue a license for the ferryman to whom such privileges were granted, and to deliver the same to the sheriff, and charge him with the amount thereof, in the same manner that he is required to be charged with other county revenue."

In *Murray* v. *Menefee*, 20 Ark. 561, the court said: "By sections 7 (3561 of Kirby's Digest) and 11 (3566 of Kirby's Digest) it is provided that any person wishing to establish a ferry shall apply to the county court, and, on showing that he is in possession of the land where the ferry is sought to be established and that its establishment will promote the public convenience, the court shall grant him a license for the term of one year. When the license has been so granted, and the ferry once established, it is made the duty of the county court to levy a tax on the privilege annually thereafter, whether application for a renewal of the license be made or not; and the duty of the clerk to issue, annually, a license, and deliver it to the sheriff for the person to whom the privilege was granted, who, on presentation of the license, is bound to pay for it." Kirby's Digest, § § 3570, 3571, 3572, 3573, 3574; *Lindsay* v. *Lindley*, 20 Ark. 573, 581.

Whenever a license to operate a ferry is granted, it is the duty of the county court to levy a tax on such privilege annually thereafter, and the person to whom the privilege is granted must take notice of that fact and act accordingly. No additional notice is necessary or required in order to authorize the county court to make the levy.

Judgment of circuit court reversed; and judgment of county court affirmed.

BAKER v. DURHAM.

Opinion delivered June 13, 1910.

1. PARENT AND CHILD—GUARDIANSHIP.—By statute, as well as at common law, the father, unless incompetent or unfit, is the natural guardian of his minor children, and entitled to have their custody and the care of their education. (Page 358.)
2. SAME—CUSTODY OF CHILD.—An order of the chancery court placing the infant child of divorced parents in the custody of the mother's parents will be reversed and the custody placed in its father where he is financially able and is not shown to be otherwise unfit to have its custody and has manifested a proper affection for the child. (Page 358.)

Appeal from Faulkner Chancery Court; *Jeremiah G. Wallace,* Chancellor; reversed.

STATEMENT BY THE COURT.

At the March term, 1908, the Faulkner Chancery Court rendered a decree, granting to the appellant, H. G. Baker, a decree of absolute divorce from his wife, the appellee, now Fannie B. Durham. Although duly served with summons, the appellee did not appear to deny the allegations against her, nor to resist the suit. The custody of the infant child of the appellant and appellee, Ida E. Baker, then only a few months old, was at the time temporarily given to appellee, the decree of the court stating specifically that this was done on account of the tender age of the child, and that the court retained control of the cause for the purpose of making proper orders relative thereto in the future, and directing that appellant be permitted to see the child at all proper times.

Some time after the above decree was rendered Mrs. Baker took the child to the home of her father, Spence Lay, and left it. She then married a man by the name of Durham and left the county.

Thereupon the plaintiff filed a petition, making both Fannie B. Durham and her father, Spence Lay, parties, in which he alleged that conditions had changed since the rendition of the above decree by the court; that his former wife had remarried and that neither she nor her husband were able to care for the child; that the appellant had been refused the right to see and visit his child; that he loved his child with a father's affection, and was

financially able to care for it and rear it, and he asked that he be given the custody of his child.

Appellees appeared, and through their solicitor and by consent of appellant made a verbal response denying the allegations of the petition.

On the hearing of the cause the appellant read in evidence the testimony of a witness who testified that Spence Lay had told him that he and his daughter had forfeited their right to keep the child by not letting its father visit it, and that Lay had told him he would rather give up the child than let its father see it.

Another witness, Mrs. Davidson, testified that she had carried clothes from Mr. Baker to his child, after his wife had left it at Durham's; that on one occasion she went there on a very cold day and found the child alone in a room; that no one was at home with it except a sick girl in another room; that it was a very cold day, and the child was barefooted.

Pete Lay, brother of Mrs. Durham, testified that he did not know where his sister was living; that she was not living in Faulkner County a few days before; that he had taken her and her husband to the train at Heber, and they said they were going to Harrison.

Another witness, Mr. Keeling, testified that he had gone to Lay's house, and found the child there alone; that all the family were out in the field except Mrs. Lay, who was at another house on the place about a quarter of a mile away; and that the child was in a bad condition.

The appellant, Mr. Baker, testified that the time he went to visit his child his former wife ordered him away, and her father, Spence Lay, told him not to come back to see it any more; that he had carried it clothing; that he was financially able and was willing to take care of his child.

On behalf of appellees two witnesses, who claimed to have visited at Lay's home, testified that, as far as they observed, the child seemed to be properly cared for. Mrs. Lay testified that the appellant raised a disturbance when he came to see his child, and her daughter, the appellee, had ordered him away; that on this occasion her daughter, the appellee, had told Mr. Baker that he was not the father of the child; that a few days

before the giving of her testimony the child had fallen in the fire and was badly burned.

Fannie B. Durham, the appellee, testified "that while she and plaintiff resided together as man and wife he was quarrelsome, and that she left him on that account and on account of being afraid of him; that she did not appear against him in the divorce case because she knew she could not live with him; that she permitted Mr. Baker to come and see the child; that every time he was there, except once, he abused her."

The court made the following findings: "This is a petition by H. G. Baker asking for the transfer to himself of the custody of his little daughter, Ida E. Baker, from the custody of her mother, Fannie B. Durham, nee Baker, to whom the child was awarded by a former decree of this court granting petitioner a divorce.

"The court finds that the mother, after the divorce, returned and lived with her father, the respondent, Spence Lay, until her recent marriage, and that since her recent marriage she still lives on her father's farm, and that the child, Ida E. Baker, has, since the separation of her father and mother, lived continuously with and been cared for by her grandfather, Spence Lay, and that her grandmother and grandfather are much attached to her, and that she is being well cared for, and that it is to the best interests of the child that she be allowed to remain with her grandparents for the present."

Upon these findings the court rendered the following decree: "It is therefore ordered and decreed by the court that the custody of said child, Ida E. Baker, be shifted to her grandfather, Spence Lay, and that her father, H. G. Baker, and her mother, Fannie B. Durham, nee Baker, both be allowed to see said child at all reasonable times, provided that they demean themselves properly when visiting said child, otherwise they are not to be allowed to see said child. The child shall not be taken beyond the jurisdiction of said court without first obtaining leave. The court retains control of the cause for further orders as occasion may require for the welfare of the child."

Appellant duly prosecutes this appeal.

R. W. Robins, for appellant.

Generally, the father is first entitled to the possession of his infant child. 37 Ark. 30; 82 Ark. 461; Kirby's Dig., § 3757; 32 Ark. 96.

WOOD, J., (after stating the facts). "By statute, as well as by common law, the father (unless incompetent or unfit) is the natural guardian, and entitled to the custody, care and education of his minor children." *Boles* v. *Dickson,* 32 Ark. 96; sec. 3757, Kirby's Digest; 21 Enc. Law, 1036, 1037.

In *Verser* v. *Ford,* 37 Ark. 30, this court, through Judge EAKIN, said: "Any system of jurisprudence which would enable the courts in their discretion, and with a view solely to the child's best interests, to take from him that right, and interfere with those duties, would be intolerably tyrannical, as well as utopian." Even as between the father and the mother, the custody in the father is generally allowed unless the child, on account of tender years, or being a female, imperatively requires, for its well being, that attention which a mother's love and care alone can supply. But, as between the parent and grandparent, or any one else, the law prefers the former unless the parent is incompetent or unfit, because of his or her poverty or depravity, to provide the physical comforts and moral training essential to the life and well being of the child. It must be an exceptional case where the evidence shows such lack of financial ability or such delinquencies in character on the part of the father as to imperil the present and future welfare of his child before a court of chancery will deprive him of the duty and the privilege of maintaining and educating his child, and of the pleasure of its companionship. See *Wofford* v. *Clark,* 82 Ark. 461.

There may be other exceptional cases where the father, by reason of indifference to the welfare of his child and the lack of proper affection for it, has voluntarily relinquished these parental obligations, privileges and pleasures to other hands for so long that the court will refuse to disturb the associations and environments which his own conduct has produced, and will leave *in statu quo* those whom he has thus permitted to stand *in loco parentis. Coulter* v. *Sypert,* 78 Ark. 193.

But the evidence in this case fails to discover any of these exceptional cases. As was said by us in *Wofford* v. *Clark, supra*: "While great weight should be given to the decree of

the chancellor, where he sees the parties and is more cognizant of the local surroundings than this court, we are nevertheless of the opinion that the decided preponderance of the evidence shows that his decree is erroneous." For here the father has all along manifested an affection for his child and a desire to have its custody. When the decree of divorce was obtained, the court doubtless correctly awarded the temporary custody of the child, because it was a female and of tender years, to its mother. But when the mother married again and left the child in the hands of her grandparents, and left the county, as the evidence tends to show, the appellant was warranted in making application for the custody of his child. The court had not awarded the child to her grandparents, but to her mother; and, as between them and the father, the latter shows the better right. He shows that he was financially able to provide for his child. There is no showing in the record that he is incompetent or unfit to discharge the duties which the law enjoins upon him as the natural guardian of his daughter. Since the court has seen proper to take the custody of the child from the mother, we are of the opinion that under the evidence adduced it should have next bestowed it, at his request, upon the father. The grandfather, for aught that appears, was not asking it, and there is no evidence to show that he was better able, financially or otherwise, to provide for the child. Nor does the evidence show that these grandparents were lavishing such wealth of attention and affection upon this child as to render it inhuman, either to them or the child, to take her away from them and give her to her father.

The decree is therefore reversed, and the cause is remanded with directions to enter a decree awarding the custody of the child to the appellant.

MANNING v. JONES.

Opinion delivered June 13, 1910.

1. NEGLIGENCE—USE OF FIREARMS.—The reasonable care which persons using firearms are required to use to avoid injuring others must be proportionate to the probability of injury, upon the principle that he who does what is more than ordinarily dangerous must use more than ordinary care. (Page 361.)

2. SAME—WHEN ERROR TO DIRECT VERDICT.—In an action for damages for negligently shooting another, it was error to direct a verdict for the defendant where it was a question for the jury whether the shooting was done negligently or was the result of a pure accident. (Page 361.)

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

STATEMENT BY THE COURT.

J. O. Manning brought this suit against W. P. Jones and R. C. Morehead, to recover damages for injuries sustained by him on account of their alleged negligence and carelessness in shooting him while engaged in hunting on his premises. The circumstances under which the injury occurred are substantially as follows:

The place where the injury occurred is a fruit farm owned by a corporation of which the defendant, Jones, was the president and manager. The plaintiff made a contract with Nelse Barnett, an agent of the corporation, whereby he became its tenant. He was to look after and care for the fruit trees for the corporation, and was to have the balance of the farm rent free. He lived on the farm. On the day he was injured plaintiff had been engaged in repairing the pasture fence. When he finished the repairs, he started home. He had gone some 40 or 50 steps when he heard two guns fired in rapid succession. He fell to the ground, shot in the eye. The defendant, Morehead, went for assistance, and Jones remained to care for the plaintiff. Morehead requested assistance of one W. L. Morgan, and at the time told him that they had shot the plaintiff. They were bird hunting at the time. The defendant, Jones, later in the day told the son of the plaintiff that he had shot his father.

The plaintiff did not see the defendants before the shots were fired, and does not know whether they saw him. But the facts and circumstances attending the occurrence are sufficient from which the jury might have inferred that they could have seen him had they looked.

The attorney for the plaintiff made the following admission: "We will admit that the defendant, W. P. Jones, had an interest in the property (referring to the fruit farm) and that they will swear that he had a right to enter there."

The court directed the jury to return a verdict for the defendants, which was accordingly done. From the judgment rendered the plaintiff has appealed to this court.

Samuel M. Casey, for appellant.

When there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. 73 Ark. 561; 76 Ark. 520; 89 Ark. 372. Defendants are liable for the damage caused by their negligent act. 16 Ark. 314; 96 Am. St. R. 477. It is error to instruct the jury to find according to the testimony of a witness if his testimony is contradicted by other witnesses. 88 Ark. 550.

R. A. Dowdy and *Oldfield & Cole,* for appellee.

Appellant failed to show that appellee fired the shot that caused the injury; therefore the verdict was properly directed. 1 Cooley on Torts, 251; 111 Tenn. 430; 78 S. W. 93. For accidental injuries no action lies; the burden is on the plaintiff to prove some omission of duty. 16 Ark. 314; 36 Ark. 607; 69 Ark. 402; 72 Ark. 572; 79 Ark. 608; 46 Atl. 4; 16 N. E. 180; 1 Thomp. on Neg., § 14.

HART, J., (after stating the facts). It is insisted by counsel for appellant that the court erred in directing a verdict for appellees, and in this we think counsel is correct. Assuming that the defendants had a right to be on the premises and to hunt there, this fact of itself did not absolve them from liability under the facts stated. The test of liability is, not whether the injury was accidentally inflicted, but whether the defendants were free from blame.

Mr. Thompson, in drawing the distinction between an intentional shooting and a shooting by mere accident, says: "But where the weapon is accidentally and not purposely pointed at another, * * * the liability of the person pointing it will depend upon the answer to the question whether he was guilty of negligence, or whether it was the result of pure accident, unmixed with negligence. Here, as in other cases, the test of the liability of the defendant is whether, in what he did, he failed to exercise reasonable or ordinary care. And here, as in other cases, the reasonable care which persons using firearms are bound to take in order to avoid injury to others is a care proportionate to

the probability of injury; and the principle is applicable that he who does what is more than ordinarily dangerous is bound to use more than ordinary care. Whether, in case of an injury proceeding from such a cause, ordinary or reasonable care was used by the person inflicting it will in almost every case present a question for a jury." Thompson, Negligence, § 780, and cases cited.

This principle of law has been recognized by the court in the case of *Bizzell* v. *Booker,* 15 Ark. 308. In that case the complaint alleged that the defendants, who had camped in the woods adjacent to plaintiff's cotton shed for the purpose of hunting, had, by the negligent management of their camp fire, set the woods on fire, and that the fire had extended to the shed and consumed plaintiff's cotton. The court held (quoting from syllabus): "Where one is doing a lawful act—or an act not mischievous, rash, reckless or foolish, and naturally liable to result in injury to others—he is not responsible for damages resulting therefrom by accident or casualty, while he is in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others; but he is answerable for damages resulting from negligence, or a want of such care and caution on his part."

In discussing the liability for the negligent use of firearms, in the case of *Hankins* v. *Watkins,* 77 Hun (N. Y.) 360, the court held: "When one does an illegal or mischievous act which is likely to prove injurious to others, or when he does a legal act in such a careless and improper manner that injury to third persons will probably ensue, he is answerable, in some form of action, for all the consequences which may directly result from his conduct. It is not necessary, in order to justify an action against him, that he should intend to do the particular injury which follows, or any injury at all." See also *Moebus* v. *Becker,* 46 N. J. L. 41; *Welch* v. *Durand,* 36 Conn. 182; *Judd* v. *Ballard,* 66 Vt. 668.

It is undisputed that the sight of one of appellant's eyes was destroyed by a gunshot wound, and the court should have submitted to the jury the question whether the gun was discharged by either of appellees, and, if so, whether he was at the time in the exercise of such care and caution to avoid injury to

others as a prudent man would observe under the circumstances surrounding him.

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

SINGER MANUFACTURING COMPANY v. W. D. REEVES LUMBER COMPANY.

Opinion delivered June 13, 1910.

1. APPEAL AND ERROR—INSTRUCTION—NECESSITY OF MOTION FOR NEW TRIAL.—The correctness of the court's action in giving an instruction will not be considered on appeal if it was not made the ground of a motion for new trial. (Page 365.)
2. SALES OF CHATTELS—BREACH—PROSPECTIVE PROFITS.—In an action by a vendee for breach of a contract to deliver saw-logs to be sawed into lumber the reasonable or usual rent or value of the use of the sawmill or machinery to be used in sawing such logs should be considered in estimating the profits of the vendee. (Page 365.)
3. SAME—DAMAGES—PROFITS.—In an action by a vendee to recover damages for nonperformance of a contract to furnish saw-logs, the cost of sawing them into lumber should be deducted from the gross profits of the vendee in order to ascertain his damages. (Page 365.)
4. SAME—DAMAGES—EVIDENCE.—In an action by a vendee to recover damages for the breach of a contract to deliver saw-logs, it was not error to refuse to permit the vendor to prove the expense of maintaining the vendee's office force, without showing what proportion of the vendee's expenditure for office force was used in running the sawmill, or that an increased office force would be needed in operating the sawmill while the vendee was engaged in sawing the logs in question. (Page 366.)
5. SAME—DAMAGES—EVIDENCE.—In determining the damages suffered by the vendee by reason of a breach of a contract to deliver saw-logs, it was not error to refuse to permit the vendor to prove the value of the vendee's entire plant or the sum of money invested therein and the cost of insurance thereon, as such evidence is too general, and should be limited to the usable or rental value of the vendee's sawmill during the time necessary to saw the logs. (Page 367.)

Appeal from Phillips Circuit Court; *Hance N. Hutton*, Judge; affirmed.

Percy & Hughes, for appellant.

The burden of proof was on the Reeves Lumber Company to show its profits. 85 Wis. 174; 4 Ency. of Ev. 5; 123 S. W.

1034; 111 Fed. 98; 49 C. C. A. 244; 6 S. W. 765; 5 R. I. 299; 73 Am. Dec. 66; 26 Minn. 252; 2 N. W. 849; 25 Ga. 386; 79 Ga. 743; 8 S. E. 58; 45 Ill. 206; 26 Ill. App. 580; 38 N. Y. Super. Ct. 185; 44 Md. 268; 6 Bing. N. C. 212; 61 S. W. 273; 67 Mich. 454; 6 Minn. 319; 112 Ala. 436; 90 Mo. App. 518; 3 S. W. 689.

Fink & Dinning, for appellee.

The loss of profits is the damages recoverable. 116 Fed. 604; 130 Fed. 641; 110 U. S. 347; 153 U. S. 540; 75 U. S. 449; 8 Wall. 201; 71 Ark. 408; 6 S. W. 210; 43 S. W. 905; 3 L. R. A. 587; 121 U. S. 264; 48 S. W. 646. The alleged error in instructions is waived by not properly objecting. 56 Ark. 594; 60 Ark. 613; 50 Hun 108; 50 Ga. 350; 105 Ill. 122; 7 N. Y. S. 485; 88 Ark. 77; 49 S. E. 988; 68 Minn. 430; 71 N. W. 622; 66 S. E. 746; 48 So. 428; 72 Atl. 301; 87 N. E. 249; 62 Atl. 489; 107 Pac. 419.

HART, J. This was a suit upon a written contract by appellee against appellant to recover damages for an alleged breach thereof in failing to deliver a certain quantity of logs to be sawed into lumber. Both parties to the suit are corporations, and the contract in question was executed on the 24th day of February, 1908.

By the terms of the contract, appellant agreed to furnish to appellee about four million feet of gum logs to be sawed into lumber at a fixed price per thousand feet. After supplying appellee with 2,176,322 feet of saw logs, which appellee manufactured into lumber according to the terms of the contract, appellant failed and refused to deliver any more saw logs. Hence this suit. At the time the contract was executed, appellee was, and had been for several years prior thereto, engaged in the general lumber business at Helena, Arkansas. It owned and operated a sawmill and box factory and also a line of tow boats and barges engaged in towing rafts and hauling logs. These various enterprises were conducted under one management.

The case was tried before a jury, which returned a verdict for appellee in the sum of $6,351.33. To reverse the judgment rendered appellant has prosecuted this appeal.

From the brief of appellant we quote the following:

"The question of liability is no longer open to debate in this case. The verdict of the jury has settled that. We desire to submit to the court only the question of damages. The rule of damages announced by the trial court was this: That the plaintiff, if entitled to recover, might recover loss of profits in sawing and stacking the lumber made from logs not furnished, and agreed to be furnished."

The action of the court in giving this instruction was not made the ground of a motion for a new trial. Hence, according to the settled rules of this court, the question of the correctness of the court's action in giving the instruction is not presented to us for review. *St. Louis & S. F. Rd. Co.* v. *Fayetteville,* 75 Ark. 534; *Ince* v. *State,* 77 Ark. 418; *St. Louis, I. M. & S. Ry. Co.* v. *Baker,* 67 Ark. 531; *Burris* v. *State,* 73 Ark. 453. Moreover, the correctness of the instruction is not questioned by counsel for appellant.

The only question presented for our consideration is the action of the court in excluding from the jury certain evidence which appellant contends should have been admitted as showing the cost of performing the contract on the part of appellee.

In discussing the items of costs to be allowed where the measure of damages is the profits to be derived from the contract, the Supreme Court of Minnestota said:

"When one party to an executory contract, like that on which this action is brought, refuses further to comply with it on his part, the other party has an immediate cause of action for said breach; and he may sue on it at any time and recover the damages which he may have sustained by being deprived of the benefits accruing to him under it.

"If he treat the contract as ended and sue immediately upon its breach, his damages are to be measured by the value of the contract to him at the time it was broken; and this value is estimated by the profits he would have realized during the continuance of the contract, had it been faithfully carried out by the parties. But, in estimating the profits which a party under such a contract would realize, allowance must be made for every item of cost and expense necessarily attending a full compliance on his part. If, therefore, the contract is for manufacturing a given article, and mills and machinery are necessarily employed in making it, the reasonable or usual rent or

value of the use of such mills and machinery enters into the cost of manufacture, and should be taken into consideration in estimating the profits, because the profits are as directly affected by such expenses as by any other." *Morrison* v. *Lovejoy,* 6 Minn. 354; *Dunn* v. *Johnson,* 33 Ind. 54, 5 Am. Rep. 177; *Heckley* v. *Steel Co.,* 121 U. S. 264; 13 Cyc., p. 54, and cases cited in note 70.

The price to be paid for sawing the logs into lumber and stacking the same was fixed by the contract at $6 per thousand feet, and the amount of logs which appellant failed to furnish amounted to 1,823,678 feet.

W. B. Reeves, the manager of appellee company, testified that he had been in the lumber business a great many years, and that the sawmill plant of appellee had a daily capacity of 60,000 feet. He stated that he had made a detailed report of the cost of one week's sawing gum. That this statement showed the expenses of a week's operation of the sawmill just after they commenced the performance of the contract in question. That the cost of sawing per thousand feet was $2.652. The items given by him are as follows:

1.	Labor of sawing	$1.82
2.	Labor trucking and stacking	.705
3.	Oil, belting and rope	.06
4.	Repairs, overhauling, etc.	.067
	Total cost per M	$2.652

He testified that the first item included all the laborers actually engaged in operating the sawmill, including the foreman. That the second item included the cost of all laborers engaged in bearing away the lumber after it was sawed and stacking it. That the third item included the cost of the oil, belting, etc., necessary to keep the sawmill in running order, and that the fourth item included the cost of overhauling the mill, making the necessary repairs, and keeping it in good condition. That the cost of each item was fixed at the cost which experience had shown them to be.

It is contended by counsel for appellant that these items do not include the total cost of operation. They first insist that the court erred in not permitting them to prove what amount

was paid the office force of appellee. The evidence offered was too general in its character. Appellee had introduced testimony tending to show the entire cost of manufacturing the logs into lumber. While it is obvious that appellant had a right to contradict this evidence by showing that other items of cost entered into the manufacture of the logs into lumber, yet it was necessary that this testimony should be of such a definite character as would assist the jury at arriving at a correct determination of the question. Appellant, in order to make such testimony competent, should either have offered to show what proportion of the expenditure of appellee for office force was used in running the sawmill, or that an increased office force would be needed in operating the sawmill while appellee was engaged in the performance of the contract in question.

It is next objected by counsel for appellant that the court erred in not allowing it to prove the value of appellee's plant or the sum of money invested therein and also the cost of insurance thereon. This assignment of error is open to the same objection as the preceding one. That is to say, the evidence offered was as to the cost or amount invested in the entire plant of appellee, and was too general. The jury could not from it have reached any satisfactory conclusion as to the cost or amount invested in the sawmill. Indeed, it is questionable if testimony of the amount of capital invested in the sawmill would be competent evidence in a case like this; for this is not a case where the end sought is to find out the net profits of a mercantile or other business of like character for a given period of time. In the present case, while appellee required machinery to enable it to perform its contract, it was not necessary for it to own such machinery. It might rent it. Hence, in ascertaining the profits, one of the elements of cost to be allowed might be the usable or rental value of the sawmill during the period necessary for the performance of the contract, and the amount of capital invested could not be taken into consideration in determining that fact. Appellee was the owner of its own sawmill plant at the time.

It is next contended by counsel for appellant that a calculation will show that the verdict of the jury was greater than that warranted by the evidence. This is conceded by counsel for appellee, and they offer to remit the excess.

The judgment will be modified to allow a recovery for $6,105.67, and the judgment, thus modified, will be affirmed.

SIMMONS NATIONAL BANK v. DILLEY FOUNDRY COMPANY.

Opinion delivered June 13, 1910.

1. CORPORATIONS—AUTHORITY TO CONTRACT.—Both at common law and under Kirby's Digest, § 839, a corporation can make no contract which is not authorized by its charter, either expressly or by fair implication. (Page 371.)
2. SAME—AUTHORITY TO BECOME SURETY.—Under Kirby's Digest, § 839, a business corporation has no power to divert its funds or assets from the purposes for which it was created, and therefore cannot become a surety for or otherwise lend its credit to another person or corporation. (Page 372.)
3. SAME—POWER TO SIGN ACCOMMODATION PAPER.—The officers of a corporation have no power to bind it by the execution of negotiable paper for the accommodation of another person or corporation, and it cannot be held liable thereon when it is known by the payee or holder that the paper was executed for accommodation merely. (Page 372.)
4. BILLS AND NOTES—NOTICE.—Knowledge that a note is in the hands of one of the joint makers to be negotiated for his benefit is sufficient to give notice that the others signed for accommodation merely. (Page 372.)
5. CORPORATIONS—AUTHORITY TO SIGN ACCOMMODATION PAPER.—If a private business corporation may become an accommodation indorser, provided all the stockholders assent and no creditors are injured, the general manager of such corporation has no authority to sign such accommodation paper on its behalf without the assent of the stockholders. (Page 373.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

Young & Rowell and *N. T. White,* for appellant.

Accommodation paper of a corporation is good in the hands of a *bona fide* holder if the corporation had, under any circumstances, authority to issue commercial paper. 28 Minn. 291; 156 Ind. 487; 101 Mass. 57. Appellant is a *bona fide* holder. 97 Mass. 494; 62 Ark. 41; 3 Thomps. on Corp. 141; 26 N. Y. 505; 26 Barb. 23; 69 Ark. 147; 65 Ark. 204; 2 Mo. App. 299. Stockholders and directors having knowledge of the corporation's indorsement are estopped to complain. 3 Cook on Corp. 2072; 97 Fed. 723; 122 N. Y. 165; 110 U. S. 7. And the same rule prevails in Arkansas. 62 Ark. 42; 65 Ark. 543; 69 Ark. 141; 67 Ark. 542; 85 Ark. 185.

Bridges, Wooldridge & Gantt, for appellee.

The contract was *ultra vires* and therefore void. 21 How. 441; 131 U. S. 371; 139 U. S. 56; 101 U. S. 83; 130 U. S. 22; 167 U. S. 362; 160 U. S. 514; 165 U. S. 538; 10 C. C. A. 415; 62 Fed. 356; 185 Ill. 37; 50 L. R. A. 765; 70 Ia. 541. A plaintiff must prove actual authority on the part of the corporation defendant to indorse the paper before he can recover. 95 U. S. 558; 98 Am. St. R. 949; 117 Wis. 569; 94 N. W. 293; 116 N. Y. 284; 72 Atl. 44; *Id.* 439; 97 Fed. 723; 30 C. C. A. 409; 86 Fed. 742. The same rule applies to partnerships. 129 U. S. 372; 18 Wend. 466; 159 N. Y. 194; 17 Ia. 567; 40 Ark. 551; 52 Ark. 556.

FRAUENTHAL, J. This was an action instituted by the Simmons National Bank to recover upon two promissory notes. One of these notes was for $3,000, and was dated November 2, 1908, and was signed by F. L. Dilley as the maker thereof. The other note was for $5,000, and was dated December 31, 1908, and was signed by Leola Lumber Company as the maker thereof. Both notes were made payable to the order of the Simmons National Bank four months after date, and were indorsed in blank by the Dilley Foundry Company by F. L. Dilley, treasurer. The latter note was also indorsed by F. L. Dilley. The action was instituted against the makers and indorsers of the notes; but no defense was made thereto except by the Dilley Foundry Company. The Dilley Foundry Company in its answer alleged that it was a corporation organized under the laws of the State of Arkansas, and that the indorsement of its name upon said two notes was made without authority; that the notes were executed without benefit or consideration to it; and that it was solely an accommodation indorser thereon. It pleaded that said indorsements were *ultra vires,* and that it was not legally bound thereby. The uncontroverted testimony adduced upon the trial presents substantially the following case:

The Dilley Foundry Company was a domestic corporation organized in 1892 for the following purpose as set out in its articles of incorporation: "The general nature of the business proposed to be transacted by this corporation is to manufacture iron and brass work and to repair and sell machinery." F. L. Dilley was the secretary and treasurer of said corporation, and from the date of its organization had complete control and

management of its assets and business. He was held out to the world by its board of directors as having, and the testimony tended to show that he actually had, authority to transact all business and make any and all contracts for the corporation in carrying out the purposes for which it was formed. But he did not have any authority to execute in its name any contract by which it became surety or guarantor for any other person or corporation, or to make or indorse commercial paper for the mere accommodation of another person or corporation. F. L. Dilley was the president of the Leola Lumber Company, which was also a domestic corporation, but it was an entirely separate and distinct corporation, and the evidence does not indicate that any person other than F. L. Dilley was a shareholder in the two corporations. The Dilley Foundry Company, F. L. Dilley and the Leola Lumber Company had been doing the greater part of their banking business for several years prior to the execution of the notes herein sued on with the plaintiff, but their business and accounts with it was done and were kept separate and distinct.

In October, 1907, the plaintiff made a loan to the Leola Lumber Company and to F. L. Dilley. Thereafter there came on a general financial depression throughout the country, and in February, 1908, when the financial panic had somewhat subsided, the Leola Lumber Company applied to plaintiff for an additional loan. On February 15, 1908, plaintiff loaned to the Leola Lumber Company $5,000, and therefor took a note signed by that corporation as maker with the indorsement thereon in blank by F. L. Dilley and Dilley Foundry Company. The cashier of plaintiff testified that this money was borrowed by the Leola Lumber Company, and was paid to that corporation by placing same to its credit, and that this was drawn on from time to time by its checks. On February 4 plaintiff loaned to F. L. Dilley $3,000, for which it took a note signed by F. L. Dilley as maker with the indorsement thereon in blank by the Dilley Foundry Company. The Dilley Foundry Company received no benefit or consideration for the indorsement of these two notes, but its indorsements thereon were solely for accommodation. Subsequently these two notes were renewed from time to time in the same manner, and this suit is instituted on such renewal notes.

Upon the trial of the case the lower court directed the jury to return a verdict in favor of the Dilley Foundry Company, which was done. The plaintiff has appealed to this court from the judgment entered upon that verdict.

F. L. Dilley was the manager of the Dilley Foundry Company, and he had authority to transact generally the business of that corporation, and to bind it by the execution of any contract within the scope of the purposes for which it was created; but he had no power, and, under the evidence, no authority, to bind it by any contract made for any other purpose. Ordinarily, a corporation itself can only do those things which are necessary to carry into effect the purposes for which it was organized. It may enter into contracts that may be fairly regarded as incidental to carrying out those purposes; but it can do no act, and can make no contract, which is not authorized by its charter, either expressly or by fair implication. In the case of *Thomas* v. *West Jersey Rd. Co.*, 101 U. S. 71, it is said: "Conceding the rule, applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In the case of *Central Trans. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, after reviewing the various decisions of the Supreme Court of the United States relative to the powers of corporations to make contracts, Mr. Justice Gray, speaking for the court, sums up the result as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all the interest of the public that the corporation shall not transcend the powers conferred upon it by law. * * * These principles apply equally to companies incorporated by special charter from the Legislature and to those formed by articles of association under general

laws." The general rule is well settled that the power of a corporation to make and take contracts is restricted to the purposes for which it is created, and can not legally be exercised by it for other purposes. *City Elec. St. Ry. Co.* v. *First Nat. Bank,* 62 Ark. 33; *Pittsburgh, C. & St. L. Ry. Co.* v. *Keokuk Bridge Co.,* 131 U. S. 371; *McCormick* v. *Market Nat. Bank,* 165 U. S. 550; *California Bank* v. *Kennedy,* 167 U. S. 363.

The statutes of this State, under which the corporation was formed, and which specify its powers, provide (Kirby's Digest, § 839): "The purpose for which every such corporation shall be established shall be distinctly and definitely specified by the stockholders in their articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds for any other purpose."

It follows from this that no corporation has the power to divert its funds or assets from the purposes for which it was created, and it therefore has not the power by any form of contract to become a surety for or otherwise to lend its credit to another person or corporation. It has the power to make all contracts necessary or incidental to its own business; and therefore a corporation organized for the purpose of carrying on a manufacturing business, such as the Dilley Foundry Company, has the implied power to borrow money and make negotiable paper for use within the scope of its own business; but it has no power to become a party to a bill or note for the accommodation of another person or corporation. The officers of a corporation have no power to bind it by the execution of such accommodation paper, and it can not be held liable thereon when it is known by the payee or holder that it was executed only for accommodation. 3 Thompson on Corporations, § 2225; *West St. Louis Savings Bank* v. *Shawnee County Bank,* 95 U. S. 557; 7 Cyc. 679; 10 Cyc. 1115; *El Dorado Improvement Co.* v. *Citizens' Bank,* 85 Ark. 185; *Park Hotel Co.* v. *Fourth Nat. Bank,* 30 C. C. A. 409; *Owen* v. *Storm,* 72 Atl. 441.

But it is urged that the plaintiff is protected herein because it was a *bona fide* holder of the paper, and acquired it in the usual course of business and for value. But, before one can become a *bona fide* and innocent holder of commercial paper, it must also appear that it was acquired without notice or knowl-

edge of defenses or circumstances which would put him on inquiry of such defenses.

In 3 Thompson on Corporations, § 2229, it is said: "The general rule of commercial paper imputing notice of infirmities to a holder apply equally to the holder of paper accepted or indorsed by a corporation for accommodation. If the circumstances are sufficient to suggest inquiry which would lead to a knowledge of the fact, then he is not regarded as an innocent holder of such paper; and a holder with knowledge of its accommodation character can not enforce the paper against a corporation." This notice and the knowledge that is imputed from such notice may arise from any irregularity in the paper or in its chain of title or from the fact that the maker only has put the note in circulation and for his benefit. Thus in the case of *Evans* v. *Speer Hardware Co.*, 65 Ark. 204, we said (quoting syllabus): "Knowledge that a note is in the hands of one of the joint makers to be negotiated for his benefit is sufficient to give notice that the others signed for accommodation merely." Daniel on Neg. Instruments (5 ed.), 380, § 365; *Nat. Park Bank* v. *German-Am. M. W. & S. Co.*, 116 N. Y. 281; *Campbell* v. *Manufacturers' Nat. Bank*, 67 N. J. L. 301; 1 Am. & Eng. Ency. Law 367.

In the case at bar the plaintiff had refused to extend further credit to the Leola Lumber Company and also to F. L. Dilley; and when these two customers applied for further loans, it desired security. It knew that the money thus loaned by it was for the benefit of these two parties, and not for the benefit of the Dilley Foundry Company, because it paid the money to these parties only by placing same to their credit respectively on its books. At the time the money was loaned upon the notes no suggestion or intimation was made that it was for the use or benefit of the Dilley Foundry Company, directly or indirectly. On the contrary, the uncontroverted evidence shows that it was for the use and benefit only of those who appear as the makers of the notes, and must have been so known to the plaintiff. The indorsements of the Dilley Foundry Company upon these notes were therefore made only for the accommodation of those persons who appeared on the notes as the makers thereof, and of this the plaintiff had such notice that the law will impute to

it knowledge of that fact. The officers of the plaintiff bank and F. L. Dilley thought no doubt that he had the power, as a matter of law and incidental to his general authority, to indorse the notes in the name of the corporation, but they knew as a matter of fact that the indorsements were made for accommodation merely. F. L. Dilley had no power, because he was an officer of the company with general authority to manage and conduct its business and affairs, to indorse or sign its name on commercial paper for accommodation. The power of indorsing for accommodation is not incidental to the powers conferred upon the corporation itself organized for a manufacturing business as was the Dilley Foundry Company; nor was such authority incidental to the general authority given to one of its officers in the management of its business. It has been held that a private business corporation may distribute its assets as it sees fit, give away its property, and therefore may become an accommodation indorser, provided all the stockholders assent, and no creditors are injured thereby. But there was no legal or competent evidence adduced on the trial of this case showing that all the stockholders, or even those owning a majority of the stock, of the Dilley Foundry Company, assented to or had any knowledge of the accommodation indorsements of these two notes. The undisputed legal testimony in the case is that they did not know, assent to or authorize these indorsements for accommodation. This act of the officer of the corporation was not, according to the evidence, authorized or ratified by the corporation; and it was therefore beyond his power to bind the corporation by the indorsements. *Louis De Jonge & Co.* v. *Woodport Hotel & Land Co.*, 72 Atl. 439.

It is urged by counsel for plaintiff that it might be inferred from the evidence that the Dilley Foundry Company made the indorsements in order that the makers of the notes might obtain money with which to pay some debt to it, or that the officers of the bank might have thought this, and therefore the jury might have inferred that the indorsements were made for the benefit of the Dilley Foundry Company. But we do not think that there were any facts or circumstances proved in the case from which such inferences could arise. The undisputed evidence shows that the Dilley Foundry Company received no benefit from or consideration for making the indorsements of these

notes; and the plaintiff loaned the money on these notes to the persons who appear thereon as makers and at the time knew that the Dilley Foundry Company indorsed the same solely to secure the payment thereof to plaintiff.

We have carefully examined the testimony adduced upon the trial of this case, and we are of the opinion that under this testimony the lower court was correct in directing a verdict in favor of the Dilley Foundry Company.

The judgment is accordingly affirmed.

RYAN v. BATCHELOR.

Opinion delivered June 13, 1910.

1. DEEDS—AMOUNT OF LAND—COVENANT.—When a vendor conveys for a specified price a tract of land which is described by metes and bounds or otherwise, with the words added, *containing a specified number of acres, more or less,* this is a contract not by the acre, but in gross, and does not by implication warrant the quantity. (Page 377.)
2. FRAUD—FRAUDULENT REPRESENTATION.—Where a statement was made merely as an expression of opinion or not in such manner as to induce the other to act in reliance thereon, even though it was false, it will not sustain an action for deceit. (Page 377.)
3. FRAUD—MISREPRESENTATION.—A misrepresentation in a sale of land, to affect the validity of the contract, must relate to some matter of inducement to the making of it, in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on account of his superior information and knowledge in regard to the subject of the contract. (Page 378.)

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

Lamb & Caraway, for appellant.

Appellant was entitled to judgment for the amount sued for. 61 Ark. 120; 19 Ark. 102; 14 N. Y. 143; 133 N. Y. 227; 30 N. E. 974; 10 L. R. A. 656.

Gaughan & Sifford, for appellee.

In the absence of fraud, the buyer takes the risk of quantity when the words "more or less" are in the descriptive part of the deed. 19 Ark. 108. Appellant had no right to rely on statements made by appellee. 47 Ark. 165.

FRAUENTHAL, J. The appellee sold to appellant a tract of land in Craighead County, and conveyed same to him by a warranty deed. In the deed the land was described as follows: "The fractional south half of the northwest quarter of section eleven, township fourteen north, range three west, being all of said subdivision lying north of the Kansas City, Fort Scott & Memphis Railway, containing seventy acres more or less." About two years after the purchase was made the appellant had the land surveyed, and claimed that there were only 57.23 acres in the tract. He then instituted this suit against the appellee, and in his complaint alleged that the appellee had falsely represented that the tract contained 72 acres when as a matter of fact it only contained 57.23 acres; and he sought to recover by way of damages the excess of price which he claimed he was induced to pay for said land by reason of said false representation. The case was tried by the court sitting as a jury, who made a finding of fact and of law in favor of the defendant; and a judgment was entered accordingly. From that judgment the plaintiff below appealed. The testimony adduced at the trial tended to prove that the appellee was a nonresident of the State, and had placed the land in the hands of a resident agent to sell. This agent called the attention of the appellee to the fact that the land was for sale. The land is situated about one and one-half miles from the city of Jonesboro, and the appellant had seen the land many times before the sale and had been on and over it. Before the contract of purchase was made the appellant and the agent of appellee talked about having the land surveyed in order to determine the number of acres that were in the tract. The agent stated that the land had not been surveyed, and that he was not in a position to have it surveyed. It was then agreed that the appellant would have the land surveyed. This was about two or three months before the deed was executed, the purchase money paid and the contract of sale consummated. There is no testimony that the agent stated that the land contained 70 acres; and the only circumstance indicating that this number of acres was mentioned is that in the deed the land is described as containing 70 acres, more or less. The appellant testified that when he purchased the land it was to contain, or that he thought it contained, 72

acres, but he does not state that the agent made such a representation.

This is an action to recover damages for an alleged deficiency in the quantity of the land claimed to have been sold. It is founded upon the alleged fraud in making a false representation as to the quantity of the land, which induced the purchaser to pay the price therefor. Such an action can not be founded upon the breach of any of the usual covenants that are contained in a deed and which were contained in this deed.

Independently of an express averment or covenant as to quantity in the deed, when the quantity is mentioned after a particular description of the land, it is regarded merely as a part of the description, and will be rejected if it is inconsistent with the actual area of the premises conveyed. In the case of *Harrell* v. *Hill,* 19 Ark. 103, it is said: "The mention of quantity of acres after a certain description of the subject by metes and bounds, or by other known specifications, is but matter of description, and does not amount to any covenant or afford ground for the breach of any of the usual covenants, though the quantity fall short of the given amount." When the vendor conveys for a specified price a tract of land which is described by metes and bounds or otherwise, with the words added containing a specified number of acres more or less, this upon the face of the contract is a contract not by the acre but in gross, and does not by implication warrant the quantity. In such event, should there be a deficiency in the quantity, the right to relief for such deficiency is founded upon fraud, misrepresentation or gross mistake. 1 Sugden on Vendors, p. 490; 3 Washburn on Real Property, § 2322; *Harrell* v. *Hill,* 19 Ark. 103; *Goodwin* v. *Robinson,* 30 Ark. 535; *Neely* v. *Rembert,* 71 Ark. 91; *Joseph* v. *Baker, ante* p. 150.

The appellant can not maintain this action for damages upon the ground that there has been any breach of a covenant in the deed or of any implied warranty of the quantity of the land. His cause of action is founded, as alleged in the complaint, upon the ground that he was induced by false representations made as to the quantity of the land to pay the price therefor. Now, before a representation will be considered fraudulent in law so as to give a right of action therefor, it must be

made relative to a matter susceptible of accurate knowledge, and must be a statement importing knowledge on the part of the person making the representation; and it must also be relied on as such. If the statement was made only as an expression of opinion, or if it was not made in a manner so as to induce the other to act in reliance thereon, then such representation, even though not true, would not be sufficient to base an action thereon for deceit. In the case of *Yeates* v. *Pryor,* 11 Ark. 58, this court said: "The misrepresentation, in order to affect the validity of the contract, must relate to some matter of inducement to the making of the contract in which, from the relative position of the parties and their means of information, the one must necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on account of his superior information and knowledge in regard to the subject of the contract; for, if the means of information are alike accessible to both, so that with ordinary prudence or vigilance the parties might respectively rely upon their own judgment, they must be presumed to have done so; or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness. Such representations therefore, to amount to fraud, must be of a decided and reliable character, holding out inducements to make the contract, calculated to mislead the purchaser and induce him to buy on the faith and confidence of the representation, and in the absence of the means to be derived from his own observation and inspection and from which he could draw conclusions to guide him in making the contract independent of the representations of the vendor." *Hill* v. *Bush,* 19 Ark. 522; *Fitzhugh* v. *Davis,* 46 Ark. 337; *Matlock* v. *Reppy,* 47 Ark. 148; 14 Am. & Eng. Ency. Law, 33.

In the case at bar when the appellant spoke to the agent of the appellee relative to the purchase of the land, its quantity was also spoken of. They talked about having the land surveyed in order to determine its quantity. The agent told the appellant that he was not in a position to have the land surveyed, and thereupon the appellant agreed to have it surveyed. This was before the contract was entered into, and long before the purchase price was paid and the sale consummated. From this testimony we think the court was justified in finding that the

agent of appellee did not make any decided representation as to the quantity of the land which was calculated to mislead the appellant. On the contrary, the court was warranted in finding that the appellant was intending to ascertain for himself the quantity of the land and rely upon the information that he would obtain relative thereto by a survey which he would have made. The court was warranted in finding that the appellant was not induced to enter into a contract for the purchase of the land by any representation made by appellee's agent which was fraudulent as understood in law.

Upon the trial of the case the appellant attempted to prove that the tract contained less than 70 acres by a witness who testified that he surveyed it. But the testimony of this witness was so unsatisfactory that we can not say that the court erred in not placing reliance thereon. This was the only testimony adduced upon the trial as to the quantity of the land.

Upon an examination of all the testimony we are of the opinion that there is sufficient evidence to sustain the finding of the court as to the facts, which therefore becomes conclusive; and that the finding of facts so made by the court fully justified its conclusion of law and the judgment which it entered.

The judgment is affirmed.

DIGGS *v.* DIGGS.

Opinion delivered June 13, 1910.

1. APPEAL AND ERROR—PRESUMPTION AGAINST ERROR.—Where the record on appeal in a chancery case shows that the cause was heard upon oral evidence, and such evidence is not brought into the record by bill of exceptions or otherwise, and there is nothing on the face of the record to show that the court erred, it will be presumed that the decree is correct. (Page 380.)
2. SAME—PRESUMPTION.—Where the appellant seeks to reverse a decree of the chancery court upon the ground that it is clearly against the preponderance of the evidence, and fails to set out the evidence in his abstract, the presumption will be indulged that the findings of the chancellor are correct. (Page 380.)

Appeal from Clay Chancery Court, Eastern District; *Edward D. Robertson,* Judge; affirmed.

J. H. Hill, for appellant.

Desertion is cause for divorce in Tennessee. The same is true in Arkansas. Kirby's Dig., § 2672; 34 Ark. 37; 65 Ark. 87; 90 Ark. 16; 66 Ark. 601.

FRAUENTHAL, J. This was an action instituted by the appellant for divorce. Upon the hearing of the cause the chancery court dismissed the action. The decree recites that the cause was heard upon the depositions of certain witnesses and also upon oral testimony. The oral testimony heard by the chancery court at the trial of the case has not been preserved, and has not been brought into the record by bill of exceptions or otherwise. The appellant has not set out in his abstract the evidence of any of these witnesses or any part thereof. He has simply stated that the depositions of certain named witnesses will be found on certain named pages of the transcript.

The sole ground upon which the appellant relies for a reversal of the decree is that the finding of the chancellor is against the decided preponderance of the evidence. But we are wholly unable to determine whether or not the chancellor's findings of fact are correct because the oral testimony heard by him has not been properly preserved and brought into the record. "Where the record shows that the cause in chancery was heard upon oral evidence, and such evidence is not brought into the record by bill of exceptions or otherwise, and there is nothing on the face of the record to show that the court erred, it will be presumed that the decree is correct." *Barringer* v. *Bratcher,* 90 Ark. 214; *Murphy* v. *Citizens' Bank,* 84 Ark. 100.

And where the appellant seeks to reverse the decree of the chancery court upon the ground that it is clearly against the preponderance of the evidence, and fails to set out the evidence in his abstract, we shall indulge the presumption that the findings of the chancellor are correct, and accordingly affirm the decree. *Nunn* v. *Lynch,* 89 Ark. 41; *Jett* v. *Crittenden,* 89 Ark. 349; *Eddy Hotel Co.* v. *Ford,* 90 Ark. 393.

The decree is affirmed.

LEONARD v. STATE.

Opinion delivered June 20, 1910.

1. STATUTES—EXTRATERRITORIAL EFFECT.—An intent to give extraterritorial effect to a statute will not be ascribed to the lawmakers unless the language employed affords no escape from such construction. (Page 384.)
2. LIQUORS—SALE OF LIQUOR IN PROHIBITED DISTRICT.—Kirby's Digest, § 5137, providing for the seizure and destruction of liquors "kept in any prohibited district to be sold contrary to law," has no application to liquor kept in a prohibitory district in this State for the purpose of selling it unlawfully in another State. (Page 384.)

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

McGill & Lindsey, for appellants.

In filling shipping orders accompanied by the money, the sale takes place where the liquor is delivered to the common carrier for the consignee. 68 Ark. 266; 17 A. & E. Enc. L. 300. In the construction of statutes words and phrases will be given their familiar sense, unless they have acquired some technical meaning. 26 A. & E. Enc. of L. 605-6. The phrase "contrary to law" means the law of the jurisdiction of the lawmaking power. 13 Sawy. 143; 13 Blatch. 184; 2 Met. 338. It will not be presumed that the Legislature intended that a statute should operate beyond the territorial limits of its jurisdiction. 66 Ark. 466; 18 Ark. 255; 82 Ark. 405. The comity between States does not extend to assisting them in executing their penal laws. 70 Ark. 95; 72 Ark. 171; 77 Ark. 439; 80 Ark. 598; 83 Ark. 133; 20 Ark. 289; 53 Ark. 423; 56 Ark. 224; 87 Ark. 409

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

Sales made in Arkansas to citizens of Missouri (McDonald County) were made "contrary to law." 212 Mo. 648; 111 S. W. 509; 88 Ark. 269; Acts 1907, laws of Mo., p. 232. The crime is committed by keeping the liquor *within the State* with intent to sell it contrary to law *without the State.* Black on Intox. Liq., § 387; 11 Atl. 767; 16 Atl. 910; *Id.* 911; 63 N. H. 368; 17 *Id.* 373; 23 Cyc. 175; *Id.* 240.

McCULLOCH, C. J. The sheriff of Benton County, pursuant to a warrant authorizing him so to do, seized a large quantity of whisky and brandy in a prohibition district in that county,

which was alleged to be stored there for sale contrary to law. Appellants, J. W. Leonard and J. D. Yeargin, claiming to be the owners of the liquor, intervened and asserted their right to it, and on a trial the court found that the liquors were kept in a prohibition district of the county to be sold contrary to law, and ordered the same to be destroyed by the sheriff.

The liquors in controversy (22 barrels of whisky, two half-barrels of brandy and a ten-gallon keg of brandy) were found by the sheriff stored in a cabin on the premises of one McKuerly. The cabin is near the north and west lines of Benton County a few hundred yards from the Missouri line and about two miles from South West City, which is in McDonald County, Missouri. The cabin was locked, and the keys were in the possession of appellants, who resided and were engaged in business at South West City. They had formerly been in the liquor business at that place, and this is a lot of liquors which they had on hand when certain prohibition laws went into force in Missouri. It seems that they had purchased the liquor jointly, but divided it, and had it stored in a building in South West City when a raid and seizure by Missouri officers was threatened; and Leonard, in the absence of Yeargin, hurried it out of Missouri and brought it to the place referred to in Benton County, Arkansas, and there stored it in the cabin to prevent its seizure. There is no evidence at all that any of the liquor was ever sold in Arkansas, or that it was here for sale in this State; but the evidence does justify the finding that it was stored in Benton County to prevent its seizure by Missouri officers, and was kept there to be sold contrary to law in the State of Missouri.

The question thus presented is whether or not intoxicating liquors kept in this State for sale contrary to law in another State are subject to confiscation under our statutes. This depends upon a construction of our statutes on the subject; for, unless they be construed to authorize confiscation under those circumstances, we need not pass on the question whether it is within the power of the Legislature to authorize the confiscation of liquors not kept for sale in this State contrary to law.

The General Assembly of 1883 passed what is known as the "blind tiger statute," which makes unlawful the clandestine sale or giving away of alcohol, ardent, vinous or malt liquors,

etc., by a device known as the blind tiger, or by any other name or device. That statute provides that proof of certain things shall constitute *prima facie* evidence of guilt on the part of any owner of a house in which such liquor is found; and it provides that warrants may be issued authorizing a search for and seizure of such liquors, but it does not provide for the confiscation of the liquors thus seized. (Act of March 30, 1883; Kirby's Digest, § § 5140-5145).

The statute under which the present proceedings were instituted was passed by the General Assembly of 1899. The title is "An Act to suppress the illegal sale of liquors and to destroy same when found in prohibited districts;" and the first section reads as follows:

"It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such warrant a seizure of such intoxicating liquors, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors. Provided, that this act shall not apply to the giving away or selling of native wines where the sale is authorized by law. Provided further, any sheriff or other officer having knowledge of any such blind tigers and failing to perform his duty shall forfeit his commission. Provided, further, that the provisions of this act shall not repeal or affect section 5145. Provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed." (Act of February 13, 1899; Kirby's Digest, § § 5137-5139).

This statute does not create a criminal offense nor provide a penalty for the commission of any act further than the seizure and confiscation of liquors "kept in any prohibited district to

be sold contrary to law." The manifest purpose of the statute was to supply the omission of the former statute by authorizing the destruction of liquor kept for unlawful sale. We are of the opinion that the words of the statute "to be sold contrary to law" refer to liquors kept for sale in this State contrary to law, and not to sales to be made outside of the State. This is plain from the title and the body of the statute, and particularly from that part which declares that "any sheriff or other officer having knowledge of *any such blind tigers* and failing to perform his duty shall forfeit his commission," which obviously refers to the keeping of the liquor for sale in this State contrary to law. Now, the term "blind tiger" is used in our statute with reference to a place for the clandestine sale or giving away of liquors by some device or other, and in employing the term "sold contrary to law" the Legislature is presumed to have aimed at liquors kept for unlawful sale here, not under any particular statute but unlawful under any statute of this State directed against sales without license. An intent to give extra-territorial effect to a statute will not be ascribed to the law-makers unless the language employed affords no escape from such construction. *State* v. *Lancashire Fire Ins. Co.*, 66 Ark. 466.

The statute is highly penal, and should be strictly construed. We have said, when construing the statute, that the liquor is the offender, and that it is immaterial who owns it. (*Osborne* v. *State*, 77 Ark. 439). But the intent with which it is kept here is controlling; for, in order to come within the terms of the statute, it must be kept for sale contrary to law, which means sale in this State contrary to law. Such is, we think, the only reasonable interpretation of the statute; and it follows that the decree is unsupported by evidence and is erroneous.

A decision of the Supreme Court of Rhode Island (*State* v. *Fitzpatrick*, 16 R. I. 54, 11 Atl. 767), is cited by the Attorney General in support of his contention that the statute means to confiscate liquor kept in this State to be sold anywhere contrary to law; but there is a difference between the precise language of our statute and that of the Rhode Island statute.

It is earnestly insisted by the Attorney General that the construction we now place on the statute would bring the laws of this State into disrepute by permitting whisky to be kept

on its borders for unlawful sale in other States. This, however, is a matter for the Legislature, as it is our province only to construe the statutes, not to enact them.

Reversed and remanded.

SHARUM v. FRY.

Opinion delivered June 20, 1910.

DRAINS—ORDER REFUSING TO ESTABLISH DRAINAGE DISTRICT—APPEAL.—Kirby's Digest, § 1428, regulating the mode of procedure in establishing drainage districts, permits a petitioner to appeal to the circuit court from an order of the county court disallowing a petition for the establishment of a drainage district; and if it does not confer such right, it is conferred by the Constitution (art. 7, § 33) and the general statutes (Kirby's Dig. § § 1487-1493).

Appeal from Lawrence Circuit Court; *Charles Coffin,* Judge; reversed.

W. A. Cunningham and *H. L. Ponder,* for appellant.

The assessment as made by the viewers is conclusive, and can not be questioned collaterally. 82 Ark. 76. The only remedy open to appellees was to go into county court and show that the assessments were unjust. 83 Ark. 54. Failing in this, an appeal to the circuit court will lie. Kirby's Dig., § 1428.

Smith & Blackford and *Davis & Pace,* for appellee.

No appeal will lie under the general statute. 90 Ark. 221. Where there is a special act on the subject, a general act on the same subject is not applicable. 68 Ark. 131. The finding of the viewers that the ditch would not be of public benefit or utility is conclusive. 66 Ark. 303; 64 Ark. 562.

McCULLOCH, C. J. Appellants were petitioners to the county court of Lawrence County for the establishment of a drainage district in that county. When the final report of the viewers came on for hearing in the county court, certain landowners in the proposed district appeared, and made objection, and the court rendered a judgment declaring that said improvement would not be "conducive to the public health, convenience or welfare," and dismissing the petition. The petitioners appealed to the circuit court, where, on motion of ap-

pellees, the appeal was dismissed on the ground that the petitioners had no right of appeal from the judgment of the county court dismissing the petition.

The statute regulating appeals to the circuit court in proceedings to establish drainage districts reads as follows:

"Any person or corporation party to proceedings may, on filing the bond, to be approved by the county court, conditioned to pay all costs occasioned thereby, file exceptions to the apportionment, or to any claim for compensation or damages at any time before the day set for the hearing of said report by the court. The county court may hear testimony and examine witnesses upon all questions made by the exceptions, and for that purpose may compel the attendance of witnesses by subpoena, and their decisions upon each of the exceptions shall be entered of record; and if they sustain the exceptions the cost of hearing the same shall be paid out of the county treasury, and if they overrule the same such cost shall be taxed against the person or corporation filing the exception. Any person or corporation may appeal from the order of the court, and upon such appeal may determine either of the following questions:

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

"Second. Whether the route is practicable.

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

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

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

county court and certify the same with all the original papers filed in his office and file them in the office of the clerk of the circuit court within thirty days from the day of filing said bond." Kirby's Digest, § 1428.

This statute clearly gives the right of appeal to "any person or corporation" aggrieved by the judgment, whether petitioner or remonstrant. But, even if it did not, as contended, give the right of appeal to petitioners, the Constitution and the general statutes confer that right. Constitution, art. 7, § 33; Kirby's Dig., § § 1487-1493; *Huddleston* v. *Coffman,* 90 Ark. 219.

The circuit court erred in dismissing the appeal.

Reversed and remanded.

HAMPTON v. CALDWELL.

Opinion delivered June 20, 1910.

1. CONTRACT IN RESTRAINT OF TRADE—VALIDITY.—A contract by a barber, in selling his business and good will at a certain place, that he will not engage in the business again at that place is reasonable and enforcible. (Page 388.)
2. STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN YEAR.—An oral contract not to engage in the business of a barber at a certain place is not within the statute of frauds as one not to be performed within a year, as the death of the obligor might bring the contract to an end within a year. (Page 388.)

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

W. E. Beloate, for appellant; *J. T. Lomax,* of counsel.

It is not enough that the court find that some contract was made, but must find one that is clear, convincing and certain in all its terms. 78 Ark. 160. It takes the same quantity and quality of evidence to procure an injunction restraining the breach of a contract as to enforce specific performance. 120 S. W. 829. The sale of the "good will" does not include a condition that the vendor will not re-enter the same business. 9 L. R. A. (N. S.) 979.

Ponder & Ponder, for appellees.

The contract was not within the statute of frauds because it is one that may be performed within a year. 88 Am. Dec. 337;

45 *Id.* 219; 31 *Id.* 142; 41 *Id.* 487; 46 Ark. 84. In order to come within the statute, the contract must be one that is not to be performed within a year. 31 Am. Dec. 142; 45 *Id.* 487; 62 Ark. 101. Where both parties without objection directed their evidence to the same issue, a defective complaint will be considered as amended to conform to the proof. 54 Ark. 289; 59 Ark. 215; 62 Ark. 262; 67 Ark. 426; 24 Ark. 326. Unless clearly against the weight of the evidence, the decree should be affirmed. 75 Ark. 52; 73 Ark. 489; 67 Ark. 200; 68 134; 71 Ark. 605.

McCULLOCH, C. J. Defendant, Thomas Hampton, is a barber, and owned and operated a barber shop in the town of Walnut Ridge, and on May 19, 1909, sold out to the plaintiffs, Caldwell & Hall. He claims that he sold to them the shop outfit for the sum of $750, and that there was no other agreement concerning the matter save that of the sale. Plaintiffs claim that he sold them the outfit for $500, and the good will of the business for $250, expressly agreeing not to again go into that business at Walnut Ridge. A few months later he started to open another shop at that place, and they instituted this action in the chancery court to restrain him from violating the alleged contract.

Such a contract is reasonable and enforcible, and a court of equity will restrain its breach. *Bloom* v. *Home Insurance Agency,* 91 Ark. 367, and cases cited.

An oral contract of that sort is not within the statute of frauds, for it is not one which, according to its terms, does not admit of performance within a year. The death of the obligor within a year would have brought the contract to an end; therefore, it might have been fully performed within a year. *Meyer* v. *Roberts,* 46 Ark. 80; *Ry. Co.* v. *Whitley,* 54 Ark. 199; *Sullivan* v. *Winters,* 91 Ark. 149; *Valley Planting Co.* v. *Wise,* 93 Ark. 1; *Lyon* v. *King,* 11 Metc. (Mass.) 411, 45 Am. Dec. 219; Smith on the Law of Fraud, § 347.

The evidence is conflicting; but we think it supports the finding of the chancellor, and is sufficient to warrant a court of equity in restraining a breach of the contract.

Decree affirmed.

FEDERAL UNION SURETY COMPANY *v.* FLEMISTER.

Opinion delivered May 16, 1910.

1. INSURANCE—FOREIGN COMPANIES—RIGHT TO DO BUSINESS.—The Legislature may dictate the terms upon which foreign insurance companies may do business in this State. (Page 394.)

2. SAME—AUTHORITY OF FOREIGN COMPANY.—The liability of a foreign fire insurance company upon a policy issued upon property in this State is governed, not by the charter powers and by-laws of such company nor by the laws of the State under which it was organized to do business, but by the terms of the policy and the laws of this State. (Page 394.)

3. SAME—FOREIGN MUTUAL COMPANY—RIGHTS OF POLICY HOLDERS.—Under a policy of a foreign mutual insurance company insuring property in this State whereby it was stipulated that the insured incurred "no other or greater liability for premium or otherwise than that expressly provided in this policy," and providing for the cancellation of the policy by the insured and the payment to him of the unearned premium, *held,* that the policy holders are entitled to cancel their policies and demand repayment of the unearned portion of the premiums, without liability for the losses of other policy holders. (Page 395.)

4. FOREIGN CORPORATION—INSOLVENCY—AUTHORITY OF STATE COURTS.—The courts of this State have no authority to dissolve a foreign corporation, but may appoint a receiver to collect and distribute its assets in this State to its creditors. (Page 396.)

5. INSURANCE—INSOLVENCY—RIGHTS OF POLICY HOLDER.—Where there was no adjudication of the insolvency of a foreign mutual insurance company, and no decree dissolving the corporation, but there was an order of a chancery court appointing a receiver to collect and distribute its assets in this State to the creditors, a policy holder whose policy has not been cancelled may recover for a loss which accrued after the receiver's appointment. (Page 396.)

6. APPEAL AND ERROR—HARMLESS ERROR.—Where a surety company signed three several annual bonds for $20,000 each, to indemnify persons having claims against an insurance company during three successive years, and it appears that the liabilities which accrued for any one of these years did not exceed $20,000, the failure of the chancellor to segregate the amounts found due on the several bonds was not prejudicial error. (Page 397.)

7. RECEIVERS—COSTS.—In the case of a receivership the fees allowed to the successful plaintiff for the receiver and his attorney should be taxed and paid out of the fund collected and distributed by the receiver, and should not be taxed against the defendant as part of the costs. (Page 398.)

8. INSURANCE—ALLOWANCE OF ATTORNEY'S FEES.—Statutes allowing attorneys' fees to be taxed against insurance companies are sustainable as a proper exercise of the police power of the State. (Page 398.)
9. SAME—INSOLVENCY—PENALTY AND ATTORNEYS' FEE.—Where persons with claims against an insurance company, not having sued elsewhere, voluntarily intervened and submitted their claims to a court of chancery, which had appointed a receiver to collect and distribute the assets of such company, such interveners will not be entitled to recover the statutory penalty and attorney's fees. (Page 399.)
10. APPEAL AND ERROR—CONCLUSIVENESS OF AGREED STATEMENT.—Where it was agreed that all claims against an insurance company not appealed from should abide the decision of certain claims appealed from, and the amounts due upon the claims appealed from were agreed upon, such agreement will be enforced as to the claims not appealed from. (Page 400.)

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

STATEMENT BY THE COURT.

On the 4th day of December, 1907, J. A. Flemister filed a complaint in the Pulaski Chancery Court, in which he alleged in substance that the defendant, National Mutual Fire Insurance Company, of Omaha, Nebraska, a corporation organized and incorporated under the laws of Nebraska, had been engaged in the business of general fire insurance in this State. That, before engaging in business here, it had filed a bond as required by law with the Federal Union Surety Company of Indianapolis, Indiana, as surety; and had otherwise complied with the laws of the State in regard to foreign insurance companies. That in the city of Omaha, State of Nebraska, a general receiver had been appointed to take charge of the assets of said company and to wind up its affairs on the ground of insolvency. That he was a creditor of said company in this State by virtue of holding two of its policies of insurance. That he files the complaint on behalf of himself and all others similarly interested, and asks that a receiver be appointed to take charge of the assets of said company in this State. The chancellor appointed a receiver in accordance with the prayer of the complaint.

The Federal Union Surety Company asked, and was granted, permission, to be made a party to the action. It alleged that it was the surety on the bond of said insurance company. It asked that all parties asserting claims against it be required

to file them in said chancery court, and prayed for an injunction to be granted, restraining such parties from proceeding against it elsewhere. The court granted the injunction. No objection was made by parties having claims against said surety company. All parties interested filed interventions asserting their claims, and voluntarily submitted themselves to the jurisdiction of the chancery court; and the liability of the Federal Union Surety Company was treated by the parties and by the chancery court as an asset of the insurance company to be collected and distributed to the creditors.

The National Mutual Fire Insurance Company of Omaha, Nebraska, applied for and obtained permission to engage in business in this State, and, pursuant to the statutes of the State, executed three separate bonds: for the insurance year of 1905, ending March 1, 1906; for the insurance year of 1906, ending March 1, 1907; and for the insurance year 1907, ending March 1, 1908. Each of said bonds is for the sum of $20,000, and is conditioned as follows: "Now, therefore, if the said National Mutual Fire Insurance Company of Omaha, Nebraska, shall promptly pay all claims arising and accruing to any person or persons by virtue of any policy issued by the said company during the term of this bond upon any property situated in the State of Arkansas, when the same shall become due, and shall pay to the State of Arkansas all such sums of money as shall be adjudged against them for the violation of any of the provisions of an act of the General Assembly of the State of Arkansas, approved January 23, 1905, entitled 'An act for the punishment of pools, trusts and conspiracies to control prices,' then this obligation to become void; otherwise to remain in full force and effect."

The policies issued by the company in this State were in the usual form of stock policies, and among other provisions contained the following: "This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice

it shall retain only the *pro rata* premium. * * * The holder of this policy incurs no other or greater liability for premium or otherwise than that expressly provided in this policy." All fire losses occurred before the receiver was appointed, except in the case of W. H. Cajul, which occurred afterwards.

There is no dispute in regard to the amount of the claims. After the receiver was appointed, all persons having policies and who had not suffered fire losses were permitted to come in and surrender their policies to the receiver for cancellation, and prove their claims for the unearned premiums.

On the final hearing of the case the chancellor found in favor of all the claimants except W. H. Cajul, and held that the Federal Union Surety Company was liable therefor. In the case of W. H. Cajul, the chancellor held that the appointment of the receiver cancelled the policies by operation of law, and, his fire loss having occurred after the receiver was appointed, the surety company was not liable. A decree was entered against the Federal Union Surety Company in favor of the respective claimants.

In addition, the chancellor fixed the amount of fees that should be allowed the receiver and his attorney, and adjudged that said surety company should pay the same as well as all costs of the suit.

The case is here on appeal.

J. W. & M. House, for appellant.

A policy of a mutual insurance company is not cancelled by the appointment of a receiver. 56 N. Y. S. 83. When a bond is given for only one year, the surety is bound only for that year. 65 Fed. 476; 11 Fed. Cas. No. 6114; 4 Dil. 185; 26 Am. R. 703; 29 *Id.* 230; 59 Ill. 172; Brandt on Sur. 187; 67 Cal. 505; 130 Mass. 242; 7 Barb. 581; 5 Cow. 424; 3 Cow. 151; 17 Mass. 603; 2 Leigh 157; 87 Ala. 334; 6 Am. St. R. 456. The policy holders are members of the company. 109 N. Y. S. 367; 21 How. 35; 9 Col. 77; 3 S. W. 385; 21 N. Y. 67; 86 Pa. 367; 79 Wis. 492. And they are bound by the rules of the company and the laws of the State. 43 N. J. Eq. 522; 64 Am. St. R. 715; 90 N. W. 926; 96 N. W. 327. As to whether a policy holder is entitled to a return of the unearned premium, see 52 N. W. 744. The premiums in a mutual company constitute a fund,

and must be exhausted before liability on the bond would attach. 66 Atl. 1072; 98 Am. Dec. 89; 45 *Id.* 656; 71 *Id.* 662. The court erred in taxing as costs attorney's fees and receiver's fees. 60 Ia. 70; 62 Ga. 146; 86 N. W. 466; 37 N. Y. 536; High on Rec., § § 339, 805, 810. The findings of a chancellor, in a case tried on depositions, will be reversed if against the weight of the evidence. 71 Ark. 605; 63 Ark. 314; 68 Ark. 134; 72 Ark. 67; 73 Ark. 489; 75 Ark. 52; *Id.* 72; 77 Ark. 216; *Id.* 303; 75 Ark. 75; 83 Ark. 343; 85 Ark. 105; 68 Ark. 314; 75 Ark. 9.

C. S. Collins and *Bradshaw, Rhoton & Helm,* for appellee.

The liability of the insurance company is fixed by the terms of the policy. *American Insurance Co.* v. *Haynie,* 91 Ark. 43; 89 Ark. 378; 52 Ark. 201. The State has the right to regulate insurance companies. 76 Ark. 303; 26 L. R. A. 295; 126 Mo. 281; 129 Ia. 725; Cooley's Briefs, Ins., 57. The by-laws of the company do not form a part of the contract unless referred to in the policy. 8 Cush. 393; 44 N. J. Eq. 224. A member of a mutual company is not liable on future assessments. 70 Am. St. R. 149; 63 Ill. 187; 57 Ill. 354; 9 How. Pr. 45; 162 Pa. 638; 86 N. W. 831; 101 N. W. 938; 87 Minn. 392; 49 Minn. 291; N. Y. S. 478; 28 Mo. App. 215; 2 Tenn. Ch. 727; 111 U. Ill. 79; 59 Wis. 162; 91 Mo. App. 339; 77 N. H. 583. The insolvency of the company constitutes a breach of its contract. 78 N. Y. 114; 34 Am. R. 522; 85 Ala. 401; 162 Pa. 586; 42 Am. St. R. 844; 38 L. R. A. 97. The bond covers unearned premiums. 112 Fed. 599. The unearned premium should be returned. 33 L. R. A. 551; 130 Ind. 332; 49 Minn. 291; 60 N. Y. S. 478; 28 Mo. App. 215; 2 Tenn. Ch. 727; 111 U. S. 264.

Carmichael, Brooks & Powers and *Funk & Funk,* for intervener.

The liability of the insurance company is fixed by the policy of insurance. 52 Ark. 201. But the liability of the sureties on the bond is fixed by the bond.

HART, J. (after stating the facts). Counsel for the Federal Union Surety Company insist that its principal was a mutual fire insurance company organized under the laws of the State

of Nebraska, and that, by virtue of the laws of that State, the articles of incorporation and the by-laws of the company, its policy holders became members of the company, and as such were not entitled to a return of the unearned premium.

In making this contention learned counsel have not duly considered the effect of our statutes on foreign mutual insurance companies.

It is settled that the Legislature may dictate the terms upon which such companies may do business in the State. *Hartford Fire Insurance Co.* v. *State,* 76 Ark. 303; *State* v. *Lancashire Fire Ins. Co.,* 66 Ark. 466.

The General Assembly of the State of Arkansas in 1905, among other conditions imposed upon foreign mutual insurance companies as a prerequisite to their doing business in the State of Arkansas, provided as follows: "Section 4. All foreign mutual fire insurance companies authorized to do business in this State shall annually give a qualified indemnity bond to the State of Arkansas, with not less than three good and sufficient sureties, or with a surety, trust or indemnity company authorized to do business in this State, as surety, to be approved by the Auditor of State, in the sum of twenty thousand dollars, conditioned for the prompt payment of all claims arising and accruing to any person during the term of said bond by virtue of any policy issued by any such company upon any property situated in the State, and said bond shall be in full force and effect during the lifetime of any policy issued by said company."

A comparison of the provisions of the above section with those prescribing the conditions of the bond of stock insurance companies will show that in all essential particulars they are the same. Acts of Arkansas, 1905, p. 772, and Kirby's Digest, § 4339.

The effect of this statute is to make the liabilities of foreign mutual insurance companies doing business in this State under policies issued by them here the same as those of stock fire insurance companies.

In the case of *Minneapolis Fire & Marine Mutual Insurance Company* v. *Norman,* 74 Ark. 190, the court held (quoting syllabus): 1. "Where a foreign insurance company, authorized to insure property upon the assessment plan, gave the bond required of stock companies issuing standard policies, and pro-

ceeded to issue policies on the standard plan, instead of the assessment plan, it can not, after receiving the benefit of such contracts, invoke the doctrine of *ultra vires* to defeat an action brought against it on such a contract."

2. "A surety on the bond of a foreign mutual fire insurance company, executed to enable it to do a standard, and not a mutual, insurance business, can not plead as a defense that the policies issued by the company were *ultra vires.*"

The effect of this decision is to hold that the charter powers, by-laws and the laws of the State under which the company was organized do not determine the character of the insurance issued, but that it is settled by the terms of the policy and the laws of this State. This was evidently the view taken of our statute by the National Mutual Fire Insurance Company; for it issued policies in this State in the usual form of standard policies issued by stock insurance companies.

The policies provided that the insured incurred "no other or greater liability for premium or otherwise than that expressly provided in this policy." This provision is inconsistent with the idea that the policy holder was a member of the company, and should be liable for losses sustained by other members.

The policy also contained a clause providing for the cancellation of the policy by the insured and the payment to him of the unearned premium, and, as above stated, it conformed in all other respects to the form of standard policies issued by stock insurance companies. The policies do not refer to the articles of incorporation or the by-laws of the company.

Therefore the right of the policy holder to a return of the unearned part of the premium on account of the insolvency of the insurer is the same in this case as in that of a stock company. The rule in such cases is well stated by the annotation to the case note to *State* v. *Minnesota Title Insurance & Trust Company,* 19 L. R. A. (N. S.) 639. It is as follows: "As to stock companies, the courts are in harmony in holding that the insured, upon the dissolution of the company, is a creditor to the amount of the unearned premiums."

In *Franzen* v. *Hutchinson,* 94 Iowa 95, 62 N. W. 698, it was held that local policy holders of a foreign insurance company, which had made an assignment for creditors in a different State, could avail themselves of a clause in their policies author-

izing them to cancel the same and demand the unearned portions of premium which they had paid, and that they could enforce these demands against any property of the company within the State. See also 22 Cyc. 1405 and note 27.

2. The court erred in holding that the policy of W. H. Cajul was cancelled by operation of law at the time of the appointment of the receiver. As we have already seen, the insurance company in question was a foreign corporation. The courts of this State had no authority to dissolve the corporation or wind up its business. The chancery court had only authority to appoint a receiver to collect and distribute its assets in this State to the creditors. *Culver Lumber & Manufacturing Co.* v. *Culver,* 81 Ark. 102. There was no adjudication of insolvency, and no decree dissolving the corporation in the present case. Moreover, no order of court had been made cancelling the policy of Cajul. As we have already held, the act of 1905 made the insurance company in effect a stock company, as far as the Arkansas policies are concerned, and the insurance contracts were not terminated by the appointment of the receiver. *Insurance Commissioner* v. *People's Fire Insurance Co.,* 44 Atl. 82, 68 N. H. 51. At the time Cajul's property was destroyed by fire his policy had not been ordered cancelled, and his claim was provable against the estate of the insurance company. Hence the Federal Union Surety Company was liable therefor.

3. Mrs. M. B. Evans filed an intervention based upon a policy for $1,000 issued by the National Mutual Fire Insurance Company, dated May 21, 1907, on a certain hotel near Rogers, Arkansas, which was afterwards destroyed by fire. The chancellor found in favor of Mrs. Evans for the face of her policy, and it is conceded by counsel that the only question raised by the appeal is whether or not the finding of the chancellor that said insurance company did, at the time the policy was issued, have notice of the fact that other policies of insurance had been previously issued on said property is against the preponderance of the evidence; for it is conceded that, if McLeod had notice of the other insurance, Mrs. Evans is entitled to recover. Mrs. Evans testified that at the time she applied for the insurance in question she informed McLeod, the agent of the company, that she had a policy for $1,000 in the Citizen's Fire Insurance

Company. McLeod denies that she gave him this information, but says she told him that she had no other insurance.

T. R. Smallwood testified that he went with Guy E. Thompson to the office of McLeod for the purpose of adjusting the loss of Mrs. Evans, and that, while there, Mrs. Evans stated to McLeod that she never gave him any notice of other insurance, and that McLeod stated to her that she positively did not give any notice.

Thompson relates the conversation in this way. He said that McLeod stated to her that he had no knowledge of the prior insurance, and his recollection is that she made no reply at all. It appears that soon afterwards Mrs. Evans left the office for the purpose of consulting with friends as to whether she should sign a non-waiver agreement which had been presented her in McLeod's office. It will be remembered that the question is whether or not Mrs. Evans gave McLeod notice of the prior insurance at the time she applied to him for the policy. Mrs. Evans claims she gave him such notice and McLeod denies it. Smallwood attempted to corroborate McLeod by testifying that Mrs. Evans admitted at McLeod's office that she had not given him notice of the prior insurance. In this, however, he is contradicted by Thompson, who stated that she made no reply to McLeod when he stated that she had not given him the notice. Under the circumstances, her failure to reply might have been considered of no probative force against her. She was at the same time being pressed to sign a non-waiver agreement, and no doubt thought it prudent to say nothing until she had consulted with friends, which the evidence shows that she did at once. Other circumstances in connection with the matter tended to corroborate her testimony, and, everything considered, we are of the opinion that the finding of the chancellor is not against the weight of the evidence.

4. The record shows that the Federal Union Surety Company signed each of the bonds, and that each bond was for $20,000. It further shows that the liabilities that accrued for any one year did not exceed the sum of $20,000. Therefore no prejudice can result to the surety company from the failure of the chancellor to segregate the amounts found to be due on the several bonds, and it is well settled that this court only reverses for errors that are prejudicial to the rights of the appellant.

5. The chancellor was of the opinion that the Federal Union Surety Company should pay the fees allowed the receiver and his attorneys, and so provided in the decree. This was error. The fees allowed them in cases like this should be taxed and paid out of the fund collected and distributed by the receiver. The costs which a successful litigant may recover do not include fees allowed to a receiver and to his attorneys. *Bradshaw* v. *Bank of Little Rock,* 76 Ark. 501.

The question whether the claimants of fire losses were entitled to attorney's fees under the act of March 29, 1905, at p. 308, is not before the court, for the reason that no claim under this act was made in the court below.

We find that the court erred in not allowing the claim of W. H. Cajul, and in taxing the fees of the receiver and his attorneys against the Federal Union Surety Company, and in that respect the decree is reversed, and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

In all other respects the decree is affirmed.

ON REHEARING.

Opinion delivered July 11, 1910.

HART, J. Appellees (claimants for fire losses) have filed a motion for rehearing on the ground that the court erred in not allowing each of them an attorney's fee.

The claim is based upon the statute of Arkansas enacted at its 1905 session, which is as follows:

"In all cases where loss occurs, and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to the holder of such policy, in addition to the amount of loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed as part of the costs therein and collected as costs and as may be by law collected." Acts 1905, p. 308.

Statutes allowing attorneys' fees to be taxed against railroad and insurance companies have been sustained as a proper

exercise of the police power of the State. *Kansas City Southern Railway Company* v. *Marx,* 72 Ark. 357; *Arkansas Insurance Company* v. *McManus,* 86 Ark. 115.

Upon examination of the record in the present case, we find that claimants for fire losses did ask for the twelve per cent. penalty and attorney's fees under the statute above quoted. The chancery court failed to allow an attorney's fee in each intervention; but allowed the receiver an attorney's fee, which we held in our original opinion must be paid out of the fund administered by him. None of the claimants for fire losses in this case instituted suits in the law courts against the insurance company before the appointment of the receiver to recover the amount alleged to be due them; but, on the contrary, the record affirmatively shows that all such claimants voluntarily came into the chancery court after the receiver was appointed and filed an intervention in the insolvency proceedings, for the purpose of recovering the amount alleged to be due for fire losses. In these interventions, the penalty and attorney's fees provided by the Acts of 1905 were asked for as part of the relief to which they were entitled. We held in the original opinion that, having voluntarily submitted themselves to the jurisdiction of the chancery court, they, by so doing, treated the liability of the surety as an asset of its principal, to be collected and distributed according to the principles governing courts of equity. The act of 1905 in question can not affect the jurisdiction of chancery courts or enlarge their powers. *Gladish* v. *Lovewell, post* p. 618; *Hester* v. *Bourland,* 80 Ark., p. 145; *Mississippi Railroad Commission* v. *Gulf & S. I. Rd. Co.,* 78 Miss. 750; *Broadnax* v. *Baker,* 94 N. C. 675.

"It is a universal rule in equity never to enforce either a penalty or a forfeiture." 2 Story on Equity Jurisprudence, § 1319.

No suits having been instituted against the insurance company to recover for fire losses until the receiver was appointed, and the claimants then having voluntarily submitted themselves to the chancery court to try their claims, we think it is in accordance with the established principles of equity not to allow either the twelve per cent. penalty or the attorney's fees.

Counsel for the Federal Union Surety Company contend that the policies of insurance are cancelled by act of the insured,

and that the basis of settlement should be the rate paid for a short term policy. In short, that the insurance company is entitled to charge the customary short rates, and the policy holder is only entitled to the difference between the amount paid by him and the short rate. In support of his contention, he cites the following cases: *Insurance Commissioner* v. *People's Fire Ins. Co.*, 68 N. H. 63; *McKenna* v. *Firemen's Insurance Co.*, 63 N. Y. Supp. 164; Ex parte *Independence Ins. Co.*, 13 Fed. Cas. 12; *State Ins. Co.* v. *Homer*, 23 Pac. 788; *Van Valkenburgh* v. *Lenox Fire Ins. Co.*, 51 N. Y. 468; *Burlington Ins. Co.* v. *McLeod*, 34 Kan. 192. As an abstract proposition of law, we think the views of counsel are correct, but we also are of the opinion that the state of the record in the case precludes him from availing his client of that principle of law. The record shows that the case was tried upon an agreed statement of facts. Appeals have been taken only in the cases of certain named claimants; and the amount due them are specifically agreed upon in the record. It is agreed that the other cases shall abide the result of these appealed from. The chancery court directed the receiver as master to prepare and file a statement of the names of the persons and the amounts due them on unearned premiums. Exceptions were filed to the report of the master on the specific ground that the surety company was not liable, but no exceptions were made on the ground that the amounts found due were erroneous, or that they were ascertained on an improper basis. Then, as above stated, an agreement was made that all such claims should abide the result of those appealed to this court, and the amounts due on those appeals were agreed upon. Hence we conclude that, under the state of facts as disclosed by the record, the motion for a rehearing on this ground should be denied. On the conclusiveness of agreed statements upon this court, see *Evins* v. *Batchelor*, 61 Ark. 521.

Rehearing denied.

HARRIS v. CAVINESS.

Opinion delivered June 6, 1910.

1. APPEAL AND ERROR—NECESSITY OF OBJECTION.—It was not error for the circuit court to try the issue whether the cause had been compromised, without submitting such issue to a jury, if neither party asked that it should be so submitted. (Page 402.)
2. SAME—HARMLESS ERROR.—There was no prejudicial error in permitting the defendant in a case to make an oral motion to dismiss the case if the motion was specific in its terms. (Page 402.)

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

Jo Johnson, for appellant.

Appellant was entitled to a jury trial. Const., art. 2, § 7; 56 Ark. 391; 48 Ark. 426; 57 Ark. 589; 36 Ark. 305; 32 Ark. 553; 26 Ark. 281; 50 Ark. 266; 40 Ark. 290; Kirby's Dig., § 6170; 125 S. W. 443; *Id.* 349; 123 S. W. 384. "Jury" means 12 men. 32 Ark. 17.

Priddy & Chambers and *John T. Castle,* for appellee.

Even if the question were such that appellant was entitled to a jury trial thereon, he waived it. 91 Pac. 115; 57 Ark. 594; 44 Ark. 202. But granting an involuntary nonsuit in a proper case does not contravene the constitutional guaranty of a jury trial. 9 Cur. Law, p. 984; 91 Pac. 115. The bill of exceptions fails to show that a jury trial was demanded and refused. 44 Ark. 202; 4 Ark. 158; 72 Ark. 261. Compromises are looked upon with favor by the courts. 46 Ark. 219; 31 S. W. 228; 32 Me. 278. And will be held binding in the absence of fraud or duress. 74 Ark. 270. A party to such an agreement can not repudiate without the consent of the other. 110 U. S. 217; 99 N. C. 58; 121 N. C. 589; 55 S. C. 555.

McCULLOCH, C. J. Daniel W. Harris and each of his four brothers instituted separate actions against appellee, Caviness, to recover damages for alleged slanderous words spoken of any concerning them by the latter. After issue joined, the court entered the following order of dismissal in each case (omitting caption):

"Comes the plaintiff, D. W. Harris, by his attorney, Jo Johnson, and the defendant, Bob Caviness, by his attorney, T.

N. Sanford, and upon motion of the defendant this cause is, after due consideration, by the court dismissed upon the settlement and compromise of the parties to the action. It is further ordered by the court that each party pay all costs incurred by him herein, to which action of the court in dismissing said cause the plaintiff at the time excepts, and plaintiff is given ninety days in which to prepare and file bill of exceptions herein."

The bill of exceptions was signed by the judge within the time allowed, and filed with the clerk. The only question presented is whether or not the order of dismissal as it appears on the record should be affirmed. The compromise and settlement referred to in the order was one alleged to have been made between the parties after the commencement of the several actions, and not before.

Counsel for appellants argue that the case should have gone to a jury on the question whether or not the cases had been settled, treating this as a matter in defense which arose after the action had been commenced and the pleadings made up. Without deciding that it should have gone to a jury upon the request of either party, it is sufficient for the purpose of disposing of these cases to say that neither party asked that it be so submitted. The court found, on testimony legally sufficient to sustain the finding, that the cases were compromised and settled subsequent to the commencement thereof. We are not at liberty to determine where the preponderance of the evidence lies, for it is our province only to ascertain whether or not there is substantial evidence in support of the finding of the trial court. The court made no written findings further than is recited in the above copied order, but those recitals necessarily imply a finding that the cases had been compromised and settled.

Appellants objected only that an oral motion be considered, and moved the court to require appellees to reduce their motion to writing. When this request was denied, they proceeded with the trial before the court without further objection, and testimony was introduced on each side in support of and in opposition to the motion. As the oral motion was specific in its terms, and as the court treated it as being controverted, there was no prejudicial error in the court's refusing

to require appellees to reduce it to writing. There is therefore nothing involved here except the question of fact, which must be treated as settled by the finding of the court.

Judgment affirmed.

WILBUR *v.* ELLEFSON.

Opinion delivered June 20, 1910.

ACCOUNT—VERIFICATION—WHEN PRIMA FACIE CASE OVERCOME.—Though an account sued on, duly verified, is *prima facie* correct, under Kirby's Digest, yet where the defendant does not deny its correctness under oath, such *prima facie* case may be overcome by the plaintiff's testimony showing that he held no account against defendant.

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

STATEMENT BY THE COURT.

Appellee, Ellefson, brought suit against appellant for $79.20 upon an open account for goods, wares and merchandise. Appellant, Wilbur, filed answer admitting the correctness of the account, but set up a counterclaim for work done, with items attached amounting to $174.05 duly verified. Appellee denied the matters set up in the cross complaint, but did not verify his answer. No evidence was introduced except as to this counter claim.

The appellant testified as follows: "Mr. Ellefson is a concrete and cement contractor, and sells cement. I, myself, am a cement contractor. On or about the — day of —— 190—, Mr. Ellefson came to me and told me that if I would go to Mr. Reynolds's residence I could get a job doing some concrete work. I went out to Mr. Reyonlds's house and built a concrete porch and some concrete steps. I made a calculation what the work was worth, charging the regular and customary price for my work and for material I had furnished, and presented a bill for same to Mr. Reynolds for payment. Mr. Reynolds refused to pay the same, and I brought this suit against him for said work. but failed to recover, and I have never been paid for this work. I afterwards made a demand upon Mr. Ellefson two different times for payment, but he refused to

pay same. The amount of the account is $184, and this is due and unpaid.

Appellant asked the court to instruct a verdict in his favor on his cross complaint, which the court refused, and appellant duly saved his exceptions.

The court on its own motion instructed the jury over appellant's objection as follows:

"1. Defendant admits this amount is due plaintiff, but sets up counterclaim against plaintiff in the sum of $174.05. This plaintiff denies. The jury will find for the plaintiff $79.20, the amount he sues for. And, if you find from a preponderance of the evidence that plaintiff owes defendant on the counterclaim sued for, you will find for defendant whatever amount you find plaintiff owes defendant, if anything.

"2. And if you find anything due defendant from plaintiff, you will strike a balance of the true sums so found and return your verdict accordingly."

The court also gave the following prayers of appellee, to which appellant excepted in gross.

"1. The court instructs the jury that the defendant can not recover on his counterclaim unless you find that he had a contract, either express or implied, with Ellefson for the building of the Reynolds porch; and that he can not recover if the contract was with Reynolds and not with Ellefson.

"2. The court instructs you that if you find from the evidence that the porch in question was not constructed in a good and workmanlike manner, then the defendant can not recover on his counterclaim."

The verdict and judgment were in favor of appellee in the sum of $79.20.

Edwin Hiner, for appellant.

A simple denial of a verified account is sufficient to put the burden on plaintiff of proving the correctness thereof. 46 Ark. 501.

Ben D. Kempel, for appellee.

A single exception to several instructions is not sufficient. 76 Ark. 482; 60 Ark. 250; 28 Ark. 8; 32 Ark. 223; 38 Ark. 528; 39 Ark. 337; 50 Ark. 348; 54 Ark. 16; 59 Ark. 312; 59 Ark. 370.

WOOD, J., (after stating the facts). Appellant contends that the court erred in instructing the jury that appellant's cross complaint was denied by appellee. Section 3151 of Kirby's Digest is as follows: "In suits upon accounts, the affidavit of the plaintiff, duly taken and certified according to law, that such account is just and correct shall be sufficient to establish the same unless the defendant shall, under oath, deny the correctness of the account, either in whole or in part; in which case the plaintiff shall be held to prove such part of his account as is thus denied by other evidence."

Under this statute appellant by his cross complaint with the account attached, duly verified, made out a *prima facie* case, *Hershy* v. *MacGreevy*, 46 Ark. 501. If appellant had introduced this account and rested there, he would have been entitled to judgment for the difference between his account and that of appellee, which was conceded to be correct. But appellant testified as a witness, and his testimony disclosed the fact that he had no account whatever against appellee, that the account on which he sued appellee was for work and labor performed for one Reynolds, and not for appellee. Appellant's own testimony shows that there was no privity of contract between himself and appellee as to the account upon which he sues appellee.

Upon appellant's own testimony there could be no recovery on the cross complaint against appellee. The judgment is therefore correct, and it is affirmed.

PRATT v. FRAZER.

Opinion delivered June 20, 1910.

1. PLEADING—DEMURRER—WAIVER.—Where a cause has proceeded to final adjudication without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived. (Page 408.)
2. SAME—WHEN DEFECT OF JURISDICTION NOT WAIVED.—It is only where the complaint discloses on its face the court's total lack of jurisdiction that such defect can not be waived, or cured by consent, and may be raised for the first time on appeal. (Page 408.)
3. ACTIONS—TRANSFER—WAIVER.—The right to have a suit in equity transferred to the circuit court is waived by voluntarily submitting to a trial of all the issues by the chancery court. (Page 408.)

4. PARTNERSHIP—SALE OF STOCKS.—Where two persons agreed to sell the stock of an insurance company and to divide the expenses and profits equally, a partnership is created, and all commissions received by either must be divided with the other partner. (Page 408.)

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

STATEMENT OF THE COURT.

This suit was instituted in the Pulaski Chancery Court by George P. Frazer against John R. Pratt. The complaint in substance alleges that the parties to the suit formed a partnership for the purpose of selling stock for an insurance company, and that by its terms they shared equally the profits and losses.

The defendant, Pratt, demurred to the complaint because it did not state facts sufficient to constitute a cause of action, and because the court did not have jurisdiction to hear and determine the case. The record does not show any ruling of the court upon the demurrer.

The defendant then answered. He denied that a partnership existed between him and the plaintiff, and denied that he was indebted to him. The facts are practically undisputed, and are substantially as follows: Some time in April or May, 1908, G. P. Frazer received a letter at his office in Little Rock, Ark., from the Co-operative Company of Rome, Ga., asking him how it would suit him for John R. Pratt to come over and for them to sell the stock of the company together. He answered that it would be all right.

Some time in May, 1908, Pratt came to his office and they made a verbal agreement to sell the stock together. They were to receive 20 per cent. commissions on all stock sold, and they agreed to share equally the expenses and profits. Later they reduced the agreement to writing, and it is as follows:

"This agreement, entered into this, the 27th day of July, 1908, between and by George P. Frazer and John R. Pratt, as follows:

"That on all stock sold in the State of Arkansas for the Co-operative Agency Company, of Rome, Ga., it is mutually agreed that the commissions are to be divided equally between said George P. Frazer and John R. Pratt.

"This contract may be terminated by giving each or either party ten (10) days' notice. In witness hereof we have hereunto affixed our signatures."

Both parties testify that they were to share equally the profits and losses.

Pursuant to the terms of their agreement, they sold 1,430 shares of the stock, and then, after deducting the expenses, they divided equally the 20 per cent. commissions. Later, Frazer learned that Pratt had an individual contract with the company whereby he was to receive an additional sum or bonus of one dollar for each share of stock sold. Frazer did not learn of Pratt having this additional contract with the company until after his settlement with him, and he claims that he is entitled to one half of the fruits thereof by virtue of his contract with Pratt. To recover it he instituted this action.

Pratt does not deny having received the additional $1 for every share of stock sold by him and Frazer, but contends that it was a bonus or gratuity given to him individually, and that Frazer was not entitled to share therein. There is no controversy as to the amount, if anything is due Frazer. The court found for the plaintiff Frazer in the sum of $710, and to reverse the decree rendered this appeal has been prosecuted.

Cammack & White and *Carmichael, Brooks & Powers,* for appellant.

The complaint does not state facts sufficient to constitute a cause of action. 44 Ark. 423; 63 Ark. 518; 30 Cyc. 378, 414. The contract did not create a partnership. 74 Ark. 437; *Id.* 615; Parsons on Part., 6; 1 Lindley on Part., p. 2. Commission means a percentage on the amount of money paid out and received. 16 So. 701; 105 Ala. 142; 7 Phila. 242. The construction of a contract free from ambiguity and technical words is a question of law. 75 Ark. 75; 64 Ark. 43. The test of a partnership as between the parties themselves is their actual intent. 44 Ark. 428.

Robert L. Rogers and *Will Akers,* for appellee.

The question of partnership should have been raised by motion to transfer to the law court. Since it was not raised in that way, it will be treated as waived. 32 Ark. 562; 37 Ark. 286; 82 Ark. 407. If substantial justice has been done, this

court will not reverse. 54 Ark. 468; 34 Ark. 105. Sharing profits is conclusive unless there are circumstances altering the nature of the contract. 74 Ark. 442; 80 Ark. 27; 87 Ark. 412; 131 Fed. 124; 142 Fed. 613. One partner will not be permitted to reap for himself a private benefit from firm transactions. 10 W. Va. 418; 131 Ia. 102; 100 Minn. 98; 107 Va. 249; 5 Ark. 580; 63 Ark. 513; 53 Ark. 153; 88 Ark. 373; 58 W. Va. 44. If the decree is supported by a preponderance of legal evidence, the case will not be reversed for the admission of improper evidence. 76 Ark. 252; 56 Fla. 768; 224 Ill. 300.

HART, J., (after stating the facts). "Where a cause has proceeded to final adjudication without judgment of the court upon demurrer filed in same, the demurrer will be considered to have been waived." *Kiernan* v. *Blackwell,* 27 Ark. 235. As far as the record discloses, the court was never called upon to rule upon the demurrer, and the cause may be said to have proceeded to final adjudication in the chancery court by consent of the parties.

The rule is well settled that it is only where the complaint discloses on its face the court's total lack of jurisdiction that the defect can not be waived and can not be cured by consent, and may be raised for the first time in the appellate court. Conceding, without deciding, that the appellant had a right to have the cause transferred to the law court, he waived that right by voluntarily submitting to a trial of all the issues by the chancery court. *Love* v. *Bryson,* 57 Ark. 589; *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, and cases cited.

Under the facts set out in the statement of the case, the agreement entered into between the parties to the suit for the purpose of selling the insurance stock constituted a partnership. *Culley* v. *Edwards,* 44 Ark. 423; *Buford* v. *Lewis,* 87 Ark. 412; *Rector* v. *Robins,* 74 Ark. 437; *Herman Kahn Co.* v. *Bowden,* 80 Ark. 23.

In the case of *Smith* v. *Hill,* 13 Ark. 173, the court held: (quoting from syllabus): "A partnership for the practice of law is legal, and, as in other partnerships, the act of one partner in the professional business is the act of all the partners. Every responsibility incident to other partnerships in general attaches to legal partnerships as well as corresponding rights." In like manner the employment of the services of persons to sell the

stock of insurance companies is a legitimate business, and a partnership may be formed for that purpose. Such firms are denominated in law non-trading partnerships, or partnerships in occupation. 1 Bates, Partnership, § 329.

Here appellant and appellee entered into such a partnership. They agreed to share equally the profits and losses. They received a sum as compensation which depended upon the amount of sales of stock they made. The expenses of conducting the business were first to be deducted, and then the profits, if any, were to be divided equally between them. The word "commission" as used in the contract, evidently was intended to mean the compensation they were to receive for their services, just as the compensation paid to a firm of attorneys is usually called their fee. The $1 additional which the company agreed to pay appellant as a bonus was but an additional compensation for the extra exertion. In this, as well as in other partnerships, the members must be loyal to each other. Good faith required that appellant should make known to appellee the fact that he was receiving extra compensation, and, in the absence of an agreement to the contrary, the partnership having been entered into upon equal terms, each partner was entitled to receive an equal division of the profits made by the firm whether the contract was made in the name of the firm or in that of one of the individual members. This is so because, from their relationship, the partners are agents for the firm, and what is done by either in furtherance of the partnership business is regarded as the act of the firm. *White* v. *Smith,* 63 Ark. 513; *Boqua* v. *Marshall,* 88 Ark. 373.

The decree will be affirmed.

BRADSHAW v. STATE.

Opinion delivered June 20, 1910.

1. HOMICIDE—FAILURE TO INSTRUCT AS TO MANSLAUGHTER.—Failure to instruct as to manslaughter in a prosecution for murder was not error where no instruction as to manslaughter was asked. (Page 411.)
2. SAME—FAILURE TO INSTRUCT AS TO MANSLAUGHTER.—Where, under the undisputed evidence, in a murder case, defendant was either

guilty of murder or insane, it was not error to refuse to instruct as to manslaughter. (Page 411.)

3. SAME—INSTRUCTION AS TO PASSION DETHRONING WILL.—It was not error in a murder case to instruct the jury "that the defendant can not avoid responsibility for killing the deceased on the ground that it was done under the influence of such passion as temporarily dethroned his reason or for the time controlled his will." (Page 411.)

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

R. G. Harper and *Thos. W. Hardy,* for appellant.

Instructions should be harmonious, else they are calculated to confuse and mislead the jury. 55 Ark. 397; Sackett, Inst. to Juries, 25; 89 Ark. 217. An instruction not applicable to the evidence is erroneous. 90 Ark. 573.

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

The testimony of the witnesses as to the dying declaration was competent and admissible. 68 Ark. 355; 75 Ark. 142; Wharton on Hom., 971.

HART, J. A. L. Bradshaw was indicted by the grand jury of Union County for the crime of murder in the first degree. He filed a petition for a change of venue, which was granted, and the cause was sent to the circuit court of Columbia County for trial. He was there tried and convicted of murder in the second degree, his punishment being fixed by the jury at a term of five years in the State penitentiary. From the judgment rendered Bradshaw has duly prosecuted an appeal to this court.

On the 5th day of November, 1907, A. I. Watson married Victoria Bradshaw, the daughter of appellant, in Union County, Arkansas, and they lived together until she was killed about the 1st day of February, 1908. Prior to their marriage appellant said that if his daughter married Watson he would kill her. The shooting occurred on Saturday afternoon, between dusk and dark, and the deceased lived until the following Tuesday morning about 10 o'clock. The deceased, her husband and his brother, Jim Watson, were in a wagon going home. When in about 300 yards of home, appellant ran out from the side of the road, and said, "Stop!" They did not stop, and appellant said,

"I told you I was going to kill you, and now I am going to do it." He then commenced to shoot with a 32 Winchester rifle. One of the shots took effect in his daughter's left shoulder. She was carried home and lived until the following Tuesday as above stated. The appellant sought to excuse the killing on the ground of insanity, and evidence was introduced to establish this defense.

The court gave all the instructions asked by appellant on this issue, and no ground of reversal is urged on that account. The appellant does claim, however, that the court erred in giving the following instruction:

"The court tells the jury that the defendant can not avoid responsibility for killing the deceased on the ground that it was done under the influence of such passion as temporarily dethroned his reason or for the time controlled his will."

His counsel insist that the instruction was misleading, in the absence of a proper instruction defining manslaughter. No instruction on manslaughter was asked by the defendant. Moreover, there is no evidence in the record that would reduce the offense to manslaughter. If appellant was not insane, then under the undisputed evidence he was guilty of murder. In such a case it is not error to refuse to instruct as to the offense of manslaughter. *Dow* v. *State,* 77 Ark. 464; *Kinslow* v. *State,* 85 Ark. 514, and cases cited.

The instruction, when considered in connection with the other instructions given by the court, was proper as distinguishing passion from insanity. *Williams* v. *State,* 50 Ark. 518.

Counsel for appellant also insist that the judgment should be reversed "because the court erred in permitting Will Flourney to testify as to the condition of the deceased, Victoria Watson, when he swore her and wrote down her dying declaration." Flourney testified that, on the Monday afternoon following the shooting, he reduced to writing the statement of deceased as to the killing, and that she did not think she could get well. The statement itself was not introduced in evidence, and the witness did not testify as to what was contained in it. Hence under no view of the matter could any prejudice have resulted to the rights of appellant. The undisputed evidence shows that appellant shot and killed the deceased. His only defense was that he was insane when he committed the act. The case was sub-

mitted to the jury under proper instructions, and the evidence clearly warranted the verdict.

The judgment will be affirmed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. HEYSER.

Opinion delivered June 20, 1910.

1. CARRIERS—INTERSTATE COMMERCE—AUTHORITY OF STATE COURTS.—Courts of the State are authorized to enforce the provision in the "Hepburn Act" of Congress of June 29, 1906, to the effect that the initial carrier in an interstate shipment shall be liable for any loss, damage or injury to the property caused by it or by any carrier to which such property may be delivered. (Page 416.)
2. SAME—CONSTRUCTION OF HEPBURN ACT.—The provision of the "Hepburn Act" of Congress of June 29, 1906, to the effect that the initial carrier in an interstate shipment shall be liable for any damage or injury to the property transported growing out of the negligence of a connecting carrier, did not create any new right, but merely declared invalid any contract which would exempt it from the liability which it assumed under the common law. (Page 418.)
3. SAME.—The "Hepburn Act" did not confer exclusive jurisdiction upon the Interstate Commerce Commission or upon the Federal courts to enforce the rights which arise from that law. (Page 418.)
4. STATUTES—CONSTRUCTION.—In testing the validity of a statute it is the duty of the courts to resolve all doubts in favor of the legislative action. (Page 419.)
5. CONSTITUTIONAL LAW—LIBERTY OF CONTRACT.—The "Hepburn Act" is not unconstitutional as depriving the initial carrier of the right of liberty of contract or as depriving it of its property without due process of law. (Page 419.)
6. CARRIERS—NOTICE OF CLAIM OF DAMAGES—SUFFICIENCY.—A provision in a bill of lading that notice of any claim of damages shall be given to the delivering carrier within a prescribed time is complied with where notice of a claim of damages was given in apt time to an agent of the delivering carrier who was its depot manager at the place of destination, and was authorized to receive such complaints. (Page 420.)

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

W. F. Evans and *B. R. Davidson*, for appellant.

The State court had no jurisdiction of this cause of action. Hepburn Act, § 1. The shipper may select the connecting carrier, and compel the initial carrier to make the through shipment in this way. Hutchinson on Car., § 130; 9 Int. Com. R. 182; 12 *Id.* 418; 50 Neb. 592; 97 S. W. 778. But this was not true at common law. 110 U. S. 667. In the absence of evidence to the contrary, the presumption is that the damage occurred on the line of the delivery carrier. 76 Ark. 589; 74 Ark. 597; 73 Ark. 114; 72 Ark. 502; 100 S. W. 889. The amendment must be read into the original act as if the entire act had been re-enacted. 89 Ark. 598; 73 Ark. 600. The jurisdiction conferred on United States courts by the act is exclusive. 41 Neb. 375; 168 Mo. 652; 33 Cal. 212; 36 Cal. 281; 45 Cal. 90; 6 Blackf. 125; 13 L. R. A. (N. S.) 966; 6 Neb. 423; 65 Tex. 301; 68 Miss. 454. It requires a uniform system applicable to the whole country. 101 U. S. 691; 114 U. S. 196. The United States courts have exclusive jurisdiction under this act. 105 Fed. 785; 74 Fed. 981; 80 Fed. 78; 112 Fed. 826; 142 Fed. 187; 152 Fed. 293; 157 Fed. 857; 165 Fed. 1; 58 Fed. 858; 116 U. S. 104; 95 Ia. 113. The Hepburn Act is unconstitutional in that it deprives defendant of its property without due process of law. 4 Wheat. 235; *Id.* 519; 18 How. 276; 94 U. S. 113; 96 *Id.* 101; 106 *Id.* 196; 124 *Id.* 219; 169 *Id.* 366; 166 *Id.* 226; 17 Wall. 438; 92 U. S. 481; *Id.* 543; 95 *Id.* 294; 103 *Id.* 182; 154 *Id.* 46; 163 *Id.* 85; 148 *Id.* 312; 85 Ark. 422; 174 U. S. 580; 20 Wall. 266; 2 Pet. 657; 159 Fed. 500; 8 Wall. 623; 111 U. S. 746; 90 N. W. 1099; 155 Ill. 98; 98 N. Y. 107; 99 N. Y. 377; 109 N. Y. 389; 46 Atl. 234; 45 S. E. 331; 66 N. E. 1005; 196 U. S. 447; 207 U. S. 463; 10 S. E. 285; 59 Pac. 341; 125 U. S. 188; 127 *Id.* 205; 15 S. W. 87; 44 Conn. 291; 47 N. E. 302.

Rice & Dickson, for appellant.

Causes of action in tort and contract may be joined. 85 Ark. 129. The State court may hear the common law cause of action. 83 S. W. 362; 80 Ark. 542. A claim for damage to goods accrues upon the delivery of the goods in a damaged condition. 88 Ark. 594. Appellant is liable for the damages. 83 Ark. 92; 81 Ark. 469. The contract was to deliver at the destination. 74 Ark. 10. A contract limiting liability is void if prohibited by statute. 169 U. S. 133; 24 Ia. 412; 28 L. R.

A. 718; 58 Am. St. R. 430; 95 Ia. 260; 63 N. W. 692; 45 Ia. 470. The State court has jurisdiction. 90 Ark. 308; 89 Ark. 404.

FRAUENTHAL, J. This was an action instituted by William Heyser, the plaintiff below, against the St. Louis & San Francisco Railroad Company to recover the damages which resulted during transportation to a shipment of peaches. It was alleged in the complaint that on August 8, 1907, the plaintiff delivered to the defendant at Rogers in the State of Arkansas two cars of peaches for carriage to Baltimore in the State of Maryland, and that the defendant accepted the property for transportation, and by its written contract agreed to carry same to said latter point and there deliver same to plaintiff. It was alleged that by reason of the negligence in failing to carry the peaches with reasonable dispatch and in failing to properly ice and keep properly iced the refrigerator cars in which they were carried the peaches rotted and decayed; and the plaintiff sought to recover the damages which he thereby sustained.

To this complaint the defendant interposed a demurrer; and thereafter in its answer also set up the grounds of the demurrer as a defense to a recovery. In its answer it pleaded that from the complaint it did not appear that any negligence occurred upon the defendant's line of railroad, and that the plaintiff sought to recover damages to the peaches which resulted by reason of negligence which occurred upon the line of railroad of another and connecting carrier by virtue of the provisions of the act of Congress commonly known as the "Hepburn Act," which was approved June 29, 1906, and which is amendatory of the Interstate Commerce Act approved February 4, 1887; that said act, in so far as it attempts to make the initial carrier liable for the negligence of a connecting carrier, is unconstitutional and invalid; and, if valid, that the State courts have no jurisdiction to enforce the rights thereby created. The defendant also denied the allegations of negligence. It also pleaded that according to the written contract of shipment it was provided that as a condition to a recovery notice of the loss or damage must be given within thirty hours after the arrival of the property at its destination and delivery, and it alleged that such notice was not given.

It appears from the testimony that the defendant owned a line of railroad running through the States of Arkansas and

Missouri, and that it was engaged as a common carrier in interstate commerce. On August 8, 1907, there were delivered to the defendant at Rogers, Arkansas, two cars of peaches to be transported from that point to Baltimore, Maryland. The defendant executed its written receipt or bill of lading for the peaches by which it contracted to transport the property, and therein named the plaintiff as the consignee and the place of destination to be Baltimore, Maryland. In said written receipt or bill of lading it was provided: "No carrier shall be responsible for loss or damage of any freight unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination. No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery. * * * It is further agreed that for all loss or damage occurring in the transit of freight the legal remedy shall be against only the particular carrier in whose custody the said freight may actually be at the time of the happening thereof."

The evidence tended to prove that when the peaches were loaded in the cars and delivered to defendant at Rogers they were perfectly fresh and sound, and that when they arrived at Baltimore they were injured by dry rot and decay, and were damaged thereby to an amount equal to if not in excess of the sum herein recovered. If the cars had been properly iced and kept properly iced, and the peaches properly transported without unreasonable delay, the testimony tended to prove that they would have reached the plaintiff at Baltimore in a perfectly sound condition.

Immediately upon the arrival of the peaches at Baltimore the plaintiff examined same, and, finding that they were greatly damaged, he at once, and within thirty hours after the arrival, gave notice of his claim of damages to the depot manager or assistant foreman of the delivering carrier, whose duty it was to notify the consignee of the arrival of goods and note any complaints for damage thereto.

Upon the trial of the case a verdict was returned in favor of the plaintiff, and the defendant has appealed from the judgment entered thereon.

By section 20 of the act of Congress approved February 4, 1887, commonly known as the Interstate Commerce Act (U. S. Comp. St. 1901, p. 3169), as amended by the act of Congress approved June 29, 1906, and commonly known as the "Hepburn Act" (U. S. Comp. St. Supp. 1907, p. 909), it is, among other things, provided:

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

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

It is urged that the rights thus created spring from an act of Congress relating to an interstate shipment, and not from any law of this State, and on that account such rights can not be recognized or enforced in the courts of this State. It is true that the State can not legislate relative to matters that are the subject of interstate commerce, but this does not prevent the courts of the State from taking cognizance of cases that arise out of such commerce. The citizen of the State is also a citizen of the United States, and is entitled to the rights and the protection which are given him by the Constitution and laws of the United States; and the courts of the State have the power to enforce those rights and grant that protection. In the case of *Robb* v. *Connolly*, 111 U. S. 637, Mr. Justice Harlan said:

"Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it and the laws of the United States made in pursuance thereof. * * * If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

And in the case of *Claflin* v. *Houseman,* 93 U. S. 130, Mr. Justice Bradley said: "The general question whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws and treaties of the United States has been elaborately discussed, both on the bench and in published treatises; * * * but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case. * * * The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as State laws are. * * * Legal or equitable rights acquired under either system may be enforced in any court of either sovereignty competent to hear such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction." *Teal* v. *Felton,* 12 How. (U. S.) 292; *Dennick* v. *Railroad Company,* 103 U. S. 11; *Defiance Water Co.* v. *Defiance,* 191 U. S. 194.

There are many instances in which rights growing out of or created by acts of Congress have been recognized and enforced in the courts of this State and the courts of other States. *York* v. *St. Louis, I. M. & S. Ry. Co.,* 86 Ark. 244; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281; *Smeltzer* v. *St. Louis & S. F. Rd. Co.,* 158 Fed. 649; *Watson* v. *St. Louis, I. M. & S. Ry. Co.,* 169 Fed. 942; *Schlemmer* v. *Buffalo, R. & P. Ry. Co.,* 205 U. S. 1; *Holland* v. *Chicago, R. I. & P. Ry. Co.,* 123 S. W. 987; *Southern Pac. Co.* v. *Crenshaw,* 63 S. E. 865.

It is further urged that the above provision of the "Hepburn Act" making the initial carrier liable for any damage or injury to the property transported growing out of the negligence of the connecting carrier is a new right which this statute has created, and that the act of Congress has prescribed the remedy for its enforcement, and that such remedy is exclusive. It is contended that by sections 8 and 9 of the Interstate Commerce Act, approved February 4, 1887, exclusive jurisdiction is conferred upon the Interstate Commerce Commission and upon the Federal courts for the enforcement of the rights thus created. As is said by Judge Rogers in the case of *Smeltzer* v. *St. Louis & S. F. Rd. Co.,* 168 Fed. 420: "The very language used makes it clear that those sections have no application to such an action as this." The provisions of those sections declare a liability for damages which result where the common carrier "shall do, cause to be done or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required." The action herein instituted is based upon the negligence which occurred during the transportation of the property, and not upon anything that is required to be done or prohibited from being done by the act. By its written contract of shipment the defendant in this case had agreed to carry the peaches from Rogers, Ark., to Baltimore, Md. Under the common law, and independent of any statutory liability, it rendered itself liable for any injury to the goods which arose through its own negligence or by reason of the negligence of any connecting carrier upon any portion of the route over which the property was transported, unless it expressly exempted itself from liability by contract. *St. Louis S. W. Ry. Co.* v. *Wallace,* 90 Ark. 138.

It attempted to do this in the written receipt or bill of lading which it executed. The Hepburn Act simply struck down that exemption, and left the liability of the defendant as a carrier as it existed at common law. It created no new right and imposed no new duty, but declared invalid any contract which would exempt it from the liability which under the common law it assumed. But, if we are mistaken in this view of the act, then we are of opinion that Congress did not give by this enactment the exclusive jurisdiction to the Interstate Commerce

Commission or to the Federal courts to enforce the rights which arise from that law. *Smeltzer* v. *St. Louis & S. F. Rd. Co.*, 168 Fed. 420; *Southern Pac. Co.* v. *Crenshaw*, 63 S. E. 865; *Holland* v. *Chicago, R. I. & P. Ry. Co.*, 123 S. W. 987. See also *Midland Valley Rd. Co.* v. *Hoffman Coal Co.*, 91 Ark. 180.

It is urged that this act of Congress is unconstitutional because it deprives the initial carrier of the right of the liberty of contract, and because it deprives it of its property without due process of law. But the right of liberty of contract is not absolute and universal, and is subject to legislative restrictions which are enacted in the exercise of the power to protect the safety, health and welfare of the people.

In the case of *Frisbie* v. *United States*, 157 U. S. 165, it is said: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations except for necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy."

The power to regulate commerce is conferred upon Congress by the Constitution of the United States, and such power is plenary, and may be exercised to the utmost extent, and has no limitation except that prescribed by the Constitution.

The character of the regulations that shall be adopted in the matters of commerce must necessarily be left largely to the discretion of Congress, to which branch of the government the power to make such regulations is confided. In testing the validity of its enactments it is the duty of the courts to resolve all doubts in favor of the legislative action. *Legal Tender Cases*, 12 Wall. 531; *Trade Mark Cases*, 100 U. S. 96; *Fletcher* v. *Peck*, 6 Cranch 87; *Bacon* v. *Walker*, 204 U. S. 311.

Cases involving rights growing out of the above clause of the "Hepburn Act" have been several times before this court, and in each case its validity has been sustained. *St. Louis S. W.*

Ry. Co. v. *Grayson,* 89 Ark. 154; *Kansas City So. Ry. Co.* v. *Carl,* 91 Ark. 97.

Its constitutionality has been upheld in an able and well considered opinion delivered by Judge Rogers in the case of *Smeltzer* v. *St. Louis & S. F. Rd. Co.,* 158 Fed. 649. Its validity has also been upheld in the case of *Southern Pac. Co.* v. *Crenshaw,* 63 S. E. 865. And we are of opinion that the enactment of the above provision of the "Hepburn Act" was within the due exercise of the legislative power conferred upon Congress by the Constitution.

It is contended that notice of the claim of damages was not given in compliance with the above condition of the bill of lading requiring such notice. This provision of the bill of lading does not designate to what officer or agent such notice shall be given; it only provides that the notice shall be given to the delivering carrier within a prescribed time. The delivering carrier was a corporation, which could only receive notice through one of its agents. Within the prescribed time the plaintiff gave notice of the claim of damage to an agent of the delivering carrier who was its depot manager at the place of destination, and to whom such complaints were customarily made. This agent appeared as a witness on behalf of the defendant, and testified that he was authorized by the delivering carrier to notify consignees of the arrival of the property and to receive and note all complaints made relative thereto at the time of arrival. Under these circumstances we think that notice to this agent was notice to the delivering carrier, and that the plaintiff complied with this condition of the contract. We are also of the opinion that the evidence adduced at the trial was sufficient to sustain the liability of the defendant for the damages to the peaches and for the amount of the recovery therefor.

The judgment is accordingly affirmed.

BATTLE, J., not participating.

EMERSON v. STEVENS GROCER COMPANY.

Opinion delivered June 20, 1910.

1. CONTRACT—MEETING OF MINDS.—Before there can be a contract formed and entered into, there must be a meeting of the minds of both parties to the terms of the agreement. (Page 425.)
2. SALE OF CHATTELS—WHEN COMPLETE.—A binding contract of sale may be entered into by letters and telegrams; and when an offer is made, either by letter or telegram, and such offer is accepted, the contract is complete. (Page 426.)
3. SAME—FORM OF ACCEPTANCE.—Unless the parties have expressly stipulated otherwise, it is not necessary that an offer or acceptance should be in any particular form. (Page 426.)
4. SAME—WHEN COMPLETED.—Where a contract is actually entered into, whether by correspondence or by word of mouth, the agreement becomes effective at once, although it was expected that the terms of the contract would afterwards be reduced to writing and signed. (Page 426.)
5. SAME—ACCEPTANCE OF OFFER—INSTRUCTION.—Where defendants offered to sell potatoes to be delivered at Newport, and plaintiff accepted the offer provided they should be delivered at Marianna, and inclosed a check in part payment, which was retained and collected by defendants, it was error to instruct the jury that the acceptance of the check was conclusive proof that defendants accepted plaintiff's proposition. (Page 427.)
6. SAME—SUFFICIENCY OF ACCEPTANCE OF OFFER.—Where defendants offered to sell to plaintiff potatoes to be delivered at Newport, and plaintiff proposed to buy them if delivered at Marianna at same price, and inclosed a check in part payment, which was retained and collected by the defendants, it was a question for the jury whether the retention of the check was an acceptance of plaintiff's counter proposition, or whether it was retained awaiting negotiations; also whether it was retained for an unreasonable time. (Page 427.)

Appeal from Jackson Circuit Court; *Charles Coffin,* Judge; reversed.

John W. & Joseph M. Stayton, for appellant.

To constitute a binding contract, there must be an offer and an acceptance. 90 Ark. 133; 52 Ind. 286; 4 Col. 353; 37 Ia. 186; 40 La. 402; 1 La. 190; 10 La. Ann. 120; 24 *Id.* 620; 105 Ill. 43; 42 N. Y. S. 578; 30 Ark. 186; 100 S. W. 271; 111 S. W. 668. The correspondence was simply preliminary, and not a final contract. 86 Hun 374; 2 Cranch, C. C. 143; 108 Cal. 666; 1 Mart. (U. S.) 420; 30 La. Ann. 117; 30 La.

Ann. 316. The question as to whether there was a contract should have been submitted to the jury. 141 N. C. 277; 8 Pa. Sup. Ct. 424; 35 N. J. Eq. 266; 53 Pa. St. 373; 2 N. Y. St. Rep. 218.

Jones & Mack, for appellee.

The acceptance and retention of the check involved the acceptance of the condition. 55 N. E. 717; 138 N. Y. 238; 33 N. E. 1035; 20 L. R. A. 785. Correspondence may result in a contract, although there is an agreement that it will later be reduced to writing. 29 L. R. A. 431; 144 N. Y. 209; 88 Wis. 622; 10 Bush 632.

FRAUENTHAL, J. This was an action for the recovery of damages for the breach of an alleged contract of sale of a car of potatoes. The appellants were merchants, located at St. Paul, Minn., and were engaged in the business of selling goods by the wholesale. The appellee was a corporation doing business at Newport, Ark. The appellee alleged that the appellants had contracted to deliver to it at Marianna, Ark., a car of potatoes at an agreed price during the first half of February, 1908, and that they had wholly failed to do so; and it sought to recover from appellants the damages which it had sustained by reason of said breach of said contract. The appellants denied that they had entered into any contract for the sale of said potatoes. The negotiations leading up to the alleged consummation of said contract were conducted by letters and telegrams. On December 23, 1908, the appellee wrote to appellants from Newport, Ark., as follows:

"Quote us not later than Saturday, December 26, prices, Triumphs, Early Rose, Burbank and Peerless seed potatoes for February shipment."

Appellants wired on the 25th:

"Triumphs dollar fifteen, Peerless, Rose ninety, Burbank eighty seven bushel, sacked, delivered."

Appellants also wrote appellee on the 26th:

"On receipt of your letter we at once wired you our price seed potatoes. It seems our crop, especially Triumphs, short and will no doubt be high."

Appellee on the 28th wired:

"Accept one car yours twenty-fifth. Specifications follow by mail."

Appellee wrote appellant on the 29th:

"This will confirm our wire order of the 28th, for one car seed potatoes for Marianna, Arkansas, shipment, same to be made in first half of February, specific shipping date to follow. Of course, you understand that these are to be genuine Northern potatoes, and we want them put up in 150 pound even weight sacks. Ship as follows:

210 bags Triumphs, at.....$1.15
35 bags Early Rose, at..... .90
4 bags Burbanks, at..... .87

"Ship direct, sending all papers to us here at Newport. Draft through the Arkansas Bank & Trust Co."

Appellants answered on the 31st:

"We have your mail order for car seed potatoes to be shipped first half of February to Marianna, Ark. We find the freight rate to Marianna is 5c cwt., or 3c bushel higher than to Newport. We suppose you had figured on the advance freight. On all future orders we damand $100 on car on contract. Please mail us your check, and we will return you your signed contract."

On December 29, appellants had written to appellee in regard to the telegram of December 28, as follows:

"We have your night wire, order car potatoes. You understand that our quotation was for reasonably prompt shipment. Hope to receive full specifications in a few days, so we can make the shipment."

On January 2, 1909, appellee wrote to appellants as follows: "Yours of the 29th at hand, and you are evidently mistaken as to the time of shipment of car as purchased of you by wire December 28. If you will refer to our letter of December 23, you will note that we ask plainly for price for February shipment, and you say nothing about when shipment was to be made, and naturally took your price for answer to our letter as referred to above. Hoping that you will see this as we do, and wishing you a prosperous year, we remain, very respectfully, etc." Appellants answered on the 4th:

"Answering yours of the 2d, we will waive the time of shipment, providing you send us your check for $100 on con-

tract. We will mail you contract on receipt of your check, and ship the potatoes first of February. Let us hear from you promptly."

On January 6, 1909, appellee then wrote to appellant as follows:

"Inclosed find our check for $100 to apply on contract for Marianna. Your competitors are offering us same price delivered Marianna, as Newport, as that place takes Little Rock rate. We will expect you to do as much for us as your competitors."

The above check was deposited by appellants in bank at St. Paul on February 9, and was paid by the bank at Newport, upon which it was drawn, on January 14, 1909; but the appellants did not make any reply to the letter of January 6 immediately upon its receipt. On January 11, 1909, the appellee wired to appellants, asking them to quote prices on another shipment of potatoes to be delivered at Diaz, Ark., and on the same day appellants replied by wire, giving quotations and also in said telegram stated: "Marianna rate as written must have additional freight." The appellee made no reply to this portion of the telegram relating to the Marianna shipment, but on January 21, 1909, wrote to appellants as follows: "Inclosed find check for $300 to apply $100 each on the three cars as follows: Newport, Newark and Swifton. Please send us signed contract for these as well as for the Marianna car as sent you some time ago."

On January 23, 1909, appellants wrote to appellee as follows: "We have your checks this morning for all the cars but Marianna, as there was some misunderstanding regarding this order. We herein return you that order, which we have cancelled."

On January 25, 1909, appellee wrote to appellant that it had in its letter of January 6 sent check for $100 on the Marianna shipment, and that the contract for sale thereof was thereby consummated. On January 27, 1909, the appellants wrote to appellee, denying that any contract had been made for the Marianna shipment, and returned to appellee check for $100. This check the appellee returned to appellants on January 29, claiming that the contract for the purchase of the Marianna car of potatoes had been fully consummated.

The appellants introduced testimony tending to prove that when they received the letter of January 6, 1909, with inclosure of check, they deposited the check in bank and held its proceeds pending the further negotiations for arriving at an agreement relative to the price of the potatoes ordered for Marianna shipment, and that when they learned that no agreement could be arrived at they at once returned the amount to appellee, and that they did not accept the suggested offer or counter-proposition contained in that letter.

At the request of the appellee the court amongst other instructions gave the following to the jury:

"3. If you find that, upon plaintiff ordering a car of potatoes on Newport quotations delivered at Marianna, defendant notified plaintiff that delivery at Marianna would be at a higher rate, and would require a deposit of $100 for future delivery, and that plaintiff remitted the amount, but asked a modification to the Newport rate, and defendants accepted and used the check so sent, without further notice to plaintiff, it would be an acceptance of the order for the carload of potatoes unless directly declined by defendants, and would be a contract."

The jury returned a verdict in favor of appellee.

The sole question involved in this case was whether or not there was a contract entered into between the parties by which the appellants sold to appellee a car of potatoes to be delivered at Marianna, Ark., at the prices quoted by them in their telegram of December 25, 1908. This is, we think, under the testimony adduced in the case, a mixed question of law and of fact. It is well settled that, before there can be a contract formed and entered into, there must be a meeting of the minds of both parties to the terms of the agreement. There can be no binding contract of sale until the parties have agreed to the same proposition which is the subject of the contract. There must be an offer to sell upon the one hand and an acceptance of the same offer before it can be said that the contract of sale has been consummated. Mere negotiations for entering into the contract will not suffice, but the proposition to which the negotiations lead for the agreement must be finally assented to by both parties. So, in determining whether or not a contract of sale has been made, the material inquiry is: did the minds of the parties meet and did they mutually assent to the

same thing? *Priest* v. *Hodges,* 90 Ark. 131; Tiedeman on Sales, § 33.

A binding contract of sale may be entered into by letters and telegrams; and when an offer is made either by letter or telegram, and such offer is accepted, the contract is complete and binding. Unless the parties have expressly stipulated otherwise, it is not necessary that the offer or the acceptance should be in any particular form. 1 Mechem on Sales, § 241; *Rankin* v. *Mitchem,* 141 N. C. 277; *Kempner* v. *Cohn,* 47 Ark. 519.

If the contract is actually entered into and made, whether by messages, correspondence or by word of mouth, the agreement becomes at once effective, although it was expected that the terms would afterwards be embodied in a written instrument and signed. The mere reference to a future contract in writing would not negative a present contract if the terms thereof were actually assented to by both parties. The written draft of the contract would only be a convenient record of the agreement and the evidence thereof, but it would only constitute evidence of the agreement, and its absence would not affect the binding force of the contract that was closed. Therefore, if an unconditional offer is made, and that offer accepted, this will constitute an obligatory contract, although the parties also understand that a written contract embodying the terms should be drawn and executed. *Bell* v. *Offutt,* 10 Bush 632; *Green* v. *Cole,* 103 Mo. 70; *Sanders* v. *Pottlitzer Bros. Fruit Co.,* 144 N. Y. 209; *Cheney* v. *Eastern Trans. Line,* 59 Md. 557. So, in the case at bar, the appellants by telegram made to appellee a definite proposition for the sale of a car of potatoes, and when by wire the appellee accepted that offer the contract became complete, although it was also understood that the terms of the contract were to be put into a formal writing and signed. But the offer made by appellants in their telegram of December 25 was to deliver the potatoes at Newport, Ark., the place from which they received the inquiry from appellee. In its letter of January 29 the appellee in effect desired to change the contract by requesting that the potatoes be delivered at Marianna, Ark. To this the appellants did not assent unless they did so upon the receipt of the letter from appellee dated January 6, 1909. The question then is, not whether the terms of the contract were to be embodied in a formal writing and executed,

but whether or not the parties actually assented to the same terms of the contract and the same proposition. By this letter of January 6, 1909, the appellee in effect made to the appellants a counter proposition, in which they offered to take the potatoes if they were delivered at Marianna at the same prices quoted in the telegram of December 25 for delivery at Newport.

Before there could be a contract obligatory upon appellants, they must have assented to the offer thus made by appellee. Under the testimony adduced in this case this was a question of fact for the determination of the jury, and not one of law. The mere fact that the appellants received the check which was sent to be applied upon the offer made in the letter of January 6 would not be conclusive proof of such acceptance of the offer by appellants. If the check was sent upon the condition that, if appellants accepted it, that should be an acceptance of the counter proposal for the potatoes, and the appellants, so understanding it, accepted the check, then the counter offer made by appellee in the letter would be accepted by appellants. *Barham* v. *Bank of Delight,* 94 Ark. 158. But whether or not the appellants accepted the check with such understanding was a question to be determined by the jury. The mere retention of the check was only evidence of such acceptance, and not conclusive proof thereof. If the appellants retained the check for an unreasonable time without notifying appellee that they only retained it for the purpose of waiting negotiations looking to the agreement of the parties to the terms of the contract, or failed to return it within a reasonable time, then the jury might infer from such action and conduct on the part of appellants that they actually did accept the terms of the offer contained in the letter of January 6 for the purchase of the potatoes. We think that under the testimony it was a question of fact for the jury to determine whether or not the appellants accepted the check upon the terms and in assent to the offer set out in appellee's letter of January 6, or whether they only held it awaiting negotiations; and that it was also a question of fact for the jury to determine whether under the circumstances of this case they retained it for an unreasonable time. But by the above instruction number 3 the court in effect instructed the jury that the retention and collection of the check

by appellants was as a matter of law an acceptance of the offer of contract made in the letter of January 6 and an assent to its terms by appellants.

We are therefore of the opinion that the court erred in giving the above instruction number 3 at the request of appellee, and that it should have been modified so as to conform with the principles set out herein.

We have examined the other instructions given at appellee's request and those which were requested by appellants and refused, and we find no prejudicial error in the rulings of the court thereon, when said above instruction number 3 is modified as above indicated.

For the error in giving the above instruction number 3, the judgment is reversed, and the cause remanded for a new trial.

FERGUSON v. STATE.

Opinion delivered June 20, 1910.

1. CRIMINAL LAW—PRESENTATION OF MOTION FOR NEW TRIAL TO COURT.—The failure of the trial court to read or have read the motion for new trial and the supporting affidavits can not deprive the accused of a new trial if he was entitled to it. (Page 430.)
2. SAME—SEPARATION OF JUROR—PRESUMPTION.—The separation of a juror from his fellows during the trial of a felony casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence; and if the State fails to show that he was not subjected to improper influence during such separation, the defendant will be entitled to a new trial. (Page 430.)
3. HOMICIDE—SELF-DEFENSE.—No one, in resisting an assault made upon him by another, is excused in taking his assailant's life unless it is necessary to save his own life or prevent great bodily injury, and he must have employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. (Page 431.)
4. SAME—INVITED COMBAT—SELF-DEFENSE.—One who has provoked an attack upon himself can not be excused for killing his assailant in order to save his own life or to prevent great bodily injury until he has in good faith withdrawn from the combat as far as he can and done all in his power to avoid the danger and avert the necessity of the killing. (Page 432.)

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

Henry Stevens, C. W. McKay and *Powell & Taylor,* for appellant.

The separation of the jury without an order of court is *prima facie* ground for a new trial. 44 Ark. 115; 57 Ark. 1; 73 Ark. 501; 84 Ark. 569; 12 Ark. 782; 33 Ark. 317; 20 Ark. 36; *Id.* 53; 26 Ark. 323; 28 Ark. 155; 34 Ark. 341; 35 Ark. 118. If the assault is so fierce as to make it apparently as dangerous to retreat as to stand, it is not the duty of one assaulted to retreat. 49 Ark. 547; 64 Ark. 147; 62 Ark. 286. Inconsistent and contradictory instructions should not be given. 13 Ark. 360; 54 Ark. 588; 55 Ark. 397.

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

Appellant must show that the juror separated from his fellow jurors was exposed to improper influences. 57 Ark. 1; 44 Ark. 115; 20 Ark. 36; 20 Ark. 60; 7 Eng. 810; 13 Ark. 320; 73 Ark. 510.

BATTLE, J. At the August, 1909, term of the Columbia Circuit Court, the grand jury indicted John Ferguson for murder in the first degree, committed by killing Dock Owens. He was tried by a jury, and convicted of voluntary manslaughter, and his punishment was assessed at two years in the State penitentiary. He filed a motion for a new trial, one ground of which was the misconduct of one of the jurors, and filed two affidavits to sustain it, which are as follows:

"G. B. Mixon states that he lives in the town of Magnolia, county of Columbia, and State of Arkansas; that he is engaged in the mercantile business in said town in a brick building on the north side of the square in said town, adjoining the building owned by the Farmers' Bank & Trust Company; that, while the jury in the case of the State of Arkansas against John Ferguson were in the custody of W. A. Scott, the officer having charge of said jury, while they were passing his store, one of the jurymen, towit, S. T. Bright, left said jury, and went to the rear end of his store, while the remaining panel of said jury, together with the officer in charge, passed on by his store to the corner of the Farmers' Bank & Trust Company; and there

remained until S. T. Bright returned to them; that the said S. T. Bright, when he went to the rear end of his store building, was out of the presence of the jury and officer in charge, and was out of the sight, presence and hearing of each and all the remaining panel on the jury and the officer in charge. This occurred after the jury was impaneled to try the case of the State against John Ferguson and placed in charge of W. A. Scott, and before the verdict was rendered in this case by them. G. B. Mixon.

"Subscribed and sworn to before me this the 4th day of March, 1910.

"Walker Smith, Notary Public."

The other was the affidavit of Vaughan Stewart, and is the same as the affidavit of G. B. Mixon, except as to the name of the affiant.

Immediately after the filing the motion and affidavits, it was submitted to the court. The court asked the counsel of the defendant if he desired to argue the motion, and, upon his answering that he did not, overruled the same. It was not read to the court, nor was there any request therefor by the court or counsel; nor was the court's attention directed to any improper conduct of the jury, or to the affidavits of Mixon and Stewart. The defendant appealed.

The failure of the court to read or have read the motion for a new trial and the affidavits supporting it can not deprive the accused of a new trial, if he was entitled to it. He should have understood upon what he was ruling before deciding.

The rule as to the separation of jurors during a trial in a felony case is stated in *Maclin* v. *State,* 44 Ark. 115, 119, as follows: "But it has long been the rule of this court in case of felony that a separation of a juror from his fellows pending the trial casts upon the State the burden of showing that no improper influence was brought to bear upon the juror during his absence. In other words, the mere fact that a juror separates from his fellows, without the order of court, is *prima facie* ground for a new trial, unless it affirmatively appears that the separating juror was not subjected to any noxious influence." The object of this rule is apparent. The jury are kept together, and an officer is put in charge of them and directed to see that they do not separate to protect the defendant against out-

side influence. They are not allowed to have any communication with outside persons with respect to the guilt or innocence of the defendant on trial, and it is the duty of the officer in charge to see that they do not. This protection is due to the defendant, and the State should see that he receives it. It is not expected of him to employ some one to watch the jury and report any misconduct on their part. Hence, when they separate, the burden is upon the State to show, by circumstances or directly, that the absent juror was not subjected to any injurious influence.

In this case it was shown that, while the jury were in the custody of W. A. Scott, the officer in charge of them, were passing a certain store, one of the jury, S. T. Bright, left them and went to the rear of the store, and the remainder of the jury and officer in charge passed on to the corner of the Farmers' Bank & Trust Company, and there remained until Bright returned to them. During that time he was out of the sight, presence and hearing of each and all of the other jurors and the officer in charge. How long he was absent, or where he went, or whether he could have been subjected to any prejudicial influence in the time and place of his absence, does not appear. The State failed to show that he was not subjected to undue influence during his absence, and the defendant is entitled to a new trial.

Inasmuch as the appellant can not be tried again for any offense except for manslaughter, it is not necessary to notice any question that arose in the trial that can not arise in the next trial.

Appellant and Owens were on friendly terms at all times previous to the trouble which ended in the killing of Owens. The killing was the result of anger suddenly aroused at the time. The law of self-defense in such cases is as follows: "No one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent

with his safety, to avoid the danger and avert the necessity of killing. He can not provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary on the ground of self-defense. He can not invite or voluntarily bring upon himself an attack with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He can not take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he can not be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has in good faith withdrawn from the combat as far as he can, and done all in his power to avoid the danger and avert the necessity of the killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable." *Carpenter* v. *State,* 62 Ark. 306, 307, and cases cited.

It is unnecessary to comment on instruction numbered ten given at the instance of the plaintiff as to the burden of proving circumstances that will justify or excuse the defendant for killing the deceased, the killing being proved, as it will be inappropriate in the next trial.

It is also unnecessary to discuss the admissibility of the protest against the re-employment of the defendant as a teacher in the trial had, as it will be inadmissible in a second trial, malicious intent in the killing of Owens being eliminated by the verdict of the jury in the first trial.

Reverse and remand for a new trial.

McCULLOCH, C. J., (dissenting). There are two reasons, to my mind, why the judgment should not be reversed on account of the alleged misconduct of the juror, Bright, viz., that this was never presented to the court for a ruling, and that the affidavits do not establish facts sufficient to place the burden on the State of showing nonexposure of the juror to improper influences.

We sit here only to correct *errors* of the trial courts, and for that purpose to review the decisions of those courts. An unsuccessful litigant must first seek a correction of prejudicial

matters before he can appeal to us. The record in this case shows affirmatively that the trial court was never in fact asked to grant a new trial on the ground of misconduct of the juror, and that the trial judge never knew that such a ground for new trial was set up in the motion. If that had been brought to his attention, doubtless he would have called on the State's representatives for an explanation as to the conduct of the juror, or at least have given the State an opportunity to show that the juror had not been subjected to any improper influences. I think the majority have missed the mark very far in saying that the court ought to have read the motion or caused it to be read before ruling on it, and could not deprive the defendant of a new trial by failing to do so. That is not the question. What we have to decide is, did the court err in refusing to grant a new trial on account of misconduct of one of the jurors? The court was not in fact asked to grant a new trial on that ground. How, therefore, can we say that he erred in refusing to do so?

It is undoubtedly the better practice for trial courts to require all motions to be read over or the substance stated before ruling on them. But should we reverse a case on account of a ruling which the court never made, and was never asked to make, simply because it stands in the record as a part of the motion? The trial judge naturally assumed, from the conduct of counsel, that the motion contained no new matter, and that the rulings complained of were those which occurred during the progress of the trial. Counsel were asked by the court whether or not they desired to argue the motion, and were thus given the opportunity to present the new matter contained in the motion for the consideration of the court. By failing to call the attention of the court to it, they ought to be held to have abandoned it.

I do not think that the affidavits make a *prima facie* showing so as to place a burden on the State. They merely show that the juror stepped behind a house and later joined his fellows and the officer, who awaited him in front of the adjoining building. It is not shown how long he remained behind the building, nor the purpose of his visit there. That is left to conjecture. I think something more ought to be shown than a mere momentary separation. It ought to be shown that there

was an opportunity for exposure before the State should be required to assume the burden and show that there was no contaminating influence. That is what Judge SMITH meant by what is said in the Maclin case. In that case the juror went into a drinking saloon and remained there some time in the hearing of comments on the trial. No effort was made to meet this by showing that he was uninfluenced by those comments.

In a very recent case we said that "in criminal cases, where evidence is adduced tending to show that the jurors have been exposed to improper influences, the burden is on the State to show that they were not in any way influenced, biased or prejudiced by such exposure." *Reeves* v. *State,* 84 Ark. 569.

For these reasons I dissent from the conclusion reached by the majority.

EAGLE v. TERRELL.

Opinion delivered June 6, 1910.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—A chancellor's finding of facts will be sustained on appeal unless clearly against the weight of the evidence. (Page 436.)
2. EQUITY—JURISDICTION IN PROBATE MATTERS.—Where an administrator was holding lands of the estate as such and accounting for their rents in the probate court, it was not error for a court of chancery to refuse to hold him liable as trustee therefor. (Page 436.)
3. ADMINISTRATION—POWER OF ADMINISTRATOR TO PURCHASE AT CHANCERY SALE.—Where property of a decedent is sold by a commissioner under order of the chancery court, the administrator can not lawfully purchase at the sale, whether he procured it to be made or not. (Page 437.)

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

STATEMENT BY THE COURT.

Foster Terrell owned lands in Lonoke County, Arkansas, consisting of his homestead and lands adjoining, in all 322½ acres, with 238 acres in cultivation. Foster and his wife executed a deed of trust on the land to the Arkansas Loan & Trust Company to secure an indebtedness of $1,300. Foster Terrell died in 1894, leaving his wife and ten children surviv-

ing him. Some of the children were minors. The wife died some two years later. W. L. Terrell, a son, was appointed administrator in 1897. He died in 1901, while his final settlement as administrator was pending. In March, 1901, appellant became administrator of the Foster Terrell estate. Appellant had purchased the interest of five of the heirs before he became administrator. In May, 1902, appellant purchased the interest of another heir. In July, 1901, suit was instituted to foreclose the mortgage. Appellant in his capacity as administrator, and also as an individual, was a party defendant. The heirs and trustee, were also made parties. A guardian *ad litem* was appointed for the minor heirs, and he filed proper answer for them. There was a decree of foreclosure, and a commissioner was appointed to make the sale, and he did so according to the terms of the decree. At public auction July 5, 1902, appellant was the highest and best bidder, and the land was sold to him for $1,400.

The commissioner reported the sale to the court, and executed a deed to appellant, and the sale was confirmed, and the deed approved November 18, 1902. Four days later (November 22, 1902) appellant sold the same land to Frank Barton for a consideration of $6,600 on a credit of five years, evidenced by notes of $1,320 each, payable annually and bearing six per cent. interest. Thereafter the heirs of Terrell instituted this suit, and in their complaint recited the above facts, and alleged various affirmative acts and delinquencies on the part of appellant in the management of the estate of Terrell and connected with the foreclosure proceedings which they claimed rendered appellant liable to them for rent of the land during his administration and for the purchase money as shown by his sale of same to Barton. They also alleged that his purchase of their interests from certain of the heirs was void on account of concealments and misrepresentations. There was a demurrer to the complaint on the first hearing, which was sustained by the trial court; and on appeal we held that the complaint was sufficient to hold appellant as trustee. *Terrell* v. *Eagle,* 85 Ark. 140. After the cause reached the lower court on remand, appellant answered, denying specifically each and every allegation of the complaint. The cause was heard upon the depositions and documentary evidence adduced, and the court decreed "that Geo.

W. Terrell, Mattie White, James Terrell, J. D. Terrell, Ellen Terrell, widow of W. L. Terrell, take nothing by their complaint, and same is dismissed, etc.," and the court found "that Thomas Terrell, Marvin Terrell and Charles Terrell are entitled to a one-tenth interest each, and William Haskins, Walter Haskins, Dan Haskins, Addie Haskins are entitled to one-tenth interest in the proceeds arising from the sale of the lands from appellant to Barton," and rendered judgment according to the finding. The appellant appealed, and appellees have cross-appealed.

J. H. Harrod, for appellant.

Eagle had a right to protect himself. 61 Ark. 571; Adams, Eq., 60; 2 Sugden on Ven., 887.

T. C. Trimble, Joe T. Robinson and *T. C. Trimble, Jr.,* for appellees.

An administrator can not buy at his own sale. 75 Ark. 185; 23 Ark. 623; 42 Ark. 25; 78 Ark. 12; 54 Ark. 62.

WOOD, J., (after stating the facts). 1. The finding of the chancellor that appellant had acquired the interest of Addie Porter, one of the Terrell heirs, and also the interest of George Terrell, another heir, is not clearly against the weight of the evidence. This was purely a question of fact, and it could serve no useful purpose to set out and discuss the evidence bearing upon the court's finding in these particulars.

2. The rents and profits of the place in controversy during the years 1901 and 1902 went into the hands of appellant as administrator. He was holding them as administrator, whether he had the legal right to do so or not, and he was accounting for them as administrator. The administration was not closed. The court did not err in refusing to take jurisdiction of these rents and profits. The probate court, having already acquired jurisdiction of these rents, is vested with ample power to grant appellees all the relief, if any, to which they may be entitled with reference to these.

3. The evidence does not warrant any finding of actual fraud on the part of the administrator (appellant) in connection with the suit to foreclose, or in connection with his purchase of the lands. But the appellant as administrator, having these

lands in possession as trustee for all parties interested in the estate, had a duty to perform with reference to them which was inconsistent with his character as purchaser for his own benefit. He was a party to the suit to foreclose, and it was his duty to make any defense to the suit that could have been made, and it was for him to determine whether there was any defense that could or should be set up to the foreclosure proceedings. Having a duty to discharge with reference to the estate and all persons interested therein, public policy will not permit him to acquire an interest, or to assume an attitude in his own behalf, that might be antagonistic to that of those whom he represents. The law will not permit him to be tempted by self-interest to neglect any duty he owes to those for whom he is trustee. Hence it is well established in this State, and generally, we believe, "that where property of a decedent is sold under order of the court, the executor or administrator can not lawfully become the purchaser." 18 Cyc. 769, 4 and note 92; *Imboden* v. *Hunter,* 23 Ark. 622; *Mock* v. *Pleasants,* 34 Ark. 63; *Culberhouse* v. *Shirey,* 42 Ark. 25; *McLeod* v. *Griffis,* 45 Ark. 505; *Hindman* v. *O'Connor,* 54 Ark. 627; *Gibson* v. *Herriott,* 55 Ark. 85; *Bland* v. *Fleeman,* 58 Ark. 84; *Montgomery* v. *Black,* 75 Ark. 184. See also *Crawford County Bank* v. *Bolton,* 87 Ark. 142.

It is wholly immaterial whether the sale at which the trustee purchases is brought about at his instance or whether it is made at the instance of another, provided he has a duty to perform with reference to the property to be sold that may be in conflict with his interest as purchaser. So it was here. It was appellant's duty to the estate to have the land bring the highest price possible. His duty as a trustee would be to do all in his power to encourage bidders, but his interest as purchaser would be to "beat down" the price and discourage competition in bidding. See *Montgomery* v. *Black, supra.*

"An administrator or executor is not allowed to purchase or speculate upon the estate confided to him for the purposes of administration." *Handlin* v. *Davis,* 81 Ky. 34; *Reeder* v. *Meredith,* 78 Ark. 111, 115.

Appellant purchased the land on a credit of three months, paying therefor the sum of $1,400. He received the commissioner's deed November 18, 1902, and four days after sold the

land to Barton for the sum of $6,600. Appellant testified that the land was worth at a cash valuation between $2,000 and $2,500. The land was appraised at $2,150. The land was sold to Barton on a credit of five years, notes being given bearing six per cent. interest, and the notes were secured by mortgage on the land. There were about two hundred acres in cultivation on the place, and there was evidence tending to prove that it had a rental value of five or six dollars per acre. The appellant sold the land to Barton in November, 1902. It was in December, 1909, when the decree was rendered. There is nothing in the record to show that appellant did not receive the full price for which he sold the lands and interest on the deferred payments. The decree of the chancellor was therefore correct.

Affirm.

HART, J., not participating.

CRAWFORD COUNTY BANK v. BAKER.

Opinion delivered June 20, 1910.

1. COVENANTS—CONSTRUCTIVE EVICTION—TITLE IN GOVERNMENT.—When the title to land is in the State or the United States, that of itself is such a hostile assertion of a paramount title as will amount to a constructive eviction, sufficient to authorize a purchaser to maintain an action against his vendor for breach of the covenants of warranty. (Page 440.)
2. SAME—EXECUTORY CONTRACT TO CONVEY.—While the fact that the paramount title to land is in the State or Federal government is a breach of the covenant in a deed purporting to convey the title, it is not a breach of an executory contract to convey and warrant the title. (Page 440.)
3. LIMITATION OF ACTIONS—BREACH OF COVENANT OF WARRANTY.—A right of action for breach of a covenant of warranty contained in a deed, which covenant was broken at the time the deed was executed, accrued at the time the deed was executed. (Page 441.)
4. SAME—COVENANT OF WARRANTY—WHEN CAUSE ACCRUES.—A cause of action accrues immediately in favor of the grantee in a deed for breach of a covenant of warranty where the paramount title is in the State or the United States, and such cause of action does not run with the land. (Page 441.)
5. COVENANTS—ACTION FOR BREACH—PARTIES.—Where deed was executed to one as trustee for plaintiff, an action for breach of a covenant of war-

ranty therein contained could be brought either by the trustee for the benefit of plaintiff or by plaintiff as the real party in interest. (Page 442.)

6. PARTIES—NONJOINDER—WAIVER.—An omission to make a proper party plaintiff was waived by the defendant if he failed to object and ask that he be made a party. (Page 442.)

7. EVIDENCE—PRESUMPTION AS TO OFFICIAL ACTS.—Proceedings of United State land officers as such are presumed to be regular until the contrary is shown. Thus, it will be presumed that the cancellation of a homestead entry was proper. (Page 442.)

8. APPEAL AND ERROR—HARMLESS ERROR.—Under the rule that the Supreme Court will not reverse for error that is not prejudicial, the error of rejecting proffered testimony will be deemed harmless unless its materiality appears. (Page 443.)

9. EVIDENCE—BEST TESTIMONY.—Oral testimony that final proofs of improvement were made by decedent and mailed to the register of the United States land office, and that final payment was made, was incompetent, in the absence of proof of loss of the original documents in the land office. (Page 443.)

10. APPEAL AND ERROR—INVITED ERROR.—Where the defendant in a suit for breach of warranty in a deed objected to testimony tending to prove plaintiff's expenses in perfecting title, and procured its exclusion, but acquiesced in plaintiff proving what he had paid for an outstanding paramount title, he cannot complain because the court instructed the jury that plaintiff could recover the purchase price and interest, instead of the expenses of perfecting title. (Page 444.)

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

Sam R. Chew and *Jesse Turner,* for appellant.

The burden was on appellee to establish a breach of covenants, and to show the existence of a paramount outstanding title. 11 Cyc. 1152-3; 33 Ark. 833; 47 Ark. 300; 74 Ark. 202. When a party complies with all the requisites necessary to entitle him to a patent, a subsequent grant of the same land to another is void. 98 U. S. 121; 101 U. S. 260; 49 Ark. 88; 9 How. 333; 44 Ark. 452; 31 Ark. 279; 26 Ark. 54; 76 Ark. 525; 80 Ark. 365; 176 U. S. 448; 57 Fed. 516; 13 Wall. 72. No right of action ever accrued to appellee. 74 Ark. 350; 7 Ark. 132; 3 N. C. 82; 1 Met. 450; 32 Ark. 714; 113 N. W. 870; 29 So. 386; 28 N. E. 1182; 4 N. W. 1035; 48 S. W. 385. The cause of action was barred. 8 Ark. 368; 42 W. Va. 753; 59 Ark. 629; 1 Ark. 313; 7 Ark. 153; 85 Ark. 589. As to the measure of damages, see 33 Ark. 643; 54 Ark. 195; 59 Ark. 195; 23 Ark. 629; 48 Tex. 355; 58 Tex. 471; 21 S. W. 172.

C. A. Starbird, for appellee.

There was a breach of covenants contained in the deed. 14 Ark. 286; 47 Ark. 351; 8 Ark. 192; 41 Ark. 465; 31 Ark. 279. Title in the State or Federal Government works a constructive eviction. 33 Ark. 593. A right of action did accrue to J. W. Baker. 26 Ark. 344; *Id.* 445; 39 Ark. 309; 40 Ark. 62; 79 Ark. 69. And his cause of action was not barred. 66 Ark. 464.. The money paid, with six per cent interest, is the measure of damages. 59 Ark. 635.

McCULLOCH, C. J. This is an action at law instituted by J. W. Baker against the Crawford County Bank to recover damages for alleged breach of covenants of warranty of title to land conveyed by deed. The defendant executed to one T. B. Baker on December 21, 1903, a deed with full covenants of warranty of title, etc., purporting to convey, for a consideration of $275, a certain described forty-acre tract of land situated in Crawford County, Arkansas. On December 26, 1903, T. B. Baker conveyed the land to plaintiff, J. W. Baker. The defendant had previously, on Oecember 22, 1900, entered into a written contract with T. B. Baker, whereby it agreed to sell said land to him for said price, and undertook on payment of same to convey the land to him by deed, with warranty of title. This action was commenced in July, 1908, which was less than five years after the date of defendant's deed to T. B. Baker.

Plaintiff undertook to prove that the defendant had no title to the land which it had attempted to convey, and that title paramount was in the United States Government; and contended that the action could, under those circumstances, be maintained by plaintiff without actual eviction having been suffered.

It is well settled in this State and elsewhere that when the title to land is in the State or the United States, that of itself is such a hostile assertion of the paramount title as will amount to a constructive eviction, sufficient to authorize a purchaser to maintain an action against his vendor for breach of the covenants of warranty. *Dillahunty* v. *Railway Company,* 59 Ark. 629; *Seldon* v. *Dudley E. Jones Co.,* 74 Ark. 348.

Learned counsel for the defendant (appellant) first insist that if paramount title was in the United States, as contended by plaintiff, that constituted an immediate breach of the covenant to convey perfect title contained in the contract of Decem-

ber 22, 1900, and that the cause of action arose then, if at all, and was barred by the statute of limitations before the commencement of this action. We are unable to agree with counsel that there was a breach of the covenant contained in the sale contract, or title bond, before the deed was executed or the time arrived, according to the contract, for the execution of the deed. Until that time arrived the contract remained executory, and there was no breach until the obligor failed to perform it according to its terms. The obligation was to convey a perfect title, but the obligor was not in default until it failed to do so at the stipulated time. For if the title rested in the Government or elsewhere, the obligor could have acquired it in order to fulfill the contract, and thus prevented a breach of the covenant of seisin; but paramount title in the Government or elsewhere could not constitute a breach of the executory contract to convey and warrant the title.

Counsel rely on the case of *Tarwater* v. *Davis*, 7 Ark. 153, but we do not think the decision in that case conflicts with these views. There the instrument purported to convey the land, and contained the further covenant "to make and deliver, when required, good and sufficient deed in fee simple, with warranty of title." The trial court sustained a demurrer to the complaint, which sought to recover damages for an alleged breach of covenant, and which alleged that the covenantor was not the owner of the land; but it failed to allege that a demand had been made for the performance of the contract. The court held that demand was unnecessary, for the reason that the covenantor was unable to execute a conveyance according to his contract, not being the owner of the land at the time of the execution of his covenant nor having acquired title thereto subsequently. That is all that was involved in that decision.

But, even if we were wrong in this conclusion, the action is not barred. The executory contract of sale became merged in the deed, and the covenants contained in the latter constituted a new point from which the statute began to run. We hold that the right of action accrued at the time the deed was executed, for the breach of covenant occurred then if the title was in the United States.

It is next insisted that the right of action accrued immediately in favor of the grantee, T. B. Baker, if it accrued at all,

and did not run with the land. *Hendricks* v. *Keesee,* 32 Ark. 714; *Dillahunty* v. *Railway Co., supra; Seldon* v. *Dudley E. Jones Co., supra.* This is correct. But the undisputed evidence is that T. B. Baker purchased the land for the plaintiff, and that the latter paid for it. T. B. Baker took the conveyance in his own name, but, until he conveyed it to plaintiff a few days later, he held as trustee for the plaintiff. The action could have been maintained in the name of T. B. Baker, as the covenant was executed to him for the benefit of plaintiff (Kirby's Digest, § 6002); but plaintiff is the real party in interest, and the action was properly instituted in his own name (Kirby's Digest, § 5999). T. B. Baker would also have been a proper party; but defendant waived the omission to make him a party by failing to object and to ask that he be made a party. *Clark* v. *Gramling,* 54 Ark. 525.

Was there a breach of the covenant of warranty, and if so, was the breach properly established by evidence? There was an original homestead entry of the lands in the United States Land Office at Dardanelle on June 3, 1870, by Nancy Butler, under which the defendant deraigns its claim of title by mesne conveyances. Plaintiff introduced in evidence a certificate issued to him by the Register of the United States Land Office at Dardanelle, dated December 24, 1907, showing that on his contest against one Rufus Tindle, homestead entry No. 2605 was cancelled, and that the land was subject to his (plaintiff's) preferred right of entry within thirty days as occupant. He also introduced the receipt of the Receiver of the Land Office, dated January 6, 1908, showing that he had entered the land as a homestead. It is not contended in argument that the Nancy Baker entry was not cancelled before the subsequent cancelled entry by Tindle and later by plaintiff, but it is insisted that the cancellation was without notice and void, at least that there was no proof of notice.

There is a presumption attending the regularity of the proceedings of the officers of the United States Land Office, as well as all other officers, and this presumption prevails until overcome by proof. *Polk's Lessee* v. *Wendell,* 9 Cranch (U. S.) 86; *Minter* v. *Crommelin,* 18 How. 87; *Delassus* v. *United States,* 9 Pet. 117; *Strother* v. *Lucas,* 12 Pet. 410.

Thus, it is presumed until the contrary appears from proof, that the old homestead entry of Nancy Butler was properly cancelled. "The National Government being the original source of title in this State, the presumption of law is that the title remained with the Government until some other disposition is shown." *Shorman* v. *Eakin,* 47 Ark. 351.

Defendant offered to show by oral testimony of a witness that the notice of cancellation of Nancy Butler's homestead entry (she being now dead) was never given to her, but the court rejected the offer and refused to admit the testimony. The offer was not sufficiently specific to make it effective as the basis of an assignment of error, for it was not shown how the witness could have given testimony establishing or tending to establish the fact that Nancy Butler was dead at the time of the trial, and never received notice of the proceedings to cancel her entry. The witness might have testified that the notice of the proceedings came through the mail to Nancy Butler after her death, but that would not have been sufficient to overcome the presumption that notice was given to those entitled thereto, and that the cancellation was regular. It is the duty of this court not to reverse judgments for technical errors or irregularities unless it appears that prejudice resulted; and unless it be shown that the rejected testimony was material, so that it might have affected the result of the trial, no prejudice appears.

Plaintiff offered to show by oral testimony of the same witness that the final proofs of improvement were made by Nancy Butler and mailed to the Register of the land office, and final payment made. No foundation for the introduction of this testimony was laid or offered. It was secondary testimony, and not competent until loss of the original testimony was proved. If the proof was presented and filed in the land office, the original or certified copies constituted the best evidence. There was no error in this ruling.

The court, over the defendant's objection, instructed the jury peremptorily to return a verdict for the plaintiff and assess the damages at the sum of the purchase price paid for the land in question, together with interest thereon at the rate of six per cent. per annum from the date of the purchase. It is insisted that, inasmuch as the plaintiff, instead of giving up the land and suing for the damage, had proceeded to acquire the

outstanding paramount title of the Government, his recovery of damages should be limited, under the rule laid down by this court in *Dillahunty* v. *Railway Co., supra,* to the expenses necessarily incurred in purchasing the outstanding title. Plaintiff exhibited with his complaint an itemized account of his expenses incurred in canceling the Rufus Tindle entry and in reentering the land as a homestead. The principal item of this account is $125 paid out for attorney's fees. During the progress of the trial he proceeded to introduce proof as to the items of this account, and offered to show that he paid out a sum for attorney's fees; but on the objection of the defendant the court excluded this testimony. Plaintiff thereupon abandoned his effort to prove the items of expense in the account, and turned to the other elements of damages, viz., the amount of purchase price paid for the land and the time of payment, and no objection was made to that testimony.

It is clear, from a perusal of the record, that the court by its rulings upon the admission of testimony held that the plaintiff's measure of damages was the amount of the purchase price with interest, and not the expenses incurred in acquiring the outstanding title. Defendant invited this ruling by objecting to the admission of testimony as to the expenses, and by acquiescing in it by failing to object to the testimony establishing the other measure of damages. The error of the court, if it was error, was therefore invited by the defendant's own conduct, or at least was acquiesced in. It is true that, after the introduction of testimony was closed, the plaintiff asked the court to give a line of instructions the last of which told the jury that the amount of plaintiff's recovery should be "limited to the sum the evidence shows was necessary to homestead the land in controversy." But this was after the court had, upon defendant's objection, excluded from the jury evidence as to that measure of damages. It was too late then, after the defendant had been instrumental in excluding evidence on that measure of damages, to ask that the recovery of damages be limited to it instead of another measure of damages, to the proof of which the defendant had offered no objection.

Upon the whole we are convinced that there was no prejudicial error committed by the court, and the judgment is therefore affirmed.

BULLOCK v. DUERSON.

Opinion delivered June 20, 1910.

1. CLOUDS UPON TITLES—PLAINTIFF'S TITLE.—In suits to quiet title the plaintiff must succeed, if at all, upon the strength of his own title, and not upon the weakness of his adversary's, and the burden is upon him to show title. (Page 447.)
2. TAXATION—CLERK'S DEED—PRESUMPTION.—A tax deed executed by the clerk, under Acts 1868, p. 280, § 70, is *prima facie* evidence of a good and valid title in the grantee. (Page 448.)
3. SAME—TAX SALE FOR TAXES OF SEVERAL YEARS.—Where land is sold for the taxes of several years, it should be sold for the taxes of all the years at one time, and not in separate sales. (Page 448.)

Appeal from Chicot Chancery Court; *Zachariah T. Wood,* Chancellor; reversed in part.

Baldy Vinson, for appellants.

The demurrer should have been sustained. 36 Ark. 456; 65 Ark. 610. The action should have been dismissed for want of affidavit of tender. 23 Ark. 644. Even if the tax deed had been void, two years' possession thereunder would render title good. 79 Ark. 364. And the purchaser is not liable for rent until redemption is effected or tendered. 52 Ark. 132.

June P. Wooten and *G. E. Snell,* for appellee.

The existence of a corporation, once formed, can be questioned only by the State in a direct proceeding for that purpose. 47 Ark. 269; 43 Ark. 120. Tender of taxes was waived. 64 Ark. 150. The tax sale was void. 55 Ark. 218; 68 Ark. 248; 61 Ark. 36; 70 Ark. 328.

BATTLE, J. On the 14th day of July, 1902, J. B. Duerson, Pauline Duerson and Henry Dittmer commenced a suit in the Chicot Chancery Court against Kit Bullock and Harrison McGehee to quiet title to the northeast quarter of section five, township fourteen south, range two west, in Chicot County, in this State, alleging that they are the owners of the land, and that the defendants are in possession of a part of it, and that the remainder is wild and unoccupied, and that the defendants are trespassers and own no part thereof.

The defendants answered, and, in part, said: "That they have expended in improvements on said land $2,500 each, under purchase by them from A. S. Caldwell, who purchased from W.

B. Streett, who purchased the same from the collector of Chicot County at a sale had for nonpayment of taxes for the year 1868, and received a deed therefor; that they went in possession of same under such purchase from W. B. Streett in the spring of 1906, and have continuously resided thereon since said date, and that plaintiffs have not been seized or possessed of said lands for more than two years next before the institution of this suit."

On the 13th day of September, 1869, William B. Streett purchased the lands in controversy at a sale of the same for the taxes of 1868. On the third day of January, 1898, Streett agreed in writing to sell the west half of the land in controversy to the defendants, and they paid him $75, and executed their promissory notes to him for the remainder of the purchase money, and Streett bound himself to convey to them the land sold upon payment of the notes.

Wm. B. Streett received no deed, in his lifetime, for the land purchased at tax sale. He died, and his heirs filed an affidavit with the county clerk of Chicot County to the effect that the certificate of purchase of lands at tax sale, executed to Wm. B. Streett, had been lost and could not be produced, and the county clerk on the 6th day of February, 1900, by deed conveyed the lands in controversy to such heirs. On the 27th day of August, 1900, Julia R. Streett, the widow, and W. R. Streett and W. G. Streett, the heirs of Wm. B. Streett, deceased, sold and conveyed to James Haggart and William McMaster all their interest and estate in the lands.

On the 9th day of January, 1906, the Alliance Trust Company, Limited, sold and conveyed the north half of the land in controversy to the defendant, Kit Bullock, and on the 25th day of January, 1906, sold and conveyed the south half of the same tract to the defendant, Harrison McGehee. We do not find in the record that Haggart and McMaster ever sold or conveyed the interest in the land conveyed to them by Julia, W. R. and W. G. Streett, and that the Alliance Trust Company, Limited, acquired any interest in the same.

The defendants took possession of the west half of the land in controversy immediately after purchasing it from Wm. B. Streett, and at all times since then have held open and adverse possession thereof.

The lands were sold on the 15th day of May, 1876, for the taxes and costs due thereon for the years 1873, 1874 and 1875. The record of such sale shows that the land was valued for each of the years 1874 and 1875 at $154, and that the county tax and penalty assessed against the land for each of such years was $1.54, and that the land was forfeited to the State of Arkansas. Such forfeiture was set aside by the Chicot Chancery Court on the 28th day of January, 1882, in a proceeding lawfully instituted under what is known as the "overdue tax act."

The chancery court, upon hearing, found that the defendants acquired title to the west half of the land in controversy by adverse possession, and dismissed plaintiff's complaint as to that part for want of equity; and found the tax sale of 1868 was void, and quieted plaintiff's title to the east half of the land as against the defendants; and both parties appealed.

It has been repeatedly held by this court that "in suits to quiet title the plaintiff must succeed, if at all, as in actions of ejectment, upon the strength of his own title, and can not rely upon the weakness of his adversary's, and the burden is upon him to show title." *Lawrence* v. *Zimpleman,* 37 Ark. 644, 647; *Kelley* v. *Laconia Levee District,* 74 Ark. 202; *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 387; *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338, 346; *Mason* v. *Gates,* 82 Ark. 294, 301; *Little* v. *Williams,* 88 Ark. 37; *McMillan* v. *Morgan,* 90 Ark. 190; *Sibly* v. *England,* 90 Ark. 420, 423.

The land was sold for the taxes of 1868 on the 13th day of September, 1869, and the deed on account of such sale was executed on the 6th day of February, 1900. This deed was authorized by the statute which provides: "When, by the provisions of any former law of this State, any officer or person was by law authorized to make deeds for lands or lots sold for taxes, and the same has not been done, the clerk of the county court of the proper county shall be and is hereby authorized to make such deeds to all persons entitled thereto, and the deeds which shall be made by the clerk of the county court shall be good and valid in law as if made by the person authorized under such former law to make such deeds." Kirby's Dig., § 7108. And such former law, under which the land in controversy was sold for taxes of 1868, provides that a deed executed in pursu-

ance thereof "shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all courts as *prima facie* evidence of a good and valid title in such grantee, his heirs and assigns." Acts of 1868, page 280, § 70.

The deed executed by county clerk of Chicot County to the heirs of William B. Streett is *prima facie* evidence of a good and valid title to the land in controversy in the grantees therein, their heirs and assigns. This *prima facie* evidence is not overcome. An effort to do so was made by the record of the sale of the land for the taxes of 1873, 1874 and 1875, on the 15th day of May, 1876. Such sale should have been for the taxes of all these years at one time, at one offering, and not in separate sales. *Worthen* v. *Badgett*, 32 Ark. 496, 532, 533. The presumption is that it was, and was sold for one per cent. county tax for 1875, when five mills was the maximum of such tax. Constitution of 1874, art. 16, § 9. The sale was void, and was afterwards set aside by decree of the Chicot Chancery Court rendered on the 28th day of January, 1882, which decree was followed by an invalid sale made under decrees rendered by a special judge at an adjourned term of the court, when the judge thereof was holding the regular term of another county. *Streett* v. *Reynolds*, 63 Ark. 1.

The court found that the tax sale of 1868 was void. We find no evidence of that fact. The plaintiff filed a copy of the record of the sale of the land for the taxes of 1868, on the 13th of September, 1869, to prove that fact. But it contains only the names of the owner, the description of the land, the taxes assessed against the same, and the name of the purchaser. It was a record of the sale, and nothing more, and does not show its invalidity.

Plaintiffs failed to show that they had title to the land. Their complaint ought to have been dismissed for want of equity.

The decree is affirmed as to the west half of the land; and as to the remainder is reversed, and the cause is remanded with directions to the court to enter a decree in accordance with this opinion.

EDGAR LUMBER COMPANY *v.* CORNIE STAVE COMPANY.

Opinion delivered June 20, 1910.

1. CONTRACT—PRIVATE CARRIER—PREFERENCE.—An agreement by a private carrier operating a steam tramroad to haul staves for a lumber company at a certain price and to charge all others a larger sum, and to credit the lumber company with all the surplus over the rates established in its favor, is not against public policy. (Page 453.)
2. CARRIERS—WHO ARE.—The fact that a motor car was run over a spur track for mail and passengers, without proof that charge was made therefor, does not establish the fact that the operator of the motor car was a public carrier of freight. (Page 453.)
3. CONTRACTS IN RESTRAINT OF TRADE—VALIDITY.—A contract in restraint of trade is valid when founded upon a valuable consideration if the restraint is reasonable as between the parties and not injurious to the public by reason of its effect upon trade, and whether the restraint is reasonable depends upon whether it is such as affords fair protection only to the party in whose favor it is given, and not so large as to injure the public. (Page 454.)
4. CONTRACTS—CONSTRUCTION—CONDUCT OF PARTIES.—Where the parties to an ambiguous contract have by their conduct placed a construction on it, that construction will be followed by the courts. (Page 455.)
5. ESTOPPEL—CONDUCT.—Where the purchaser of a lumber company's property, finding its contract with another in force, continued to perform it for three years and to receive the benefit under it, it will be held to be estopped to deny that it is liable under such contract. (Page 455.)

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

STATEMENT BY THE COURT.

This suit was instituted in the Union Circuit Court by the Cornie Stave Company against the Edgar Lumber Company to recover damages in the sum of $972.11 for an alleged breach of contract. Both parties are corporations duly organized under the laws of the State of Arkansas. The contract of June 25, 1902, having expired by its own terms, this suit was brought on the second contract, which is as follows:

"This contract and agreement made and entered into by and between the H. C. McDaniel Lumber Company, of Wesson, Arkansas, hereinafter known as the party of the first part, and the Cornie Stave Company, of Junction City, Arkansas, hereinafter known as the party of the second part:

"Witnesseth that, for and in consideration of the sum of one dollar cash in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the party of the first part hereby agrees and contracts with the party of the second part to use their best efforts at all times to secure cars for loading bolts and staves on their main line and spurs, and to deliver same promptly, when loaded, to their nearest connection with the Arkansas Southern Railroad.

"The party of the first part further agrees and contracts with the party of the second part that, in order to better protect the interest of the party of the second part in the territory adjacent to the tramroad of the H. C. McDaniel Lumber Company, to charge all parties, except the party of the second part to this contract, the following rates on shipments off their road: Staves and heading bolts, $20 per car; sawn staves and sawn heading, $20 per car; rough split staves, $25 per car; bucked staves, $30 per car. And all surplus over rates established for party of second part shall be credited to account of party of second part. In consideration of the above, the party of the second part agrees to pay to the party of the first part the following rates on stave mill products, viz: Oak staves and heading bolts, $10 per car; oak sawn staves and heading, $10 per car; oak rough split staves, $12 per car; oak bucked staves, $15 per car.

"The party of the second part further agrees, in consideration of the above specifications on the part of the party, to handle all stave products gotten out by them in the following territory, viz: north half township 19, range 17; all of township 19, range 18; all of township 20, range 18, in Union County, Arkansas. Also township 23, range 5 south and west of Cornie Creek; also township 22, range 5; also township 23, range 6 and township 22, range 6, in Claiborn Parish, Louisiana; over their logging road under their above agreement, and that they will not divert any part of said material to any other line for transportation.

"It is further agreed and understood that, should more than one class of material be loaded into the same car, the higher rate is to be effective on said shipment. It is further agreed that the freight due the party of the first part on above-mentioned shipments shall be paid by the party of the second part

on the 15th and 1st of each month. It is further agreed and understood by both parties that this contract is to be in full force and effect immediately upon the expiration of the present contract existing between the party of the first part and the party of the second part, made and signed June 25, 1902, and is to remain in full force and effect for the period of six years from its commencement. It is further agreed and understood that this contract shall be binding on both parties to this agreement, their heirs and assigns.

"This contract made and signed in duplicate this the 28th day of April, 1903."

At the time these contracts were executed, and thereafter, the Cornie Stave Company owned and operated a stave mill at Junction City, Arkansas, on the main line of the Arkansas Southern Railroad, which commenced at El Dorado and extended south sixteen miles to Junction City, and from there into the State of Louisiana. Cornie Junction was a regular station on said railroad, about four miles north of Junction City. The town of Wesson was about four miles west of the town of Cornie Junction and from the line of the Arkansas Southern Railroad. It came into existence by reason of the location there of a sawmill plant by the H. C. McDaniel Lumber Company, a domestic corporation. A spur railroad track was constructed from Cornie Junction to Wesson for the use of the McDaniel Lumber Company in hauling its products from its mill to the main line of said railroad at Cornie Junction. For the purpose of hauling saw logs to its mill, the McDaniel Lumber Company constructed a tram or log road, some ten miles in length, extending out into its timber west of the mill. This tram road was of standard guage, and was connected with the spur track at Wesson. The McDaniel Lumber Company owned an engine, and operated it for the purpose of hauling logs on its tram road to its mill to be sawed into lumber, and also for the purpose of hauling lumber from its mill over the spur track to Cornie Junction on the main line of the Arkansas Southern Railroad Company. The cars used were obtained from the railroad company.

In the territory traversed by the tram road was valuable stave timber, some of which was owned by the Cornie Stave

Company. The contract in question was executed for the purpose of having this stave timber hauled to its mill.

In the year 1904 the Edgar Lumber Company was incorporated, and during the same year purchased the entire holding of the McDaniel Lumber Company. The contract in question was then in force, and was being performed by the McDaniel Lumber Company. The Edgar Lumber Company continued the performance of the contract according to its terms for a period of time which will be stated later. On the 14th day of September, 1905, articles of incorporation of the El Dorado & Wesson Railway Company were issued. The stockholders were in the main the same as those of the Edgar Lumber Company. This railroad was constructed from Wesson to El Dorado, a distance of ten miles. The steel was removed from the spur track between Wesson and Cornie Junction after the El Dorado & Wesson Railroad was finished; and some time in August, 1907, the Edgar Lumber Company ceased to use said spur track. Thereafter its cars were carried to the main line at El Dorado over the El Dorado & Wesson Railroad. The Edgar Lumber Company continued to perform the contract sued on until the 16th day of July, 1908, at which time it refused to deliver any more cars under the terms of said contract to the main line of the Rock Island Railroad, which had become the successor of the Arkansas Southern Railroad Company. During the latter part of the year 1907, and after the spur track had been torn up, the Edgar Lumber Company hauled the cars containing its lumber and the timber of the Cornie Stave Company over the line of the El Dorado & Wesson Railroad to El Dorado. In the early part of 1908 the latter road began operation as a public carrier, and thereafter until the 16th day of July, 1908, it hauled said cars and charged the freight to the Edgar Lumber Company. After July 16, 1908, when the Edgar Lumber Company refused to further pay the freight, it was paid under protest by the Cornie Stave Company to the El Dorado & Wesson Railroad Company, and this suit was brought against the Edgar Lumber Company to recover the amount of freight so paid.

During the years 1906 and 1907, the Edgar Lumber Company operated daily over the spur track from Wesson to Cornie Junction a motor car which carried mail and passengers, except when it was broken down.

The court tried the case sitting as a jury, and found for the plaintiff. Judgment was therefore rendered in favor of the Cornie Stave Company against the Edgar Lumber Company for $972.11. To reverse that judgment this appeal is prosecuted.

Gaughan & Sifford, for appellant.

The wording of the contract should be looked to, to determine the intent of its makers. 15 L. R. A. (N. S.) 854; 71 Ark. 552. There was no binding contract on appellant. Cook on Corp., vol. 4, p. 704.

Powell & Taylor, for appellee.

Appellant is estopped to deny liability. 74 Ark. 190; *Id.* 377; 77 Ark. 109; *Id.* 128; 69 Ark. 287; 79 Ark. 14; 78 Ark. 483. Even if the contract was made without authority, appellant is bound by ratification. 11 Ark. 189; 21 Ark. 539; 28 Ark. 59; 29 Ark. 131; 66 Ark. 209; 112 Fed. 554; 119 Fed. 279; 121 Fed. 343; 43 N. E. 47; 6 L. R. A. (N. S.) 397.

HART, J., (after stating the facts). It is earnestly insisted by counsel for appellant that the contract in question is illegal and void as being in restraint of trade. It is well settled that agreements by common carriers which interfere with the performance of their duties to the public are illegal and void as being contrary to public policy. 9 Cyc. 498. No one has a right to enter into a contract where the obligation imposed by it can not be performed by the other party without a violation of law; but we do not think the rule has any application to the facts adduced in evidence in the case at bar. While the tram road from Wesson west into the timber was a standard gauge steam railroad, it was operated for private carriage. The undisputed evidence shows that the McDaniel Lumber Company built it for the express purpose of hauling its own logs to its sawmill. It was not chartered as a public carrier, and its owner and operator did not hold it out as such. It was operated as a private carrier, and as such its owner had the right to contract to haul exclusively for one person, firm or corporation. As a private carrier, it had a right to give a preferential rate to appellee in consideration of doing all its hauling. The evidence also shows that the spur track from Wesson to Cornie Junction was a private spur, and was not built for the use of

the public. The railroad company did not operate its trains on the spur, and that it was built for the exclusive use of the lumber company is shown by the fact that when they ceased to use it the spur track was torn up. It was attempted to establish the fact that the spur track was operated as a common or public carrier by showing that the lumber company ran a motor car between Wesson and Cornie Junction in 1906 and 1907 for the purpose of carrying the mail and passengers, but the evidence does not show that any charge was made for their carriage. When it is remembered that the evidence shows that Wesson came into existence by the location of the lumber company's sawmill, it may be inferred that this motor car was run for the convenience of the company and its employees. In any event the fact that the motor car for mail and passengers was run during the years 1906 and 1907 does not establish the fact that the spur was operated as a public carrier of freight. Indeed, the evidence establishes just the reverse. It shows that the spur track was laid for the exclusive private use of the lumber company, and that it was not operated as a public carrier of freight. In construing a contract in all essential particulars similar to the one in question, the Supreme Court of Virginia in the case of *Merriman* v. *Cover,* 104 Va. 429, held (quoting from syllabus): "2. A contract in restraint of trade is valid when founded on a valuable consideration, if the restraint imposed is reasonable as between the parties and not injurious to the public by reason of its effect upon trade. Whether or not the restraint is reasonable is to be determined by considering whether it is such only as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Upon the evidence in the case at bar the stipulation by defendants as private individuals and owners of a steam railroad, engaged in private carriage, that no chestnut oak bark shall be shipped over their road except to the plaintiffs, unless they refuse to pay the market price therefor at their own or any other large tannery in that county, is reasonable as between the parties, and does not injuriously affect the public, and hence is valid."

It is next contended by counsel for appellant that the words "to their nearest connection with the Arkansas Southern Railroad," as used in the contract, did not mean Cornie Junction,

but that it meant Wesson. They insist that, if Cornie Junction had been meant, it would have so stated in the contract by that name. Their contention has no argumentative force; for, as said by counsel for appellee, if Wesson had been meant, it would have been just as easy to have named Wesson in the contract. Indeed, the contention of appellee is more reasonable; for the line of the Arkansas Southern Railroad was located, and was not likely to be changed. The town of Wesson had a fixed location; and if the latter point had been meant, the parties would have used the word "Wesson," instead of the words, "their nearest connection with the Arkansas Southern Railroad." On the other hand, the lumber company prepared the contract, and may not have wished to name their point of connection as Cornie Junction for the reason that this would have compelled them to deliver at that point. They doubtless wished to use language that would enable them to change their point of connection with the Arkansas Southern Railroad during the life of the contract without committing a breach of it. This seems to have been the interpretation placed upon the contract by the parties; for the cars were delivered at Cornie Junction until the spur track was torn up, and then, by consent, the place of delivery was changed to El Dorado, and the contract as thus construed was carried out until the 16th day of July, 1908. Hence we think the parties are bound by their own construction of the contract as evidenced by their acts in performing it.

It is next contended by counsel for appellant that it did not, by the purchase of the property of the McDaniel Lumber Company, become liable to perform its contracts. This may be true, and still they are liable under the facts and circumstances in evidence. The evidence shows that the appellant purchased the entire property of the McDaniel Lumber Company in 1904, and its officers state that they found the contract in force and continued to perform it upon the same terms as provided in the original contract. They so continued to perform the contract until July 16, 1908, at which time they refused to further perform it. Their refusal was not based upon the ground that they were not liable to perform it, but was based upon a disagreement as to what was meant by its terms. This act itself was a recognition of the binding force of the contract. While the mere fact that appellant purchased the property of the Mc-

Daniel Lumber Company did not make it liable upon that company's contract, yet, having accepted the contract and having undertaken to perform it according to its terms for the period of nearly three years, it may now be said that it assumed the contract. Having reaped the benefits of the contract for that length of time with a full knowledge of its terms and conditions, it is now estopped to deny liability under it.

The judgment will therefore be affirmed.

INDUSTRIAL MUTUAL INDEMNITY COMPANY *v.* WATT.

Opinion delivered June 27, 1910.

1. DEATH—PRESUMPTION AGAINST SUICIDE.—The presumption against suicide goes so far as to justify the inference, upon proof of a self-inflicted death, that the killing was accidental. (Page 458.)
2. INSURANCE—SUICIDE AS DEFENSE—WHEN QUESTION FOR COURT.—In an action upon a policy of life insurance where the defense was that the insured committed suicide, which was an excepted risk, it was error to submit the question to the jury whether the killing was accidental if the undisputed evidence establishes that the killing was intentionally self-inflicted. (Page 459.)

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

STATEMENT BY THE COURT.

The Industrial Mutual Indemnity Company issued to William N. Watt a policy of life insurance for the sum of $1,000, payable to Mabel Watt, his wife. William N. Watt died from a pistol shot wound, and Mabel Watt brought this suit to recover the amount of the policy.

The policy contained a clause which exempts the insurance company from liability in the event of the death of the policy holder from self-destruction, and this was the only defense interposed.

William N. Watt died on the 28th day of December, 1906, in the city of Hot Springs, Arkansas, from a pistol shot wound. The facts bearing on the question of suicide are as follows:

William N. Watt was a married man, about 45 years old, and resided in the city of Hot Springs, Arkansas, where he held the office of constable. He had a wife, but no children.

On the evening of the 27th of December, 1906, Watt and his wife went to a dance, returning home some time after 12 o'clock at night. They slept in the same bed that night, and along about 3 or 4 o'clock in the morning Watt asked his wife if she would not die with him, and she told him that she did not think it was the right thing. The next morning about 9:30 o'clock, Mrs. Watt, who had arisen from bed and dressed herself, heard a pistol click. She at once turned and looked at her husband, who was still in bed. He had a pistol in his hand. Neither said a word for a minute, but just looked at each other. Watt then said to his wife that he was going to put the pistol over under the other pillow. He was in the habit of carrying a pistol and sleeping with it under his pillow. Shortly afterwards he arose, and went down town. About 12:30 o'clock of that day, he left his office for his home. At the time, he told one of his deputies that he would be back that afternoon. Before going home, however, he called up a friend and inquired why she and her husband had not gone to the dance the night before, and appeared to be in his usual spirits. When he reached his home, he sat down in his wife's lap, and asked her to untie his collar and cravat. He told her of the death of a friend of his. He then undressed, and told her that he would lie down and take a nap before dinner. He lay down on his back on the bed, putting his pistol under his pillow. His wife left the room, and in a few minutes, probably five, she heard a pistol shot in the room where her husband was, and she went to his door and looked in, but did not enter. She gave the alarm, and Disheroon, a neighbor, came in. He went into the room, and found Watt lying dead on the bed on his back with a pistol shot wound in his breast. His undershirt was on fire where the ball entered, and Disheroon put out the flame. He and other witnesses who came in stated that Watt was lying on his back stretched out on the bed. He was shot through the heart. The bullet passed through his body and on down through the mattress on to the floor. Neither the bed clothes nor anything else in the room was disarranged. A 45-caliber six-shooter was lying on the bed, and one chamber appeared to have been recently discharged, and the wound was made by a pistol of that caliber. Mrs. Watt stated in the proof of loss made by her that her husband died as the result of a pistol shot wound inflicted by himself.

She repeated this statement at the trial, but says that she did not know whether it was accidental or not. About one year before this Watt had attempted to kill himself by taking morphine. His wife stated that he appeared to be in as good spirits as usual when he came home on the day in question, but stated that he spoke of the death of his friend, which occurred in the city of Hot Springs where he resided.

The trial resulted in a verdict for the plaintiff for the amount of the policy, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

James E. Hogue and *Calvin T. Cotham*, for appellant.

From the evidence given on the trial but one reasonable inference could be drawn, and that was that the deceased took his own life. 100 Wis. 266; 75 N. W. 991. Isolated facts should not be singled out in instructions. 75 Ark. 76. And they should be hypothetical. 14 Ark. 287; *Id.* 531; 31 Ark. 699.

Wood & Henderson and *C. V. Teague*, for appellee.

If a party does not follow the ruling of the court on his objections by clinching it with an exception, he waives the objection. 73 Ark. 409; 44 Ark. 106. Even the verdict of a coroner's jury finding that his death was suicidal would not have made a *prima facie* case to that effect. 80 Ark. 190. The burden of proving suicide was on the defendant. 80 Ark. 194; 73 Am. St. R. 244.

HART, J., (after stating the facts). It is insisted by counsel for appellant that the evidence did not warrant the verdict of the jury.

In discussing the principle of law applicable to cases of this sort, in *Grand Lodge of A. O. U. W.* v. *Banister*, 80 Ark. 190, the court said: "In the first place, there is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted—it is presumed to have been accidental until the contrary is made to appear. This rule is founded upon the natural human instinct or inclination of self-preservation, which renders self-destruction an improbability with a rational being." To the same effect, see *Clemens* v. *Royal Neighbors of America*, 8 Am. & Eng. Ann. Cases, 1111, and case note; *Lindahl* v. *Supreme Court Independent Order of Foresters*, 8 L. R. A. (N. S.)

916; *Tackman* v. *Brotherhood of American Yeomen,* 8 L. R. A. (N. S.) 974.

Hence we see that if reasonable men, viewing the facts, which are undisputed, might come to different conclusions as to whether the deceased committed suicide, then the facts, although undisputed, were properly submitted to the jury.

A careful consideration of the facts and circumstances adduced in evidence irresistibly lead us to the conclusion that the death of Watt was by suicide. All the physical facts point that way, and they are inconsistent with any other reasonable theory. It is conceded that all the circumstances point with certainty to the conclusion that Watt shot himself; but counsel for appellee claim that the jury might have found that it was accidental, and rely on the Banister case cited *supra* as sustaining their contention that the court properly left it to the jury to decide whether his death resulted from accident or suicide.

We are of the opinion that the facts in the case at bar tending to establish suicide are much stronger than in the Banister case. There it was shown that Banister was very nervous and excitable, always being in fear of burglars when aroused from sleep. The killing occurred at night after he had retired and from the physical facts it was not impossible that he might have inflicted the wound by accident in restlessly tossing in slumber or upon awakening suddenly and in affright. He was shot in the temple. He had never talked of killing himself. Here the facts are essentially different. Watt had about one year previous to his death attempted to kill himself. On the very day of the unfortunate occurrence, he had at 3 or 4 o'clock in the morning, a time when people usually sleep soundest, talked with his wife about the self-destruction of both her and himself. After she had risen next morning, and before he had left his bed, she heard the click of his pistol. The fact that they looked at each steadily for a minute and said nothing, as she says they did do, indicates that his later remark that he was changing his pistol from one pillow to another was a subterfuge. If that was his purpose, there was no occasion for the pistol to click, and no occasion for them to look each other steadily in the eye without saying anything. He shortly afterwards arose and went down town, carrying the pistol with him. While she says he was cheerful when he returned at noon, he

was still talking of death. He referred to the death of his friend. Then the immediate facts attending his death of themselves shut out the theory of accidental shooting. He was found lying on his back stretched out on the bed, and there appeared no disarrangement of the bed clothes. His undershirt was on fire where the bullet entered his body in the region of his heart. It went through his body on down through the mattress and on to the floor, and its course could be traced from the position in which he lay. The condition of the body when it was found and the course of the bullet, coupled with his recent statements and acts in regard to self-destruction, are conditions and circumstances inconsistent with any other reasonable cause of death than that of suicide.

The judgment will therefore be reversed, and the cause dismissed.

BUNDY v. STATE.

Opinion delivered June 27, 1910.

1. CONSPIRACY—EVIDENCE.—The existence of a conspiracy alleged to have been composed of two persons cannot be established by evidence of the acts or declarations of one in the absence of the other. (Page 462.)
2. SAME—SUFFICIENCY OF EVIDENCE.—To sustain an indictment of two persons for a conspiracy, it is not sufficient to prove that one of them conspired with a third person. (Page 462.)

Appeal from Prairie Circuit Court, Southern District; *Eugene Lankford,* Judge; reversed.

J. G. & C. B. Thweatt, for appellant.

The admission of a co-conspirator is not admissible until the fact of conspiracy is proved *aliunde.* 77 Ark. 444. The evidence failed to show a conspiracy between appellants.

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

The indictment was sufficient to put appellants upon notice of what they were expected to answer. Kirby's Dig., § § 2228, 2241, 2242 and 2243; 84 Ark. 477. It was not necessary to prove an unlawful agreement between appellants by direct and positive evidence. 77 Ark. 444.

McCULLOCH, C. J. Appellants, James Bundy and C. S. Bell, who were school directors in a certain common school district in Prairie County, were tried and convicted under an indictment charging them with unlawfully conspiring together to cheat and defraud one Geneva Lucas out of the sum of $20 by exacting and demanding of her said sum of money as a corrupt consideration to be paid to them for her employment as a teacher in the public school of said district. Bundy and Bell and one Brown had been directors of the district, but Brown died about the time or shortly before the time a contract was entered into with Geneva Lucas to teach the school, but after negotiations had been entered into for her employment. The evidence adduced establishes beyond dispute the fact that Bell and Brown had been for several years prior to this time exacting pay from the teachers they employed. They had demanded and received from Geneva Lucas the payment of a portion of her monthly salary the year prior to this time for employing her as teacher, and before Brown died he and Bell promised to again employ her, doubtless with the hope, or upon the understanding, that she was to pay them a part of her salary. There is no proof, however, that Bundy ever participated in any of those unscrupulous and unlawful practices. On the contrary, it affirmatively appears from the State's evidence that Bundy had nothing to do with those transactions.

Geneva Lucas testified that she applied to Bell for the principalship of the school, and that the latter told her she could have the place if she would give him $20, and that he had been offered that by another person. She said she refused to give him $20, and that he then offered to give her a position as assistant teacher, and demanded $10 for that position. They gave her the position, and she taught one week, but was ordered by Bell to stop when she declined to pay the amount which he demanded. The only way in which she connects Bundy with the transaction is that Bell gave her a note to Bundy, saying that he would find her all right, because she had taught there before, and that Bundy agreed to employ her. Speaking of the interview with Bundy, she made this statement: "He told me that he had heard that Bell and Brown had been charging $5 for the school, and asked me if I had paid it, and I told him that I did, and that I would quit the school before I would pay

it any more, and he told me to go ahead and teach." Other witnesses testified about paying Bell and Brown for employment as teachers.

The only evidence which tends to show a knowledge on the part of Bundy as to the unlawful practices of Bell and Brown was the above statement of Geneva Lucas and the testimony of her husband to the effect that Bundy said this to him: "We (meaning himself and Bell) met the other night, and he talked like she (meaning Geneva Lucas) wilted on her obligation, and I don't know anything about it;" also the statement of another witness, who had paid money to Bell and Brown for employment, that some time afterwards Bundy told him that Bell and Brown had made a contract with Geneva Lucas for $15 a month. Now, the most that this testimony established is that at some time Bundy acquired the knowledge that his co-directors, Bell and Brown, were selling positions as teachers and exacting a part of the teachers' salaries. It does not show that he knew these things at the time they were practiced, or that he ever received this information at or before the time of this transaction with Geneva Lucas. When he made these statements to witnesses, it seems to have become common knowledge that Bell and Brown were doing these things, and it was only a short time afterwards that the matter was taken up by the prosecuting attorney and referred to the grand jury.

We said in the case of *Chapline* v. *State*, 77 Ark. 444, that, "to establish a conspiracy, it is not necessary to prove an unlawful agreement by direct and positive evidence; if it be proved that two or more persons pursued by their acts the same unlawful object, each doing a part, so that their acts, though apparently independent, were in fact connected, a conspiracy may be inferred, though no actual meeting among them to concert means is proved."

The weakness, however, of the State's case here is that there is no evidence whatever that Bundy ever participated in the plan to exact money from the teachers, or that he had ever done so or sought to do so. All of the State's evidence tends to the contrary. Proof is abundant that Bell and Brown both indulged in these practices; but the existence of the alleged conspiracy between Bundy and Bell can not be established solely by evidence of the acts or declarations of the latter in the ab-

sence of the former. *Cumnock* v. *State,* 87 Ark. 34. The evidence being insufficient to establish a conspiracy, neither Bell nor Bundy can be convicted of that offense, even though there is evidence sufficient to establish those unlawful practices on the part of Bell alone, or Bell and Brown. The indictment charges a conspiracy between Bundy and Bell, and in order to convict it devolved upon the State to prove that particular offense. It was, of course, not sufficient under that indictment to show a conspiracy between Bell and Brown.

The sufficiency of the indictment was questioned on demurrer, but we are of the opinion that the indictment charged a public offense with sufficient certainty to put the defendants on their defense; but, the evidence being insufficient to support the verdict, the judgment is reversed, and the cause is remanded for new trial.

SMITHWICK v. BANK OF CORNING.

Opinion delivered June 27, 1910.

TRUSTS—DECLARATION.—Where a widow, to whom her husband left money, frequently spoke of such money as belonging to her husband's sole heir, but died leaving such heir nothing in her will, her declaration, being without consideration, did not convert the money into a trust fund.

Appeal from Clay Chancery Court, Western District; *Edward D. Roberteson,* Chancellor; affirmed.

J. L. Taylor and *F. G. Taylor,* for appellant.

The court erred in making the administrator a party defendant. 22 Ark. 191. The action of the bank in paying the money to the administrator was a conversion of the money. 34 Ark. 421. The court should not have transferred the cause to chancery. 56 Ark. 391; 65 Ark. 503; 113 U. S. 550. A delivery is not necessary to constitute a trust. 75 N. Y. 134; 31 Am. R. 446; 80 N. Y. 422; 179 N. Y. 112; 105 N. Y. S. 332.

G. B. Oliver, for appellee.

The administrator was properly made a party defendant. Kirby's Dig., § § 6006, 6011, 6145. The administrator's evi-

dence was competent. Kirby's Dig., § 3093. A court of law would have instructed a verdict for defendants. 65 Ark. 503. Incomplete voluntary trusts are not inforcible. Pom. Eq. Jur., § 997; Perry on Trusts, § 96; 28 Am. & Eng. Enc. Law, 892; 12 L. R. A. (N. S.) 547.

BATTLE, J. On the 27th day of January, 1901, J. J. Smithwick departed this life, intestate, leaving C. A. Smithwick, his widow, and W. R. Smithwick his only heir. At the time of his death he was the owner of considerable real estate, and two thousand dollars in cash and notes, and about forty head of cattle. After his death the widow and heir by a written contract divided the estate of the deceased between themselves. In the division some money was set apart to the widow. She deposited it in a bank to her credit. She often referred to it as W. R. Smithwick's money, but never relinquished control over it, and always controlled it, collecting interest on it.

Mrs. Smithwick died on the 16th day of July, 1908, leaving a last will and testament. She left nothing to W. R. Smithwick. G. B. Oliver became administrator of her estate. W. R. Smithwick brought a suit against the bank, claiming the money deposited in the bank as held in trust for him. Oliver, as administrator, was made a defendant.

The court, after hearing the evidence, dismissed the complaint for want of equity; and plaintiff appealed.

The money received by the widow in the division of the estate of her husband was her absolute property. Her frequent declarations that it was the appellant's money did not convert it into a trust fund. They manifested an intention to give the same to appellant at some time. But they were not based on any consideration, and were not binding on her. Intention without acts is of no effect.

Decree affirmed.

CRENSHAW v. STATE.

GANAWAY v. STATE.

Opinion delivered July 11, 1910.

1. PEDDLING—SALE OF STEEL RANGES.—Acts 1909, p. 292, providing that "before any person, either as owner, manufacturer or agent, shall

travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage, or other vehicle, or either of said articles, he shall procure a license," is violated where a manufacturer of steel stove ranges employs men to travel through a county and solicit orders for such ranges and employs other men to deliver the ranges so sold, without procuring a license. (Page 468.)

2. SAME—APPLICATION OF STATUTE.—Where a nonresident manufacturer of stove ranges, without procuring a license as a peddler, employed men to travel through a county and solicit orders for their sale and delivery within this State, and shipped the ranges to fill the orders in separate packages in car load lots from another State, without the purchasers' names being designated on the packages, and separated the packages after they reached this State, and delivered them to the purchasers, the ranges not being separately appropriated to the filling of any particular order, the transactions were in violation of the peddling act of 1909. (Page 470.)

3. INTERSTATE COMMERCE—STATE REGULATION.—Acts 1909, p. 292. prohibiting peddling without license, is applicable to articles shipped from another State and peddled here, as the license is not required for the sale of goods, but for peddling them. (Page 470.)

Appeals from Union Circuit Court; *George W. Hays,* Judge; affirmed.

Marsh & Flenniken and *Moore, Smith & Moore,* for appellants.

The course of dealing pursued by appellants should not be construed to violate act 97 of Acts of 1909. 12 Cush. 393; 114 Mass. 267; 85 Minn. 290; 88 N. W. 984; 20 S. E. 544; 47 Fed. 539; 8 Pac. 865; 39 N. W. 191; 28 N. W. 13; 6 So. 393; 132 Ill. 380; 55 N. J. L. 522; 69 N. H. 424; 50 La. Ann. 574; 74 S. W. 31; 50 S. E. 428; 49 Pac. 373; 130 N. C. 724; 41 S. E. 785; 140 N. Y. 187; 41 Fed. 775; 57 Fed. 496. If the act must be construed so as to prohibit the course of dealing pursued by appellants, then it is unconstitutional. 120 U. S. 489; 128 U. S. 129; 135 U. S. 100; 153 U. S. 289; 185 U. S. 27; 187 U. S. 632; 203 U. S. 507; 10 So. 853; 11 S. E. 233; 84 Ga. 754; 20 S. W. 21; 43 N. E. 463; 55 S. W. 834; 47 S. E. 648; 97 N. W. 1020; 96 S. W. 914; 43 S. E. 740.

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

The circuit court has no authority to hear and determine a case on appeal from a justice of the peace until the justice

has filed a certified transcript with the clerk of the circuit court. 5 Ark. 474; 6 Ark. 252; 9 Ark. 474; 11 Ark. 639; 73 Ark. 608; 7 Ark. 11. Jurisdiction can not be conferred by consent. 90 Ark. 198; 85 Ark. 213. The bill of exceptions fails to show upon what evidence the judgment of the circuit court was based. 70 Ark. 127; 72 Ark. 21; 74 Ark. 195; 72 Ark. 185. But, if it can be determined from the bill of exceptions what the evidence was, the judgment should be affirmed. 67 Ark. 464; 72 Ark. 185; 45 Ark. 240; 58 Ark. 134; 26 Ark. 653; 35 Ark. 220; 46 Ark. 17; 30 Ark. 527; 64 Ark. 488; 25 Ark. 503; 15 Ark. 348; 28 Ark. 5; 29 Ark. 562; 107 Ind. 502; 84 Ga. 754; 105 Ga. 457; 15 Pa. Sup. Ct. 612; 118 N. C. 328. The statute applies to the course of dealing pursued by appellant. 20 Pac. 620; 38 Wis. 428; 134 Mich. 181; 146 Mich. 443; 169 Ind. 508. The statute is constitutional. 86 Ark. 69; 83 Ark. 448; 85 Ark. 12; 143 U. S. 339; 41 Fed. 468.

Marsh & Flenniken and *Moore, Smith & Moore,* in reply.

The power of the circuit court to hear and determine does not depend upon the signature of a justice of the peace. 83 Ark. 517. That is no more essential than the filing of a proper affidavit for appeal. 33 Ark. 747; 46 Ark. 305; 37 Ark. 206; 60 Ark. 444.

McCULLOCH, C. J. Appellants were tried before a justice of the peace of Union County, and convicted on a charge of violating the peddling statute of 1909, which provides that "before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license," etc. Acts 1909, p. 292. On appeal to the circuit court they were again convicted, and appealed to this court. The case was heard on the following agreed statement of facts:

"The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Mo., in which city and State it also has a factory, at which are manufactured the ranges sold by its traveling salesmen throughout Union and other counties of Arkansas and other States of the United States.

"The manner and form in which said company is conducting its business in Union and other counties of Arkansas is as follows: R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a division superintendent, has general supervision of said company's business in Union and other counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said company known in the business as sample men or salesmen, and two other employees of said company known in its business as deliverymen. All of said employees are paid for their services stipulated compensations by said company, and none of said employees has any financial or monetary interest in the property of said company located in Union County, or in the sales or proceeds of sales made by them in said county or elsewhere in the State of Arkansas, other than compensation hereinbefore referred to. Each of said employees of said company, known as salesmen, is furnished by said company with a sample range, sample wagon and team, and is sent into such territory in Union or other counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen, the purchaser signs a note or order, one-half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said company fails to deliver the range so ordered within sixty days from date.

"All orders so taken by said salesmen are forwarded by them to the said Sutton, who investigates the credit of said purchasers, and, if same is found satisfactory, he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said company hereinbefore referred to as deliverymen, each one of whom is furnished with a delivery wagon and team by said company for such purpose.

"All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to, are the sole and exclusive property of said company. Under no circumstances do the employees hereinbefore referred to as salesmen, sell, or offer to sell or deliver, the sample ranges entrusted to them by

said company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said deliverymen sell, or offer to sell, or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen. All ranges so owned and manufactured are shipped in carload lots to Union County, each car containing sixty separate and distinct ranges, each car being consigned by said company to itself, in care of R. L. Sutton, its employee.

"A carload of ranges was shipped from St. Louis, Mo., to El Dorado, Ark., for the purpose of filling orders previously secured by said soliciting agents or traveling salesmen. Upon the arrival of said car at El Dorado the ranges were taken from said car, loaded on said delivery wagons and delivered by said deliverymen to said purchasers in the precise shape, condition, form and packages in which they were delivered by said company to the common carrier at St. Louis, Mo. * * *

"It is further agreed by and between the State of Arkansas, through its prosecuting attorney, and the defendants herein, that E. L. Ganaway and W. W. Dennis are salesmen of the Wrought Iron Range Company, and have in Union County, Arkansas, within the last twelve months, exhibited sample ranges, and solicited and taken orders for them, and have taken notes for the same, doing all of said business in the manner hereinbefore stated. That A. C. Crenshaw and P. L. Hadler are acting as deliverymen in the employ of said Wrought Iron Range Company, and have in the manner hereinbefore set forth delivered ranges to parties in Union County, Arkansas, who had previously given orders to the said above-named salesmen within twelve months before that time.

"That all of said persons above-named are hired employees of the said Wrought Iron Range Company, and have been arrested, and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas."

We decided in Ex parte *Byles*, 93 Ark. 612, that the statute in question is valid, but it is now insisted that, as applied to the transactions set forth in the statement, it is a

burden on interstate commerce, and to that extent void. Appellant Ganaway solicited orders for ranges, and appellant Crenshaw made deliveries thereof after they were ordered and shipped to El Dorado, Ark., for delivery to the respective purchasers. They were working under the same employer, and pursuant to a plan whereby one was to solicit orders and the other to deliver the articles sold. So, if the two acts constituted an offense when performed by one person, its unlawful character would not be changed when performed by two persons, acting in concert, but both would be guilty.

The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute. This definition varies from the common-law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words "peddle" and "sell" are used synonymously, but in order to come within the terms of the statute it is essential that a sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach to it. It should also be especially noted that the statute does not discriminate against nonresidents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description.

Does the method in which appellants conducted business for their employer exempt them from the operation of the statute? We think not.

The opinion of the Supreme Court of the United States, delivered by Mr. Justice Gray in *Emert* v. *Missouri,* 156 U. S. 296, announces the law applicable to the case and sustains the views we express. In that case the agent of a nonresident manufacturer of sewing machines was engaged in peddling machines in Missouri without obtaining a license, as required by the statutes of that State. He asserted his right to sell free of license, on the ground that the transaction constituted inter-

state commerce. All of the prior decisions of that court are reviewed; and the following conclusions announced:

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States, and manifests no intention to interfere in any way with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, and even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door. * * * The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders."

It is true, in that case the vendor carried the machines with him from place to place, and made deliveries as he sold them. But we can not see that that alters the principle, for the Legislature has the power to define the act of peddling, and that definition should be upheld by the courts unless it is manifestly evasive.

The other decisions of the Supreme Court of the United States which are relied on by counsel do not conflict with the case above cited. *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for nonresident merchants, and such legislation was declared to be a burden on interstate commerce. Here, no such burden is imposed, for the license is not demanded merely for soliciting orders, but for peddling.

Leisy v. *Hardin,* 135 U. S. 100, arose under a statute of Iowa prohibiting the sale of intoxicating liquors without license. That was before the passage of the act of Congress known as the Wilson Act, and the court held that the imposition of a license fee on the sale of liquor was a burden on interstate commerce insofar as it applied to imported goods sold in original packages. The present statute, as we have already stated, does not require a

license merely to sell, but the license is required to peddle or sell by traveling from place to place over and through the county.

Caldwell v. *North Carolina,* 187 U. S. 622, is along the same line, for the ordinance found to be repugnant to the Federal Constitution prohibited the sale and delivery of certain wares (pictures and picture frames) in any manner without procuring license.

In *Rearick* v. *Pennsylvania,* 203 U. S. 507, the vendor's agent solicited orders for wares to be shipped into the State from Ohio, and the same were by the vendor in that State appropriated to the fulfillment of the contract of sale, and properly tagged and shipped into the State for delivery to the purchaser. In the present case the ranges were not separately appropriated to the filling of any particular order. The ranges were not separated and tagged with the name of any purchaser, but the appropriation was made by the agent of the vendor after the goods came into the State. Moreover, the court in that case seems to have treated the condemned ordinance as merely requiring a license for the sale of goods, and not as one requiring license for peddling, though the ordinance could be construed as applying only to peddlers or street vendors.

We discover no conflict between that decision and the decision in *Emert* v. *Missouri, supra,* which we think announces the law of the present case.

Both appellants were properly convicted, and the judgments against them are affirmed.

BATTLE, J., (dissenting). Where property in one State is bargained, sold or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of such transaction is shipped to the other State to the person to whom it has been bargained, sold or exchanged, and reaches its destination, and becomes a part of the general mass of the property of the State to which it is shipped, it becomes subject to taxation in that State.

It was held in *American Steel & Wire Company* v. *Speed,* 192 U. S. 500, that "goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection

which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed, without discrimination, like other property within the State." *Woodruff* v. *Parham,* 8 Wall. 123; *Brown* v. *Houston,* 114 U. S. 622; *Emert* v. *Missouri,* 156 U. S. 296.

In *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, it is said: "As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held in the case of *Brown* v. *Houston,* 114 U. S. 622. When goods are sent from one State to another for sale, or, in consequence of a sale, they become a part of its general property and amenable to its laws; provided no discrimination be made against them as goods from another State, but only taxed in the usual way as other goods are. *Brown* v. *Houston, supra; Machine Co.* v. *Gage,* 100 U. S. 676. But to tax the sale of such goods, or to offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

In *Brown* v. *Maryland,* 12 Wheaton 419, 441, Mr. Chief Justice Marshall, speaking for the court, said: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In *Leisy* v. *Hardin,* 135 U. S. 100, 110, it is said: "The point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of

property and a tax which finds the article already incorporated with that mass by the importer."

In *Emert* v. *Missouri,* 156 U. S. 296, 311, cited in the opinion of this court in this case, the goods for to sell which the peddler was required to pay a license, were a part of the general mass of the property of the State. The court said: "The defendants's occupation was offering for sale and selling sewing machines by going from place to place in the State of Missouri, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

In *Brown* v. *Houston,* 114 U. S. 622, 632, 634, it was held: "Coal mined in Pennsylvania and sent by water to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under the general laws of that State, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port."

In speaking of the tax in that case the court said: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a State of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or

two years. It had become a part of the general mass of property in the State, and as such it was taxed for the current year, as all other property in the city of New Orleans was taxed. * * * It was subject to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the manner as such goods were treated."

In the same case the court said: "We do not mean to say that, if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be; and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham,* which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city and in precisely the same manner."

But property in one State, bargained, sold or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of that transaction shipped to the other State to be delivered to the person to whom it was bargained, sold or exchanged, while in transit, before it reaches its destination, before it comes to a rest, or becomes a part of the general mass of the property of the State to which it is shipped, is a part of the interstate commerce of the country, and, under the commerce clause of the Constitution of the United States, is subject to the exclusive control of Congress.

In *Brennan* v. *Titusville,* 163 U. S. 289, it was held: "An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power

to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

To the same effect it has been held in *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 494; *Brown* v. *Maryland,* 12 Wheat. 419, 444; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburgh* v. *Hennick,* 129 U. S. 141; *Crutcher* v. *Kentucky,* 141 U. S. 47, 61; *Stockard* v. *Morgan,* 185 U. S. 27, 37; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Rearick* v. *Pennsylvania,* 203 U. S. 507; *Wrought Iron Range Co.* v. *Campen,* 47 S. E. 658; *Gunn* v. *White Sewing Machine Co.,* 57 Ark. 24.

The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 497.

"It is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." *Brennan* v. *Titusville,* 153 U. S. 289, 302; *Brown* v. *Houston,* 114 U. S. 622; *Leisy* v. *Hardin,* 135 U. S. 100, 109, 113, 114, 123 and 124; *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, 493.

In *Lyng* v. *Michigan,* 135 U. S. 161, 166, it is said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

The facts in this case are briefly as follows: The Wrought Iron Range Company, a corporation organized under the laws of the State of Missouri, manufactures ranges at its factory in the city of St. Louis, in that State. It has a division superintendent in this State, who looks after and superintends its

business in Union and other counties of the State. It has also salesmen and deliverymen. Each of the salesmen is furnished by it with a sample range, sample wagon and team, and is sent into such territory in Union or other counties as may be designated by the division superintendent, to solicit orders for ranges, manufactured by the company, similar to the sample range furnished him. When he secures an order, the purchaser executes his note for the same, which contains an express stipulation that it shall be void in the event the company fails to deliver the range so ordered within sixty days from date, thereby making the order subject to the approval of the company. Such orders are forwarded by the salesmen to the division superintendent, who investigates the credit of the purchaser, and, if found satisfactory, proceeds to have the order filled within the sixty days. In no case is the salesman allowed to sell the sample range entrusted to him. When the ranges ordered are received, they are delivered to the purchasers by the deliverymen. All money and notes, in excess of the amount necessary to pay expenses, are sent by the division superintendent to the company.

The ranges until sold and delivered form no part of the general mass of property of this State, are not subject to the jurisdiction of this State, and are not subject to taxation in the same. The solicitations of the salesmen, the orders of the purchasers and the sales of the ranges are transactions between citizens of two States, and are obviously interstate commerce. The requirement by the statute of April 1, 1909, of the company's employees (if it refers to them) to pay a license fee and to take out a license is a tax on the ranges while subjects of interstate commerce, and is a regulation of interstate commerce, and as to such persons is of no effect and null and void. *Brennan* v. *Titusville,* 153 U. S. 289, 298, 303; *Stockard* v. *Morgan,* 185 U. S. 27, 37; *Brown* v. *Maryland,* 12 Wheat. 419, 444, 447, 448.

WOOD, J., concurs with me in this opinion.

BAUSCHKA *v.* WESTERN COAL & MINING COMPANY.

Opinion delivered June 13, 1910.

1. MASTER AND SERVANT—NOTICE OF CONDITION OF MINE—EVIDENCE.—In order to show that a company employing men to work in an underground mine had notice that the roof of the mine was in an unsafe condition, it was competent to show that certain of the employees had called attention of the company to the unsafe condition of such roof and had asked for props to support it. (Page 478.)
2. SAME—DUTY TO FURNISH SAFE PLACE.—The owner of a mine is bound to exercise ordinary care, even if props have not been demanded, to discover the condition of the roof of the mine and to keep same in reasonably safe condition for its servants to work in. (Page 479.)
3. SAME—NEGLIGENCE OF MASTER—INSTRUCTION.—Where plaintiff was injured by the fall of a rock from the roof of defendant's mine, and the evidence tended to prove that a rock in the roof of such mine was in a dangerous condition, which would justify an inference that defendant was negligent in failing to discover its condition, an instruction that evidence that the rock was loose was "not sufficient to establish such negligence as would authorize plaintiff to recover," was erroneous as invading the jury's province. (Page 480.)
4. SAME—LIABILITY FOR UNSAFE PLACE.—To establish a master's liability for an unsafe working place, it must be shown, not only that there was an unsafe place which caused injury, but also that the master knew or by the experience of ordinary care should have known of such defect. (Page 480.)
5. SAME—ASSUMED RISK—INSTRUCTION.—Where a miner sued for injuries alleged to have been caused by the defendant mining company's failure to prop the roof of the mine, it was error to instruct the jury that the plaintiff assumed the risk of dangers connected with the business, as the servant does not assume the risk of dangers created by negligence of the master unless he is aware of the danger. (Page 481.)

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

Robt. A. Rowe and *Rowe & Rowe*, for appellant.

Appellee should have kept timbers at the mine for use as props. Kirby's Dig., § 5352.

Ira D. Oglesby, for appellee.

The judges of this court will not explore the record to discover errors of the trial court. 90 Ark. 393; 89 Ark. 43;

83 Ark. 359; 88 Ark. 450; 75 Ark. 571; 87 Ark. 351; 46 Ark. 69; 59 Ark. 257; 75 Ark. 347; 55 Ark. 547.

McCULLOCH, C. J. Plaintiff, John Bauschka, was employed by the defendant, Western Coal & Mining Company, as a shot firer in its coal mine at Jenny Lind, Sebastian County, Arkansas, and was injured by falling rock while in the discharge of his duties. He was passing along the entry or air course in the mine, and a large rock fell from the roof and struck him down, severely injuring him. He sues to recover damages for the injury thus received, alleging that the same was caused by negligence of the company in failing to exercise ordinary care to provide a reasonably safe place for him to work, and also in failing to furnish props with which to make safe the roof of the air course.

Defendant in its answer denied that plaintiff had received his injury on account of its negligence, and pleaded assumption of risk and contributory negligence on the part of plaintiff.

A trial before jury resulted in a verdict in favor of defendant, and the plaintiff appealed.

Plaintiff's duties were to go into the mine at the close of the day, after the miners quit work, and to go from room to room and fire the shots put in by the miners, to break down coal for the next day's work. He was passing along the air course when the rock fell on him. It was a large rock, five or six feet long and six feet wide. He was alone when it fell and weighed him down, but succeeded with great difficulty in getting himself from beneath it. He states that, while lying beneath the rock, he observed another large rock hanging loose, and that this frightened him into renewed effort and strength to get from under it. After he had extricated himself and gotten out of further danger, his groans and cries attracted the attention of another shot firer, who carried him out of the mine.

The testimony tends to show that the roof was in a dangerous condition and needed propping, though it is not shown when the rock which fell became loosened or gave evidence of being loose. The kind of roof is what the miners call a draw-slate roof, or shaly roof, and there was evidence to the effect that such a roof is dangerous unless propped. One of the workers in the mine testified that, two days before plaintiff's

injury occurred, he saw a small rock fall from this roof about ten feet from the place where the large rock fell which injured plaintiff. It appears that the entries and air courses are mined out by the miners, and that they constitute the working place of the miners so engaged so long as they are engaged in taking out coal, but that thereafter it is the duty of the company as employer to keep the place safe as a common passway for the use of all employees whose duties call them there.

During the course of the examination of one of the witnesses, the plaintiff offered to prove that one of the miners, while working in the air course, called for timbers with which to prop the roof, and that the same were not furnished. After the question was propounded and ruled out by the court, plaintiff's counsel made the offer in the following language: "We also offer to show that there was no timber there to prop it." The court then made the following ruling thereon: "You may show the condition of the mine, but the company is not bound by any demands this man made, unless you connect it with the plaintiff." Plaintiff saved exceptions to the ruling. He again offered to prove by another witness that the latter "was on a committee of the local union, and called on the company for props and notified the company that there were no props there to prop that roof." The court refused to allow it, and exceptions were saved.

The language in which the ruling of the court is couched indicates that it was necessary, in order to make the testimony competent, to connect plaintiff with the demand for props by showing that he caused the demand to be made, or was relying on the company to furnish the props. This is not correct. It was competent to show that timbers were demanded by any one for use in propping this particular portion of the roof. This for the purpose of showing notice to the company of the dangerous condition of the roof. It was the duty of the company, even if props had not been demanded, to exercise ordinary care to discover the condition of the roof of the air course, and to keep same in a reasonably safe condition, for the air course was the working place of all the employees who used it, in the sense that it was the duty of the employer to exercise ordinary care to make it reasonably safe. It is questionable, however, whether the plaintiff's offer was sufficiently

specific to show that it related to the particular part of the roof where plaintiff was injured, as the air course was more than one thousand feet long at that time. Notice of the necessity of props at another place in the air course would not necessarily constitute notice that the roof was in a dangerous condition at the place where plaintiff was injured. The judgment is to be reversed on other grounds, and, as the testimony may be different on the next trial, we need not decide whether the offer was sufficiently specific to constitute prejudice in the ruling of the court in refusing to allow the offered testimony.

The court gave the following instruction at defendant's request, over plaintiff's objection: "9. If it is shown by the evidence that prior to the accident the rock which fell was loose and needed propping, that of itself is not sufficient to establish such negligence as would authorize plaintiff to recover."

This instruction was clearly on the weight of the evidence, and invaded the province of the jury. It was prejudicial, and calls for a reversal of the judgment. Plaintiff proved that the large rock was loose and fell, and that another large rock was hanging loose; also, that the roof was in a dangerous condition by reason of being shaly and composed of draw-slate. The jury had the right to infer from these facts that the dangerous condition of the roof could have been discovered by the company in the exercise of ordinary care, and that it was guilty of culpable negligence in failing to discover it. Yet this instruction in effect told the jury that the mere fact that the rock which fell was loose and needed propping for any length of time prior to the time of plaintiff's injury was not sufficient to warrant a finding of negligence on the part of defendant in failing to discover a defect in the roof; and it thus cut off the inference which could have legitimately been drawn that the defect was one which could have been discovered by the exercise of ordinary care. The jury must have understood it to mean that, regardless of the time before the accident the dangerous condition of the roof existed by reason of the loose rock which needed propping, defendant was not responsible unless it had notice of the condition. It is true, we have held that, in order to make the master responsible for an unsafe condition of the working place of a servant, it must be shown,

not only that there was a defect which caused injury, but also that the defect was one that the master had discovered or could have discovered by the exercise of ordinary care. *St. Louis, I. M. & S. Ry. Co.* v. *Andrews,* 79 Ark. 437; *St. Louis & S. F. Rd. Co.* v. *Wells,* 82 Ark. 372.

But in the present case the defect recited in the instruction was one which was discoverable if it existed any length of time, or at least such an inference might reasonably have been drawn by the jury; and to deny to the jury the right to draw such an inference amounted to an instruction on the weight of the evidence. Other instructions properly submitted the question whether or not defendant exercised ordinary care to discover and repair the defect; but they did not cure the vice of this instruction, which was inherently incorrect and prejudicial.

Another instruction, given at the instance of defendant, was erroneous. It reads as follows: "3. The defendant is not the insurer of the safety of the plaintiff while at work in its coal mine. If there are dangers connected with the business in which plaintiff was injured, he assumes the risk by the wages paid him." It is too broad, for plaintiff by his contract of employment did not assume the risk of dangers created by the negligence of the plaintiff unless he was aware of the defect and appreciated the danger. A servant only assumes the risk of dangers which are incident to the work in which he is engaged, or dangers from defects caused or permitted by the master of which he is aware.

Inasmuch as the question of assumed risk was correctly submitted in other instructions, we need not decide whether or not the fault of this instruction should have been called to the attention of the court by a specific objection. We mention it now so that it may be corrected on the next trial.

Counsel for defendant insist that the abstract furnished by plaintiff is insufficient, and ask for an affirmance on that ground. We are of the opinion that the abstract, though not perfect, is sufficient to comply with the rules of the court. There is enough to show that instruction number 9 was erroneous and prejudicial.

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

ROESCH v. W. B. WORTHEN COMPANY.

Opinion delivered June 20, 1910.

1. OFFICES AND OFFICERS—FEES—ASSIGNMENT.—While the unearned fees or salary of a public officer may not be assigned, and are not subject to garnishment, there is no reason why an assignment of such fees or salary may not become effective after the salary or fees have become earned and are payable. (Page 485.)
2. SAME—WHEN ASSIGNMENT OF COMMISSIONS EFFECTIVE.—Where a county treasurer assigned his unearned commissions to a creditor, such assignment became effective when the commissions were earned, and took precedence over an equitable garnishment procured by another creditor which sought to have the commissions applied to the payment of the latter's claim. (Page 486.)
3. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will be sustained on appeal unless clearly against the preponderance of the evidence. (Page 487.)

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

Miles & Wade, for appellant.

Appellant is entitled to subject by a creditor's bill the fees of the county treasurer that had already accrued to him for work. 56 Ark. 476; 70 Miss. 267; 49 Mo. 565; 42 Pac. 733; 10 Fed. 799; 91 Fed. 574; 11 Col. 337; 20 Conn. 416; 10 R. I. 285; 13 N. H. 502; 26 Pac. 1002; 10 B. Mon. 108; 12 Bush 354; 15 O. St. 462; 35 S. W. 412; 65 Tex. 359; 29 Atl. 815; 84 Ga. 769; 92 Mich. 285; 21 Neb. 675; 66 Ia. 99; 31 Gratt. 784; 17 N. E. 75. There was no authority to appropriate the funds to the payment of appellee's debt. 78 Ark. 245; 21 Atl. 815; 8 Wheat. 174. The attempted assignment was void. 68 Neb. 482; 118 Mo. 146; 24 S. W. 937; 27 S. W. 723; 141 N. Y. 9; 110 Mich. 203; 98 Ill. App. 517; 58 N. Y. 442; 86 Tex. 303; 45 How. Pr. 392; 36 Fed. 147; 89 Ala. 266; 2 Ariz. 358; 46 N. J. Eq. 560; 49 N. J. L. 144; 10 S. Dak. 306; 42 W. Va. 229. Because as to appellant it is fraudulent. 18 N. J. Eq. 532; 86 Me. 147; 20 Md. 107.

Cockrill & Armistead, for appellee.

The assignment was complete and valid and not fraudulent. 23 Minn. 239; 25 Ia. 336; 95 Am. Dec. 790; 20 W. Va. 497. The assignment, coupled with order on funds, entitled appellee to

commissions. 63 Mich. 350; 54 Fed. 867; 35 Vt. 89. The assignment was not void. 4 Ala. 333; 37 Am. Dec. 744; 15 Wis. 78; 7 Metc. 335; 61 Am. Dec. 414; 2 Allen 541; 4 Bush 8; 91 Ky. 596; 16 S. W. 464; 34 Am. St. Rep. 242; Rice, Eq. 60; 79 Ky. 260; 42 Am. Rep. 215; 9 Wash. 473; 43 Am. St. Rep. 849; 28 Kan. 415; 42 Am. Rep. 167. Appellant acquired no lien against appellee. 80 Ill. App. 338; 75 Tex. 458; 86 Md. 344; 22 Nev. 127; 58 Am. St. Rep. 729; 32 Minn. 381; 166 Mo. 503; 69 N. H. 390; 76 Am. St. Rep. 178; 66 Neb. 236; 73 Tex. 612; 11 S. W. 863. The salary of a public officer can not be garnished. 56 Ark. 476; 9 Ark. 553; 33 Minn. 132; 45 Ill. 133; 92 Am. Dec. 204; 3 Pa. St. 368; 45 Am. Dec. 650; 15 Wis. 193; 100 Ga. 346; 170 Ill. 580; 44 L. R. A. 405; 6 Ill. App. 225; 15 O. St. 462; 10 Fed. 799; 2 Kan. App. 407; 42 Pac. 733; 54 Ind. 501; 23 Am. Rep. 661; 156 Mo. 643; 79 Am. St. Rep. 545.

FRAUENTHAL, J. This was an action in the nature of a creditors' bill, seeking to satisfy a judgment out of indebtedness due to the judgment-debtor, which could not be reached by ordinary legal process, and by equitable garnishment to apply such indebtedness to the extinguishment of the judgment.

Fred Roesch, the plaintiff below, had obtained a judgment against R. J. Polk, the principal defendant in the present suit, some years prior to the institution of this action, which remained wholly unsatisfied. In 1907 and for some years prior thereto R. J. Polk was treasurer of Pulaski County, Arkansas, and had deposited the public funds of said county during said years with the defendant, W. B. Worthen Company, an incorporated bank, in his name as such county treasurer. The compensation of said Polk as county treasurer consisted of commissions upon the public funds thus received by him from time to time. These commissions during the year of 1907 and up to the time of the institution of this action in June, 1908, amounted in the aggregate to about $5,000. In his complaint the plaintiff alleged that these commissions due to said Polk were on deposit with said W. B. Worthen Company in the name of said Polk as county treasurer, and had not as yet been segregated from the public funds of said county, and he sought by this proceeding in the nature of an equitable garnishment against said Worthen Company to have the said com-

missions due to Polk applied to the satisfaction of his judgment against him.

The testimony of the cashier of W. B. Worthen Company tended to prove that on October 16, 1907, R. J. Polk became indebted to W. B. Worthen Company in the sum of $6,000, for which he on that day executed his note payable 9 months after date; and in said note it is stated that he "deposited or pledged with said W. B. Worthen Company as collateral security for the payment of this note all my commissions as treasurer of Pulaski County, Ark., which are or may become due to October 31, 1908." On the same day he executed an additional written instrument in which he authorized and directed "W. B. Worthen Company to collect and receipt for all commissions which are or may be due me as county treasurer of Pulaski County during my present term of office, which expires October 31, 1908." All the commissions that the evidence adduced upon the trial of this case shows were due to R. J. Polk had been earned and were due to him prior to the institution of this action, and the cashier of W. B. Worthen Company testified that these commissions as they were earned were in the hands of W. B. Worthen Company, and became the property of that company by virtue of said assignment from Polk, and were appropriated to the payment of said note from Polk, although they were not actually credited upon the note until after the institution of this action; that there were no commissions due to Polk at the time of the institution of his suit, and that W. B. Worthen Company was not indebted in any manner to said Polk. The chancellor made his findings in favor of W. B. Worthen Company, and entered a decree denying to plaintiff any relief against the said company; and from that portion of the decree the plaintiff has appealed to this court.

It is urged that the assignment of the commissions of his office of county treasurer made by R. J. Polk to W. B. Worthen Company on October 31, 1907, was invalid. This contention is made upon the ground that the fees or commissions of the office were at that time unearned; and plaintiff invokes the rule of law that the assignment of the future emoluments of a public office is void. This is the English rule, and the preponderance of American authority supports the rule.

It is said that "the rule rests upon the ground of public policy, which forbids anything tending to weaken the efficiency of the public service." The law presumes that the officer requires the payment of his salary to enable him to properly perform the duties of the office. It is held that the public service is protected by protecting those engaged in performing public duties, and the funds that are provided by the law for the maintenance of the office should be received by those who are to perform the work at the time and in the manner appointed by the law for its payment. In order to obtain faithful and efficient service from public officers, it is the policy of the law to forbid the assignment of the unearned commissions or salary of a public officer. *Bliss* v. *Lawrence,* 58 N. Y. 442. And see *First Nat. Bank* v. *O'Brien,* 4 A. & E. Ann. Cases, 423 and note to said case; *McGowan* v. *New Orleans,* 10 A. & E. Ann. Cases, 633; 4 Cyc. 19.

But the same rule of public policy which forbids the assignability of the unearned fees and salary of a public officer involves also the conclusion that such fees and salary can not be reached by attachment, garnishment or other legal proceeding. This rule is placed upon the further ground that the officers entrusted with public duties should not be embarrassed or interrupted by such litigation, and that the efficiency of the public service should not be hazarded by any uncertainty respecting the payment of the officer charged with the performance of public duties. In the case of *McMeekin* v. *State,* 9 Ark. 553, it is said: "The question is distinctly presented whether or not the salary due from the State to one of her public officers can by garnishment be seized before being paid to him and appropriated to the payment of his judgment debts. And this seems to be absolutely forbidden by considerations of public policy. * * * The proper and efficient administration of the State Government in all its departments would be endangered by the establishment of the doctrine contended for by the plaintiffs in error; * * * it would at all times in its practical operation be embarrassing, would frequently be mischievous, and under some circumstances might prove fatal to the public service." *Geist* v. *St. Louis,* 156 Mo. 643; *Morgan* v. *Rust,* 100 Ga. 346; *Knox* v. *Erie City,* 28 Pa. St. 175; *Mayor* v. *Rowland,* 26 Ala. 498; *McDougal* v. *Supervisors,* 4 Minn. 130; *Boalt* v. *Williams Co.,*

18 Ohio 13; 12 A. & E. Enc. Law, 70; 20 Cyc. 1030; Rood on Garnishment, § 18.

But the objections to an assignment of the prospective compensation of an officer do not apply to his fees and salary after the same have been earned, and there is no legal objection to such an assignment becoming effective after the salary or fees have become earned and are payable. Throope on Public Officers, § 45; *Bliss* v. *Lawrence,* 58 N. Y. 442; *Stephenson* v. *Walden,* 24 Iowa 84.

In the case at bar the commissions of Polk as county treasurer on the various public funds received by him prior to the institution of this suit were then earned and payable to him. These fees and commissions so earned were then in the hands of W. B. Worthen Company, and the assignment thereof which had been made to it by Polk became then effective. The mere fact that credit therefor was not then written upon the note would not defeat the right of W. B. Worthen Company thereto. The commissions were in their possession; and by the assignment, which then was valid and effective, these commissions were in equity appropriated to payment on the note, which represented the indebtedness that Polk was then owing the W. B. Worthen Company, and to the payment of which the commissions were pledged. The rights which the plaintiff seeks to obtain by this equitable proceeding can be no greater than the rights which the W. B. Worthen Company obtained to the earned fees and commissions by virtue of said assignment.

Nor can the plaintiff, by virtue of this proceeding in the nature of an equitable garnishment, acquire any greater right to these earned commissions than the defendant Polk could have asserted or enforced, in the event the indebtedness to W. B. Worthen Company was *bona fide,* and the assignment of the fees was made in good faith and for a valuable consideration. By this proceeding W. B. Worthen Company was in effect made a garnishee, and as such it had a right to retain all funds and earned fees which it could by virtue of said assignment appropriate to the payment of the indebtedness of said Polk to it. For such fees and commissions the defendant Polk could not hold W. B. Worthen Company liable, and this garnishment proceeding can not place it in a worse position, or under any greater liability, than it would be should the debtor Polk at-

tempt to obtain these earned fees which had thus been equitably appropriated upon his indebtedness to W. B. Worthen Company. Rood on Garnishment, § § 44, 46; 20 Cyc. 1060.

It is urged that the assignment of said commissions is void because it was made for the purpose of delaying and defrauding the plaintiff in the collection of his judgment. This contention presents a question of fact as to whether or not Polk was actually indebted to W. B. Worthen Company and made the transfer of said commissions to it in good faith and for a valuable consideration. The chancellor by his decree, in effect, made a finding that the note executed by Polk to W. B. Worthen Company in October, 1907, was for money actually loaned to him, and that the indebtedness represented by the note was *bona fide;* and that the assignment of the commissions was made in good faith and to secure the payment of said note, and not with the intent to delay or defraud plaintiff in the collection of his debt. We have examined the evidence adduced upon the trial of this case, and we can not say that these findings of the chancellor are clearly against the preponderance of the evidence. We do not think that it would serve any useful purpose to set the testimony out in detail. It appears that the relations between R. J. Polk and W. B. Worthen Company were very close, and that the entire control and management of the treasurer's office was turned over to the cashier of that company. But the manner in which that office was conducted and the emoluments received therefrom could not in any way affect the rights of the parties to this litigation. There was sufficient evidence to sustain the findings of the chancellor that the indebtedness due from Polk to W. B. Worthen Company as represented by the note was *bona fide,* and that the commissions were assigned in good faith, and were subject to be appropriated in payment on said note prior to the institution of this suit. Under such circumstances the findings of the chancellor should not be disturbed. *Whitehead* v. *Henderson,* 67 Ark. 200; *Hinkle* v. *Broadwater,* 73 Ark. 489; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 166.

The decree is affirmed.

B. A. STEVENS COMPANY v. WHALEN.

Opinion delivered June 27, 1910.

1. SALES OF CHATTELS—BREACH OF WARRANTY—REMEDIES OF VENDEE.—If there be a breach of warranty of the soundness or fitness of an article which the vendee has had no opportunity to inspect before delivery, he may elect to rescind the contract, or to affirm by keeping the property and, when sued for the price, to set up the false warranty by way of recoupment. (Page 492.)
2. SAME—REMEDIES OF VENDEE—ELECTION.—A vendee of personal property, having a right to elect to rescind the contract for breach of a warranty as to its quality, must exercise his right of election within a reasonable time after he discovers the defect. (Page 492.)
3. SAME—BREACH OF WARRANTY—RECOUPMENT OF DAMAGES.—Where the vendee of personal property has waived his right to rescind the contract for breach of a warranty as to its quality, he will be entitled in a suit for the purchase money to recoup the cost of correcting the defect if it could be corrected at a reasonable expense, or the difference between the value of the defective article and one free of such defect. (Page 492.)
4. COUNTERCLAIM AND SETOFF—SEPARATE CONTRACTS.—Under Kirby's Digest, § 6099, providing that a counterclaim must be a cause of action "arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," damages for breach of one contract can not be counterclaimed in an action on another contract. (Page 493.)
5. SAME—UNLIQUIDATED DAMAGES.—Unliquidated damages, even for the breach of a contract, can not be the subject of a setoff. (Page 493.)

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin,* Judge; reversed.

Smith & Blackford, for appellant.

Instead of returning the defective table, appellee elected to retain it, and he is bound thereby. 22 Ark. 454; 81 Ark. 549; 77 Ark. 546; 53 Ark. 155; 77 Ark. 522; 48 Ark. 325; 38 Ark. 351; *Id.* 334. And the measure of damages would have been the difference between the defective table and the table contracted for. 78 Pa. St. 141; 21 Ark. 349; 25 Ark. 164; 64 Ark. 228; Mechem on Sales, § 817; 83 Ark. 232. One will not be permitted to avail himself of the advantages of inconsistent positions. 64 Ark. 213. One wishing to rescind a contract must do so within a reasonable time. 38 Ark. 351; *Id.* 334; 81 Ark. 549; 17 Ark. 228; 55 Ark. 148; 7 Ark. 579; 78 Ark. 501.

Parol evidence was not admissible to vary the terms of the mortgage. 25 Ark. 191; 35 Ark. 309.

J. N. Beakley and *W. E. Beloate,* for appellee.

McCULLOCH, C. J. This is an action instituted by the plaintiff, B. A. Stevens Company, against defendant, Pat Whalen, to recover possession of two pool tables and the paraphernalia connected therewith, which plaintiff had formerly sold to the defendant and had taken chattel mortgages back to secure the purchase price. Defendant purchased one of the pool tables in controversy and the cues, balls, racks, etc., to be used in connection therewith, from plaintiff on October 12, 1907, and executed to the latter a chattel mortgage on same to secure the price, which was divided into eleven promissory notes of $10 each, five of which he paid and six remained unpaid at the time of the commencement of this action. Defendant purchased the other table in controversy from plaintiff on May 18, 1908, and executed a chattel mortgage to secure the price, evidenced by eleven promissory notes of $10 each, one of the notes only having been paid at the time of the commencement of this action. The action was commenced in April, 1909, after all the said notes became due. An order of delivery was issued at the commencement of the action, and the property was taken thereunder and delivered to plaintiff, defendant failing to give a retaining bond.

The evidence tends to show that the second table, purchased on May 18, 1908, was defective by reason of the fact that the slabs of slate out of which the top of the table was constructed did not fit together, and that when the table was put up there were joints between the ends of the pieces of slate; also that one of the carom blocks did not fit the pocket in the table. This table was shipped from plaintiff's factory or place of business at Toledo, Ohio, to the defendant at Hoxie, Arkansas, and complete instructions were sent showing how to set the table up. Soon after the table was received and put up by defendant, he wrote to plaintiff notifying it of the defect. He did not, however, reject the table or notify plaintiff that he intended to do so. Further instructions were sent to him by plaintiff about correcting the defect, and after defendant made an effort to correct the defect he again notified plaintiff

of the continued existence of the defect, concluding his letter with the following statement: "Now, I will want you to make good your mistake. Let me hear from you." He still did not offer to return the table, nor did he notify plaintiff definitely that the same would be rejected. On the contrary, he continued to use the table in his pool room up to the time this action was commenced.

In September, 1908, in response to a demand for payment of the notes then due, he wrote a letter to the agent of plaintiff who had the notes for collection stating that it would be impossible for him to pay then on account of the fact that the cotton crop had not begun moving, and that he could not pay anything until about thirty days later. The notes were afterwards sent to an attorney in Lawrence County, and presented to the defendant, and he refused to pay, failing, however, to make an offer to return the table.

There was no defect about the first table, and it is undisputed that six of the notes were unpaid and past due at the time this suit was commenced. Defendant introduced testimony tending to prove the defective condition of the table, and also tending to prove the usable value of a pool table. After the introduction of all the evidence, the court refused to give any of the instructions requested by plaintiff, but on motion of defendant submitted to the jury the following interrogatories, which were answered by the jury as indicated below:

"1. Was the last table bought by Pat Whalen from the B. A. Stevens Company defective?

"A. Yes.

"2. Was the plaintiff notified of the defective table?

"A. Yes.

"3. What was the usable value of a good combination table like the one bought by defendant from the plaintiff in the business house of the defendant, Pat Whalen, at Hoxie, Arkansas?

"A. One dollar per day.

"4. What was the usable value of the table actually received by the defendant from the plaintiff?

"A. Fifty cents.

"5. What was the usable value of the good table taken from Whalen by the replevin action?

"A. One dollar per day.

"6. If the defective table taken by the plaintiff in replevin had been such a table as was intended to have been sold, what would have been the usable value of the same since the replevin was brought?

"A. One dollar per day.

"7. What was the value of any of the property replevied by the plaintiff that was not owned by the defendant at the time the mortgage was given?

"A. $22.18.

"8. How much insurance is included on the notes sued on in this action?

"A. $7.00.

"9. What was the value of the articles replevied? Give the articles and values.

"A. Total $337.20; 1 No. 6864 4x8 Buckeye pool table, $143.00; 1 set carom blocks, $2.50; 1 set billiard markers, $1.25; 1 cue rack, $4.00; 1 set 2⅜ No. 910 billiard balls, $20.75; 1 ball rack, $4.00; 1 dozen cues, $4.00; 1 brush, 55 cents; 1 bridge, 35 cents; 1 basket, 40 cents; 1 shake bottle, 35 cents; 1 shake ball, 20 cents; 1 triangle, 30 cents; 1 rail fork bit, 20 cents, 1 No. 6535 4x8 Buckeye pool table, $125.00; 1 set pool balls, $16.00; 1 cue rack, $4.00; 1 ball rack, $4.00; 1 dozen cues, $4.00; 1 brush, 55 cents; 1 bridge, 35' cents; 1 basket, 40 cents; 1 shake bottle, 35 cents; 1 rail fork bit, 20 cents; 1 set shake balls, 20 cents; 1 triangle, 30 cents. Total, $335.20."

The court then made a finding that the defendant had tendered the defective table at various times, and had paid as a part of the price thereof $45 in cash, $12.77 in freight and $7 insurance, which should be credited upon the notes given for the other table, and that, when so credited, said sums were sufficient to cancel all the notes given for the first table purchased. The court thereupon held that, the purchase price of the first table being thus paid, plaintiff had no right to recover the first table, and that the taking thereof under the order of delivery was wrongful. Judgment was thereupon rendered against plaintiff and the surety on the replevin bond for the recovery of the first table and paraphernalia, viz., the one purchased in October, 1907, or its value, a total of $155.35, together with the sum of $215 as damages for detention of same during the pendency of the action. Plaintiff appealed.

It has been often decided by this court that if there be a breach of warranty of the soundness or fitness of an article which the vendee has had no opportunity to inspect before delivery, he may make his election, either to rescind the contract, or to affirm the contract by accepting and keeping the property, and, when sued for the price, set up the false warranty by way of recoupment. *Plant* v. *Condit,* 22 Ark. 454; *Weed* v. *Dyer,* 53 Ark. 155; *Bunch* v. *Weil,* 72 Ark. 343; *Ward Furn. Co.* v. *Isbell,* 81 Ark. 549.

In the last case cited above, which was a contract for the sale of lumber, the rule is stated as follows: "The contract specifications as to age and grades of lumber were not merely warranties, but conditions precedent, which gave appellant these rights: (1) if the lumber was not according to contract in these respects, to reject the same, or (2), to accept same and bring cross action for breach of warranty when sued for the purchase price, or (3), without bringing cross action for breach of warranty, to use the breach by way of reduction or recoupment in the action by the vendor for the price."

The vendee, having his election, can not employ all of these remedies, but must make a choice between them. Now, in the present case, defendant sought to take advantage of the remedy allowed him to rescind the contract, and the court allowed him the benefit of this. It was too late, however, to make his election after the action had been commenced against him to enforce the contract. It was his duty to make his election within a reasonable time after he received the property and discovered its defective condition. He had no right to keep the property and use it, and at the same time insist on a rescission of the contract. By keeping the property and using it, he elected to pursue the other remedy—that of demanding damages sustained by reason of the defect, which would be the cost of correcting the defect, if it could be corrected at a reasonable expense, or the difference between the value of the defective table and one which was free of defect, such as was contracted for. If the damages found by the jury, by reason of the defective condition of the table, exceeded the amount of the mortgage notes, then the plaintiff could not recover judgment for possession of the property. *Ramsey* v. *Capshaw,* 71 Ark. 408; *Ames Iron Works* v. *Rea,* 56 Ark. 450.

Under the statutes of this State, which provide that in replevin suits to recover mortgaged property the mortgagor shall be allowed to prove the amount of payments or set-offs against the debt, and that judgment shall be rendered for the balance due on the debt (Kirby's Digest, § 6869), whatever damages the jury shall find to be due the defendant by reason of the defective condition of the table should be allowed by way of counterclaim as a payment on the mortgage debt due for the defective table. The amount so found can not, however, be a counterclaim against the mortgage debt due for the price of the first table, for that is a separate contract, and the statute provides that a counterclaim "must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action." (Kirby's Digest, § 6099). *Barry-Wehmiller Mach. Co.* v. *Thompson,* 83 Ark. 283.

Nor can it be pleaded as a set-off, for unliquidated damages for a breach of contract can not be the subject of a set-off. *Gerson* v. *Slemons,* 30 Ark. 50; *Stewart* v. *Scott,* 54 Ark. 187.

Upon the pleadings and proof, plaintiff was entitled to a judgment for the possession of the pool table and paraphernalia sold to defendant in October, 1907. The question of damages on account of the defective condition of the other table should have been submitted to the jury.

The judgment is therefore reversed, and the cause remanded for new trial.

LASATER v. WADE.

Opinion delivered June 27, 1910.

FRAUDS, STATUTE OF—PAROL SALE OF LAND.—Where a mortgage of land was foreclosed, and after the period of redemption expired the purchaser verbally agreed to resell to the mortgagors upon their paying the taxes, keeping the improvements in repair and repaying the purchase money and interest, but the mortgagors failed to do so, and permitted the property to forfeit for taxes and to be redeemed by the purchaser, the latter was neither legally nor equitably bound to convey the lands to them.

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

J. E. London and *C. A. Starbird,* for appellant.

The contract was within the statute of frauds. Kirby's Dig., § 3665; 50 Ark. 71. Appellee is estopped to assert his contract. 33 Ark. 465. Possession, to take a contract out of the statute, must be delivered and obtained *solely* under the contract. 30 Ark. 262.

Sam R. Chew, for appellee.

The purchase of the property by appellant, and putting his mother in possession of it that she might live on it the remainder of her life was in effect a gift. 74 Ark. 104; 1 Ark. 83.

BATTLE, J. Macey Lasater brought an action against Henry Wade and Eliza Howell to recover possession of certain lands, claiming to have purchased the same from Isaac Lasater on the 11th day of January, 1908.

The defendants answered as follows: "Defendants, further answering, say that on the .. day of ...., 189.., defendant Henry Wade and Henry Howell purchased the above land from Sarah A. Smith, and executed to said Sarah A. Smith a mortgage on same for $450, the balance of the purchase money, said mortgage debt being due and payable on the .. day of ...., 190... The defendant Henry Wade and Henry Howell were unable to pay off said mortgage, and Sarah A. Smith became the purchaser thereof and took title in herself.

The defendant Wade procured one Isaac Lasater to redeem said land and take deed to same in his own name, with the understanding, and by express agreement, that his mother, the mother-in-law of Wade, and the grandmother of plaintiff, Macey Lasater, should have and use said land as a home, so long as she should live, and that defendant Wade should have the right, and be allowed, at any time before the death of the said defendant Eliza Howell, to pay to said Isaac Lasater the amount expended in redemption of said land, and upon said payment said Isaac Lasater agreed to and was to deed said land to said Wade. In furtherance of said agreement said Isaac Lasater redeemed said land, or purchased the same, from Sarah A. Smith, and took the deed in his own name.

"Defendants further say that they deposited in the Citizens' Bank of Van Buren, to the credit of Isaac Lasater, the yearly interest on the money expended by him on said lands, and have now on hand and now tender in payment the whole amount due said Isaac Lasater, and have frequently notified him, Lasater, of said fact.

"Defendants, further answering, say that on the .. day of ...., 190.., with full knowledge of said agreement before mentioned and in utter disregard of the same, permitted said land to be returned as delinquent for taxes for the year 190.., and allowed the same to be sold for said taxes and afterwards redeemed the same from Lewis Bryan, taking title in his own name. That afterwards on the .. day of ...., 1907, said Isaac Lasater, with intent to defraud these defendants, sold and conveyed by warranty deed said land in controversy to this plaintiff, Macey Lasater, he, Macey Lasater, having full knowledge of the agreement entered into between his uncles, Isaac Lasater, Henry Wade and his grandmother, Eliza Howell, and being fully apprised of the right by which said Isaac Lasater held said land."

They asked to be allowed to pay into court "the amount due said Isaac Lasater upon said land; that the deed of Isaac Lasater to Macey Lasater for said land be cancelled, and that Isaac Lasater be required upon the payment of amount due him to convey the land to the defendant Henry Wade, and for other relief."

Upon motion of the defendants the action was transferred to the Crawford Chancery Court.

After hearing the evidence, the court cancelled the deed executed by Isaac Lasater to Macey Lasater; and upon payment of $50 and interest and $470 and taxes paid on the lands by Isaac Lasater to the clerk of the court for Isaac Lasater, decreed that all right, title and interest that Isaac Lasater may have in the lands shall be annulled, set aside and held for naught, and that the title in the land vest in the defendant Henry Wade, subject only to a life estate of the defendant Eliza Howell; and the plaintiff appealed.

Some time in 1902 Henry Wade and his wife and Henry Howell and Fanny Howell purchased from Sarah A. Smith the

land in controversy; they agreed to pay her $550 for it, and paid in cash $100, and gave her their note for the remainder, $450. Mrs. Smith conveyed the land to them by a warranty deed, and they executed a mortgage to her to secure the $450. Afterwards they paid her about $245, and were unable to pay the balance. She then foreclosed the mortgage, and purchased the land. They were entitled to redeem at any time before the 1st day of January, 1905. On the 9th day of January, 1905, after the time for redemption had expired, Isaac Lasater purchased the land from Mrs. Smith, paying her $475 for the same. After purchasing the land he said to his mother, Eliza Howell, that she could continue to reside on the land for the remainder of her life, and to Henry Wade that he might have the land by paying taxes on it and keeping improvements in repair, and paying him the money he had paid for the land, $475, and interest during the lifetime of his mother or at her death. These promises were gratuitous, and in parol. The defendants were in possession at the time, and continued in possession the same as they had been before. Wade failed to pay the taxes, or keep the improvements in repair, or pay the interest on the $475, but permitted the land to sell for taxes, and allowed Isaac Lasater to pay $50 to redeem the same. Isaac Lasater was neither legally nor equitably bound to convey the lands to the defendants or either of them. *Moore* v. *Gordon,* 44 Ark. 334; *Phillips* v. *Jones,* 79 Ark. 100; *Hackney* v. *Butts,* 41 Ark. 393; *Bland* v. *Talley,* 50 Ark. 71.

The plaintiff, Macey Lasater, is entitled to the possession of the land, he having title to the same.

The decree of the court is reversed, and the cause is remanded with directions to the court to enter a decree in accordance with this opinion.

WILSON v. BLANKS.

Opinion delivered June 27, 1910.

1. IMPROVEMENT DISTRICTS—PURPOSE—AREA.—Improvement districts may be created in a city or town for the purpose of constructing waterworks or for the purpose of supplying electric lights, and such districts may embrace the entire area of the city or town. (Page 498.)

2. SAME—DISTRICT COMBINING TWO IMPROVEMENTS.—Where two improvements cover the entire territory of a city or town, and can be made by one improvement district as effectively as by two, and without prejudice to the rights of any of the property owners, there is no reason why they may not be combined and made in such manner. (Page 499.)

3. SAME—PRESUMPTION.—In a suit to enforce an assessment of an improvement district the presumption is that the district was lawfully created. (Page 500.)

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

Appellant, *pro se.*

Only one improvement can be embraced in an ordinance authorizing the making of assessments. Hamilton on Ass., § 393; 2 Page & Jones on Tax. by Ass., § 790; 66 Cal. 313; 4 Pac. 31; 52 Neb. 345; 72 N. W. 218; 61 Ill. 142; 11 Phila. 447.

George & Butler and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The ordinance was valid. 75 Ill. 21; 46 Mich. 150; 59 Pa. St. 455; 180 Mass. 274; 62 N. E. 397; 187 Mass. 451; 73 N. E. 554; 81 Wis. 326; 51 N. W. 566; 216 Ill. 331; 74 N. E. 1044; 28 Wash. 639; 69 Pac. 393; 162 Ill. 113; 38 N. E. 750; 130 Ill. 566; 22 N. E. 624; 123 Ill. 871; 14 N. E. 871; 96 Ga. 670; 23 S. E. 900; 29 Ind. App. 147; 53 N. E. 1071; 138 Cal. 52; 70 Pac. 1023; 213 Pa. 236; 62 Atl. 848; 36 O. St. 288; 47 Minn. 406; 50 N. W. 476.

BATTLE, J. On the 17th day of May, 1910, W. L. Blanks, J. H. Schaefer and D. E. Watson, Commissioners of Water and Light District No. 2 in the town of Hamburg, filed a complaint in Ashley Chancery Court, and therein alleged:

"Plaintiffs say that they are the Commissioners of Water & Light District No. 2 in the town of Hamburg, Arkansas, a district duly organized under the laws of this State, embodied in sections 5664 to 5742 of Kirby's Digest, and the statutes amendatory thereof; that said district was duly organized for the purpose of supplying the inhabitants of the territory embraced therein with water and electric lights as provided in said act, and the town council of the said town of Hamburg has duly levied its assessments for the making of said improvement. That

the defendant is the owner of the following real estate in said town and within the limits of said district, towit: Lot No. 2 in block No. 13 in the town of Hamburg, Arkansas, and that the amount of the assessment levied against said property aforesaid is $7.50. The said assessment has long been overdue, and the defendant refuses to pay the same.

"Wherefore plaintiffs pray for a decree for the foreclosure of the lien of said assessment; that the property aforesaid be sold, and the proceeds applied to the satisfaction of said lien, and for all other proper relief."

The defendants answered and denied that the district was duly organized, and alleged that it was illegal because it embraces "two entirely distinct and separate improvements."

The plaintiffs amended their complaint by alleging "that said improvements are combined for purposes of economy, and that their combination is to the advantage of the property owners of the district, since in this way one plant, which is operated by day for water purposes and by night for electric lights, will supply all the requirements and be greatly to the advantage of the consumers, in that the total cost of the improvements will not exceed twenty per centum of the value of the real property in the said district as shown by the last county assessment."

The defendants demurred to the complaint as amended, and plaintiffs demurred to the answer.

The court overruled the defendant's demurrer, and sustained the plaintiffs, and, the defendants declining to plead further, rendered judgment in favor of plaintiffs, and the defendants appealed.

The Constitution of this State provides: "Nothing in this Constitution shall be so construed as to prohibit the General Assembly from authorizing assessments on real property for local improvements in towns and cities under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected." Const. 1874, art. 19, § 27.

Section 5665 of Kirby's Digest, as amended, provides: "When any ten owners of real property in any such city or incorporated town, or of any portion thereof, shall petition the city or town council to take steps toward the making of any

such local improvement, it shall be the duty of the council to at once lay off the whole city or town, if the whole of the desired improvement be general and local in its nature to said city or town, or the portion thereof mentioned in the petition, if it be limited to a part of said city or town only, into one or more improvement districts," etc.

Section 5667 of the same Digest provides: "If, within three months after the publication of any such ordinance, a majority in value of the owners of real property within such district adjoining the locality to be affected shall present to the council a petition praying that such improvement be made, which petition shall designate the nature of the improvement to be undertaken, and that the cost thereof be assessed and charged upon the real property situated within such district or districts, the city council shall at once appoint three persons, owners of real property therein, who shall compose a board of improvement for the district."

Section 5675 of Kirby's Digest provides: "In the case of the construction of water works or gas or electric light works by any improvement district or districts, the city or town 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 or town council may supply water and light to private consumers, and make and collect uniform charges for such service, and apply the income thereof to the payment of operating expenses and maintenance of such works."

In *Crane* v. *Siloam Springs,* 67 Ark. 30, it was held that improvement districts can be created under these statutes for the purpose of constructing waterworks, and that such district might embrace the entire area of a city or town. It is equally certain that improvement districts can be created by the same authority for the purpose of supplying a city or town with electric lights. Can one district be created for both purposes? The statutes do not expressly prohibit the creation of one district for the purpose of making two local improvements. Their object is to secure the improvements upon the terms and conditions prescribed by the statutes. If the two improvements cover the same territory, and can be made as fully and effectually and in the same manner, and without prejudice to the rights of any

of the property owners under the statutes, by one as they can be by two districts, we see no valid reason why they should not be combined and made in such manner. In such way they can be treated as one improvement, and as such made in the manner prescribed by the statutes. And this may especially be done when, so combined, they can be constructed and maintained by one district at a much less cost than they can be otherwise, as in this case. When, however, one district can not be used to make two improvements in the manner indicated, it would seem to be unauthorized by the statutes, and one district should be created for making each improvement, and in case of doubt is preferable.

Further than is shown by the pleadings, we are not advised as to how the "Water and Electric Light District Number 2 of the town of Hamburg" was created or how it will serve to answer the purpose of making the two improvements for which it was created, or whether it can serve for both purposes. But the presumption is it was lawfully created. Section 5691 of Kirby's Digest is as follows: "The board (on refusal of any property owner to pay his assessment) shall straightway cause a complaint in equity to be filed in the court having jurisdiction of suits for the enforcement of liens upon real property, for the condemnation and sale of such delinquent property, for payment of said assessment, penalty and costs of suits, in which complaint it shall not be necessary to state more than the fact of the assessment and nonpayment thereof within the time required by law, without any further statement or any steps required to be taken by the council, or the board, or any officer whatever, concluding with a prayer that the delinquent property be charged with the amount of such assessment, penalty and costs, and be condemned and sold for the payment thereof." That has been substantially done in this case. The defendants, answering, did not attack the district in question, except to say that it "embraces two entirely distinct and separate improvements." The presumption is the district was created in a lawful manner, and is legal. *Kansas City, Pittsburg & Gulf Railway Company* v. *Waterworks Improvement District No. 1 of Siloam Springs,* 68 Ark. 376, 378; *Whipple* v. *Tuxworth,* 81 Ark. 391, 403.

Decree affirmed.

BANKS *v.* WALTERS.

Opinion delivered June 27, 1910.

1. USURY—SUFFICIENCY OF COMPLAINT.—A complaint asking to have an absolute deed declared to be a mortgage, which alleges that defendants, by seeking to collect rent in addition to the mortgage debt, are endeavoring to force plaintiff to pay more than is due them, is not a technical plea of usury; but is sufficient to cause equity to scrutinize the tranaction closely. (Page 504.)
2. MORTGAGES—AGREEMENT OF MORTGAGOR TO PAY RENT.—Where a vendee of land requested the defendants to advance him enough money ($90) to pay the balance of the purchase money, which the defendants agreed to do on condition that the vendee pay $1 per week rent and the $90 so advanced, and the title remain in the defendants until such sum is paid, the contract was in effect a mortgage, and the vendee was liable for $90 with interest, but not for rent. (Page 504.)
3. SAME—POSSESSION OF MORTGAGEES—EFFECT OF RECEIVING RENTS.—Where appellant was unable to pay for land which he had bought, and induced appellees to advance the money for that purpose, and agreed to repay the loan and interest and also pay rent, the agreement as to rent was without consideration, and the appellees should be treated as mortgagees in possession as to the rents so collected and be held to account therefor. (Page 504.)
4. PAYMENT—RECOVERY OF VOLUNTARY PAYMENTS.—Where a mortgagor voluntarily overpaid the amount of his debt, he is not entitled to recover the excess. (Page 505.)
5. USURY—AGREEMENT OF MORTGAGOR TO PAY RENT.—An agreement of a mortgagor to pay rent, in addition to paying the secured debt and 10 per cent. interest, is usurious and not enforceable. (Page 505.)

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

STATEMENT BY THE COURT.

The appellant states in his complaint that about January 26, 1905, he purchased from Paul T. Davidson a certain lot of land in the city of Arkadelphia, Arkansas, for one hundred dollars; that he paid ten dollars cash and executed his note for ninety dollars with interest at ten per cent. per annum from date until paid, due one year after date; that Davidson executed to appellant bond for title, which appellant had lost; that when the note was due appellant made an agreement with appellees whereby they were to pay the grantor, Davidson, the purchase money note of ninety dollars and interest, and were

to take the deed in their own names as security, and were to allow appellant to repay the ninety dollars and interest at the rate of four dollars per month; that appellees paid the ninety dollars with interest, and Davidson, at appellant's request, executed to them a deed to the lot; that appellant paid appellees one hundred and forty-seven dollars and fifty cents, which sum is $30.50 more than the note and interest, and that the surplus was paid through mistake; that when appellant had paid the amount of the note to appellees he demanded of them a deed to the lot, and they refused; that appellant, when he purchased the lot of Davidson, went into possession thereof and made improvements thereon costing $238; that he had been in continuous possession since his purchase; that appellees *falsely claim* that there is a balance due them for what they call "rent" to April 1, 1909, of $13.50, and the original note of $90, making a total of $103.50; that by making this claim appellees are seeking to take undue advantage of appellant, and to force him to pay more than is due them.

Appellant's prayer was that the deed from Davidson to appellees be declared a mortgage; that the mortgage be declared satisfied in full; that appellees be required to make him a deed; that he have judgment over for $30.50; and that the court grant him all equitable and proper relief.

The answer was simply a specific denial of all the allegations of the complaint. Appellees prayed no affirmative relief.

The testimony of appellant tended to prove that the contract between himself and appellees was as alleged in his complaint.

H. W. Austin, one of the appellees, testified as follows: "Plaintiff stated that he was going to lose the place, and wanted Walters and myself to pay Davidson and have the deed made to us. It was with the understanding between plaintiff, Walters, and myself that plaintiff would pay a dollar a week and the amount that we paid Davidson, that we agreed to pay off the debt due Davidson and take a deed to us. I would not have agreed to have paid the debt that plaintiff owed Davidson unless he had agreed to have allowed the deed to be made to us and agreed to pay rent on it at $1 per week until he was able to pay for the place. I knew that the plaintiff was not prompt in paying his obligations. When the plaintiff would pay

me the rent from week to week, I would give him a receipt, showing that it was for rent paid for that week. Since the deed was made to us by Davidson, Walters and myself have paid the taxes and kept the place insured, and it is now insured. When the year that we gave the plaintiff to pay the debt had ended, he had paid nothing but the rent, and was not able to pay the amount we had paid Davidson. At the end of the first year the plaintiff stated that he was running a restaurant on the place, and that he needed his money, and that he would just continue to pay rent at a dollar a week for another year, with the understanding that at the end of the year he could pay the amount we paid Davidson, and we would make him a deed to the place. At the end of the second year the plaintiff was not ready to pay the amount that we had paid Davidson, and stated that he would just go ahead and pay the rent until he could get the money or borrow it."

William Walters, the other appellee, testified as follows: "I went with him (appellant) to H. W. Austin, and the plaintiff agreed with me that if we would pay the amount due Davidson and give him a year to pay us what we paid Davidson he would pay us rent at the rate of $1 per week. There were no writings of any kind between plaintiff, Austin and myself. We had Davidson to make us a deed at plaintiff's request. We did not intend to beat him out of the place, and it was at his suggestion and his agreement that he would pay us rent at a dollar per week. When the first year was ended, we extended the time with the same understanding that he was to pay us a dollar per week rent. And the same agreement was made at the end of the second year."

Witness Davidson testified in part as follows: "He (appellant) came in company with the defendants, Walters and Austin, and told me to make a deed to them, the said defendants, conveying the said property. And I thereupon duly executed, acknowledged and delivered to the defendants a deed to said property. This took place on the 26th day of January, 1906. I do not remember what became of the $90 note, but my impression is that I gave the note to Banks, and he gave me the bond for title back. Neither Austin nor Walters, the defendants, said anything to me about buying the property or anything at all about the agreement they had with Banks, and I

simply made the deed to them at Banks's request, after I was satisfied that they would pay the deferred payment of $90."

Appellant testified that he did not surrender his bond for title. The court found that appellees were the owners of the lot in controversy, and that appellant "agreed to buy same from them and to pay $90 therefor."

The court decreed that, upon the payment of ninety dollars with interest within ninety days, appellees execute to appellant a deed; and, if appellant failed to pay the amount within ninety days, that a writ of possession go against him in favor of appellees.

Appellant duly prosecutes this appeal.

Callaway & Huie, for appellant.

The effect of a bond for title is to create a mortgage in favor of the vendor. 66 Ark. 167. Courts disregard the form and try to get at the real nature of the transaction. 47 Ark. 287; 9 Pet. 446.

McMillan & McMillan, for appellees.

The parties have the right to make their own contract. 65 Ark. 295. The defense of usury must be pleaded. 26 Ark. 356; 25 Ark. 195; *Id.* 258. And the burden of proof is on the party pleading it. 57 Ark. 556. The proof must be clear and convincing. 83 Ark. 36; 74 Ark. 241; 68 Ark. 162.

WOOD, J., (after stating the facts). The complaint alleges that appellees falsely claim that there is a balance due them for what they call rent to April 1, 1909, of $13.50, and the original note of $90, making a total of $103.50; that by making this claim appellees are seeking to take undue advantage of appellant and to force him to pay more than is due them." While this is not a technical plea of usury, it is a sufficient allegation to cause a court of equity to scrutinize the transaction closely, in order to determine whether or not the parties seeking a benefit under it are attempting to enforce an illegal exaction.

Here, while appellees have not asked any affirmative relief, the court, after hearing the testimony, has treated the answer as if it were amended to ask affirmative relief, and granted to appellees a writ of possession against appellant unless he paid the ninety dollars with interest within ninety days. The court

thus treated the contract between appellant and appellees as a mortgage by appellant of the lot in controversy to appellees to secure the latter in the amount of money they had advanced to the former to enable him to pay for the lot. The court was correct in treating the contract as a mortgage, but erred in finding that the amount due appellees under it had not been paid. Appellees should be treated as mortgagees in possession as to the amount of rents they collected from appellant under the contract, and should be held to account to him for the amount of these rents. So treating them, the evidence shows that appellant has more than paid them the balance due on the ninety dollars with interest. Appellant, however, is not entitled to any judgment for the amount overpaid by him because as to this amount it must be regarded as a voluntary payment.

The evidence of appellees shows that they at all times recognized that appellant under the contract was the equitable owner of the lot. Their testimony tends to prove that they, at the request of appellant, took the deed from Davidson in their own name, intending to hold the title to the lot only as security for the amount of money they had advanced to appellant to pay for the lot. They at all times acknowledged the right of appellant, upon the payment of the purchase money advanced by them to him, to have deed to the lot.

The effect of the contract between appellant and appellees, as we view the evidence, was to substitute appellees for Davidson. Thy stood virtually in Davidson's shoes, and the effect of his contract was to make him a mortgagee holding the title to the lot, "subject to all the essential incidents of a mortgage." *Strauss* v. *White,* 66 Ark. 167, and cases cited. But they say that in the meantime appellant agreed with them that he should pay them a bonus of $1 per week as rent for the lot. There was no consideration for this agreement except the advance made by appellees to appellant of the ninety dollars and interest. Considered in this light, the bonus called *rent* would be nothing more nor less than a forbearance for the use of the ninety dollars and interest, and would render the contract void for usury. In *Scott* v. *Lloyd,* 9 Peters, 418, Chief Justice Marshall, speaking of the purchasing of an annuity or rent charge which was alleged to be a cloak for usury, said: "Yet if it is apparent that if giving it this form the contract will afford a cover which

conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity for disregarding the form, and examining into the real nature of the transaction. If that be in fact a loan, no shift or device will protect it."

We are therefore of the opinion that appellant, having paid to appellees the amount due them, is entitled to his deed. The chancery court of Clark County erred in holding otherwise. The judgment is therefore reversed, and the cause is remanded with directions to enter a decree in accordance with this opinion.

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

Opinion delivered June 27, 1910.

1. CARRIERS—EJECTING SOBER PASSENGER AS DRUNK—LIABILITY.—Under the act of March 2, 1909, § 3, providing that conductors on trains running in this State are authorized to arrest drunken persons on their trains and deliver them to peace officers, a railway company is not liable for the arrest of a sober passenger and his ejection from the train if the conductor in the exercise of ordinary care honestly believed at the time of the arrest that the passenger arrested was drunk, and used only such force as was necessary to eject him. (Page 508.)
2. FALSE IMPRISONMENT—ARREST BY TRAIN CONDUCTOR.—In a suit against a carrier for an arrest made by its conductor, an instruction that, though the conductor was the judge as to whether plaintiff was intoxicated when arrested, yet if he was mistaken the company would be liable, was erroneous, as it ignored the question whether the conductor acted in good faith. (Page 509.)
3. INSTRUCTIONS—CONFLICT.—Conflicting instructions which leave the jury without any correct guide are erroneous. (Page 509.)
4. CARRIERS—EJECTION OF PASSENGERS—DAMAGES.—In a suit for unlawfully ejecting as drunk a sober passenger, it was not error to instruct the jury that if you find for the plaintiff "you may take into consideration any injuries inflicted upon the plaintiff, the pain and suffering incident thereto, his humiliation and mortification, and assess his damages at such a sum as in your judgment you may find from the testimony would compensate him for the injuries done, pain, suffering and humiliation." (Page 510.)
5. INSTRUCTION—ASSUMING UNDISPUTED FACT.—An instruction which assumes an undisputed fact is harmless. (Page 510.)

Appeal from Cleburne Circuit Court; *Brice B. Hudgins,* Judge; reversed.

Lovick P. Miles and *Thomas B. Pryor,* for appellant.

When it appears that prejudicial error has been made in the trial, this court will reverse. 58 Ark. 253; 123 Ill. 333. The conductor is the proper person to pass on the question as to whether a person desiring to take passage on a train is a proper person to be admitted to the train. 75 Ark. 490. Appellant is not liable for the humiliation or mortification, if any, suffered by appellee on account of his arrest and imprisonment. 87 Ark. 524.

WOOD, J. The appellee brought this suit against appellant to recover damages alleged to have been sustained by appellee in being refused admission as a passenger on, and in being ejected from, one of appellant's trains while in the act of boarding same at Little Rock, Arkansas, for the purpose of taking passage to Batesville, Arkansas.

There was a jury trial, and the verdict and judgment were in favor of appellee for $700.

The evidence on behalf of appellee tended to show that he, in company with two other parties, one of whom had purchased a ticket for appellee, attempted to get on one of appellant's train at the depot in Little Rock, for the purpose of going to Batesville; that the officials in charge of the train refused to permit appellee to board the train, stating to him at the time that he was drunk; that appellee, notwithstanding such refusal, when the train going to Batesville began to move, attempted to board same; that the conductor shoved or threw him from the steps to the ground; that in the fall his leg was injured in the same part where it had been fractured some three years before; that the injury was severe and very painful; that the appellee had been a cripple, one limb being shorter than the other; that in consequence he limped; that as soon as he was ejected from the train a policeman arrested him, having been requested to do so by the one who ejected him from the train; that the policeman dragged him to the baggage room, and from there he was taken to police headquarters, and thence to jail.

The testimony on behalf of appellant tended to show that appellee, when he attempted to board appellant's train, was drunk; that because of that fact the conductor refused to permit him to board the train; that, on being refused, appellee became boisterous and profane, and that for this cause the policeman arrested him, and took him before the police court on a charge of breach of the peace; that appellee was not injured or hurt in any manner by the act of the conductor in refusing him admission to the train.

First. Section 3 of the act of March 2, 1909, provides as follows:

"All conductors on trains running in this State are hereby authorized and impowered to act in the capacity of peace officers on their respective trains in this State for the specific purpose only to arrest any and all persons on their respective trains that they find to be drunk or in an intoxicated condition, and deliver said person or persons together with the names of two witnesses, who are not railroad employees, to some peace officer at the first available opportunity, and said conductor is hereby authorized and impowered to deputize any person or persons present to assist him in the performance of said duty."

The appellant contends that the act "makes the conductor the absolute judge of the passenger's condition with reference to being drunk on any train in this State." That is not a correct construction of the statute. The conductor in the discharge of his duty under this statute must not act arbitrarily, and without due care. While the company, under this statute, could not be held liable for the conduct of the conductor in making the arrest of any person so long as such conductor was acting in good faith and with ordinary care, yet the company would be liable if the conductor in arresting any person did not exercise ordinary care to ascertain whether such person was drunk or did not act in good faith, *i. e.*, with the honest purpose to discharge his duty under the circumstances.

Where one arrested by the conductor of a railway train shows that he was not drunk when he was arrested, the company, in order to escape liability for any damages that resulted proximately from such arrest, would have to show that its conductor acted in good faith in making such arrest, *i. e.*, that he honestly believed, after the exercise of ordinary care under

the circumstances of the arrest, that the person arrested was drunk. The company would not be liable for the arrest, where the person arrested was sober, if the conductor, exercising ordinary care, honestly believed, under all the facts and circumstances, that the party arrested was drunk, and made the arrest and the ejection without any unnecessary force. Whether or not the party arrested was drunk at the time of the arrest, and whether the conductor in making the arrest acted with ordinary care, and whether he honestly believed at the time of the arrest that the party arrested was drunk, and whether he used only such force as was necessary, are all questions of fact to be submitted to the jury under appropriate instructions.

Second. Appellant contends that the court erred in giving appellee's prayer number 8 as follows:

"8. Although you are instructed that the conductor would be the judge as to whether the plaintiff was drunk, yet, if the conductor erred in his judgment, the defendant would be answerable and liable for any injuries that resulted therefrom."

The instruction was erroneous. It does not conform to the statute as we have construed it. Under this instruction the appellant would be liable for any mistake of its conductor in making the arrest, no matter if he acted in good faith and with ordinary care. True, in other instructions given at the request of appellant the jury were told that if the conductor "honestly and in good faith believed that appellee was drunk," and for that reason "refused to permit him to enter the train," etc., appellee could not recover. But these latter instructions were in conflict with instruction number 8, *supra*.

The attention of the court was specifically directed to the error in instruction number 8 by instructions numbered 3 and 13 given at appellant's request (Reporter set forth 3 and 13 in note).*

The jury under the conflicting instructions would not know which were correct, and would be without any sure guide. Con-

*Instruction No. 3 requested by the appellant and refused by the court, and instruction No. 13 given at appellant's request, were as follows:

"3. If you find from the evidence that at the time plaintiff presented himself at the train of defendant in Little Rock for the purpose of taking passage thereon he appeared to be under the influence of intoxicants or was intoxicated, or if the conductor or the agents and employees of

flicting instructions should not be given. *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, and cases cited. See also *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564.

The court gave, over appellant's objection, the following instruction:

"You are instructed, if you find for the plaintiff, that it will be your duty to assess his damages, and that in doing so you may take into consideration any injuries inflicted upon the plaintiff, the pain and suffering incident thereto, his humiliation and mortification, and assess his damages at such a sum as in your judgment you may find from the testimony would compensate him for the injuries done, pain, suffering and humiliation."

There was no error in the giving of this instruction. By it the jury were left to determine from the testimony what damage appellee had suffered from the injuries done, pain, suffering and humiliation. The instruction did not assume the facts. But there was no conflict in the evidence as to appellee having been injured, nor that he suffered pain, and was ejected under circumstances that were humiliating. Therefore, even if the instruction assumed these as uncontroverted facts, it was nevertheless not prejudicial.

The other errors of which appellant complains as to the manner of interrogating witnesses and the remarks of counsel will not likely arise in the next trial, and we will therefore not discuss them.

For the error in giving instruction number 8 as indicated the judgment must be reversed, and the cause remanded for new trial.

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defendant in charge of said train honestly and in good faith believed that he was drunk or intoxicated, and for that reason refused to permit him to enter said train, then he cannot recover, and your verdict must be for the defendant."

"13. If you find from the evidence that the conductor in charge of defendant's train honestly and in good faith believed from plaintiff's appearance and from the smell of liquor on plaintiff's breath that plaintiff was drunk or intoxicated when he presented himself for passage upon defendant's train, and that on account of his said condition the conductor refused to accept plaintiff as a passenger, and used no more force than was necessary to prevent plaintiff from entering upon said train, then plaintiff cannot recover, and your verdict should be for defendant." (Rep.)

STATE MEDICAL BOARD OF THE ARKANSAS MEDICAL SOCIETY v. MCCRARY.

Opinion delivered June 27, 1910.

1. PHYSICIANS AND SURGEONS—REVOCATION OF LICENSE.—Acts 1909, c. 219, § 8, impowering State Medical Boards to revoke a license to practice medicine, among other causes, for "publicly advertising special ability to treat or cure chronic and incurable diseases," is not unconstitutional as depriving the person whose license is revoked of his property without due process of law. (Page 514.)
2. SAME—REVOCATION OF LICENSE—VALIDITY OF STATUTE.—Acts 1909, c. 219, § 8, impowering State Medical Boards to revoke the license of one who publicly advertises "special ability to treat or cure chronic and incurable diseases," is not too vague and indefinite to be enforced. (Page 516.)

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

STATEMENT BY THE COURT.

A. S. McCrary was duly notified to appear before the State Board of the Arkansas Medical Society in the hall of the House of Representatives, in the State House, in the city of Little Rock, Arkansas, on November 10, 1909, and show cause why his certificate to practice medicine in said State should not be revoked under subdivision (d) of sec. 8 of act 219 of the Arkansas General Assembly, approved May 6, 1909. It is as follows:

"Section 8. Every person residing in this State, or coming into it, of the age of twenty-one years, who has not heretofore been licensed to practice medicine under the existing laws, making application to register under the provisions of this act for the purpose of practicing medicine in this State, shall first make application to the secretary of the board representing the school of medicine from which he graduated, and his application shall be accompanied by a fee of fifteen dollars, this fee being for examination and registration before the boards. The applicant shall present to the board satisfactory evidence of graduation from a reputable medical school, and a school shall be considered reputable within the meaning of this act whose entrance requirements and course of instruction are as high as those adopted by the better class of medical schools of the United States. Such examination may be written or oral, and shall be of a practical

character and conducted on the scientific branches only, and shall include anatomy, physiology, medical chemistry, materia medica, therapeutics, theory and practice of medicine, pathology, bacteriology, surgery, obstetrics, gynecology and hygiene. All questions and answers, with grades attached, shall be preserved by the secretary for one year.

"If in the opinion of the board the applicant possesses the necessary qualifications, the board shall issue to him a certificate. The boards may, at their discretion, arrange for reciprocity in license with the authorities of States and territories having requirements equal to those established by the boards, and every person desiring license under reciprocity must make application to the secretary of the board representing the school of medicine from which he graduated. License may be granted applicants for license under such reciprocity on payment of twenty-five dollars.

"The boards may refuse to grant or may revoke a license for the following causes, towit:

"(a) Chronic and persistent inebriety.

"(b) The practice of criminal abortion, either as principal or abettor.

"(c) Conviction of the crime involving moral turpitude.

"(d) Publicly advertising special ability to treat or cure chronic and incurable diseases.

"(e) The representation to the board of any license, certificate or diploma which was illegally or fraudulently obtained, or the practice of fraud or deception in passing the examination.

"In complaints for violating the provisions of this section, the accused person shall be furnished a copy of the complaint, and given a hearing before said board in person, or by attorney, and any person after such refusing or revocation of license, who shall attempt or continue the practice of medicine, shall be subject to the penalties hereinbefore described."

On November 10, 1909, Dr. McCrary filed a complaint against said board and the members thereof to enjoin them from acting on the complaint filed against him before said board. With his petition he filed the following exhibits:

First. The notice served on him to appear before the State Medical Board and show cause why his license to practice medicine in the State of Arkansas should not be revoked.

Second. The complaint filed against him before said board. It charged that he had violated subdivision (d) of the above quoted act "by publicly advertising special ability to treat or cure chronic and incurable diseases," in violation of the terms thereof.

Third. A verbatim copy of his advertisement, stating his success and ability to cure certain ailments.

It is not necessary to set out his advertisement; for it seems to be conceded that, if the act in question is constitutional and is not void for uncertainty, the advertisement falls within its prohibition.

The board demurred to the complaint. The court overruled the demurrer on the ground that subdivision (d), which authorized the board to revoke the license of a physician if he "publicly advertise special ability to treat or cure chronic and incurable diseases is too indefinite and uncertain for enforcement."

The board electing to stand on its demurrer and refusing to further plead, a decree was entered enjoining it and the members thereof from in any way interfering with the right of the plaintiff to practice medicine because of the advertisement charged in the complaint made against him.

To reverse that decree, this appeal is prosecuted.

Hal L. Norwood, Attorney General, for appellant; *Coleman & Lewis* of counsel.

The statute is a proper exercise of police power. 77 Ark. 506; 66 Kan. 710; 1 L. R. A. (N. S.) 811; 129 U. S. 114; 170 *Id.* 189; 119 N. W. 644; 41 L. R. A. 212. The act is sufficiently definite and certain: 54 L. R. A. 415; 125 Ill. 289; 110 Ill. 180; 4 B. & S. 582; L. R. 23 Q. B. Div. 400; 103 Mo. 22; 32 Minn. 391; *Id.* 227; 195 Mo. 551; 22 R. I. 538. The act does not deprive appellee of his rights without due process of law. 1 L. R. A. (N. S.) 811; 54 L. R. A. 415.

B. D. Brickhouse, Jr., and *W. T. Tucker,* for appellee.

The Legislature has no right to invest the board with judicial power, or to create a court not authorized by the Constitution.

Art. 4, § § 1 and 2, Const. 1874; *Id.* art. 7, § 1; 12 Pet. 718; 3 Ark. 299; *Id.* 352; 7 Ark. 400; 165 Ill. 538; 99 U. S. 761; 73 N. Y. S. 306; 77 Ala. 422; Petitioner's right to practice medicine is a property right. 2 Ala. 31; 7 How. (Miss.) 127; 22 N. Y. 67; 1 Mo. 772; 4 Wall. 333; 54 L. R. A. 838; 90 Pa. 477; 95 Pa. 220. And cannot be taken from him without the judgment of a court of competent jurisdiction. 24 Ark. 162; 10 Ark. 156; 4 Wall. 333; *Id.* 277; 63 S. W. 787. The language of the act is not sufficiently definite and certain. 45 Ark. 381; 63 S. W. 787; 77 Cal. 165; 148 Cal. 590; 25 D. C. App. Cas. 444.

HART, J., (after stating the facts). The constutionality of the above quoted statute is attacked by appellee. He contends that his license to practice medicine is a property right, the revocation of which is an exercise of judicial power, which can not be vested in any adminstrative board, but only in the courts; and that to assume to invest this power in the board is to deprive him of his property without due process of law in violation of sec. 8 of art. 2 of our Constitution.

In discussing this question, the Supreme Court of the State of Minnesota, in a clear and well considered opinion delivered by Mr. Justice Mitchell, said: "The radical fallacy in this chain of argument is the assumption that the revocation of such a license is the exercise of judicial power. 'Due process of law,' or the law of the land" (which means the same thing) is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive as well as the judicial department of government. When it is declared that a person shall not be deprived of his property without 'due process of law,' it means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. * * *

"It has never been held that the granting or refusing to grant such a license as this was the exercise of judicial power; * * * and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise are in each case identical, viz., to exclude an incompetent or unworthy person

from this employment. Therefore the same body which may be vested with the power to grant, or refuse to grant, a license may also be vested with the power to revoke. The statutes of all the States are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackmen, draymen, pawn brokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained, and indeed rarely questioned.

"The only authorities cited by relator to support his contention are cases in which it has been held that the removal of an attorney by a court from his office as an attorney of the court, *like the order of his admission,* is the exercise of judicial power, and is a judgment of the court. But these cases are not at all analogous to the one at bar. They rest expressly upon the ground that attorneys are *officers of the court,* whose duties relate almost exclusively to proceedings of a judicial nature, and at common law it vested exclusively with a court to determine who is qualified to become one of its officers, and for what cause he ought to be removed, and hence that attorneys could only be removed from office for misconduct ascertained and declared by judgment of the court. Ex parte *Garland,* 4 Wall. 333." *State* v. *State Board of Medical Examiners,* 34 Minn. 387. This is a leading case on the subject, and has been cited with approval by nearly all the courts where the question has been under consideration. In the case of *Meffert* v. *State Board of Medical Registration and Examination,* 66 Kan. 710, which was affirmed by the United States Supreme Court without discussion (195 U. S. 625), all the authorities bearing on the question were reviewed, and the quotation we have made from the Chapman case was discussed and approved in its entirety. The Meffert case is also reported in 1 L. R. A. (N. S.) 811, and contains an excellent case note. To the same effect see *Dent* v. *West Va.,* 129 U. S. 114; *Hawker* v. *New York,* 170 U. S. 189; *State* v. *Schmidt,* 119 N. W. (Wis.) 647; *State* v. *Webster,* 41 L. R. A. (Ind.) 212, and cases cited.

Our own court, in a carefully prepared opinion by Mr. Justice RIDDICK, has held: (quoting from syllabus) "Acts 1903, p. 342, forbidding physicians and surgeons engaged in the practice of medicine to solicit patients by paid agents, is a valid exercise of the State's police power in regulating the practice of medicine and surgery." *Thompson* v. *Van Lear,* 77 Ark. 506.

As stated in the case of *Commonwealth* v. *Porn* (196 Mass. 326), 13 A. & E. Ann. Cases, 569, "the maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health, and reasonable regulations to this end do not contravene any provision of the State or Federal Constitution.

It is also contended that subdivision (d) of the section of the statute in question is too vague and indefinite to be upheld and enforced; and to our minds this is the most difficult question in the case to determine. It has given us the gravest concern, and, after due consideration, we have decided to uphold it.

Our attention has not been called to any case where a statute of similar import has become the subject of judicial determination.

Counsel for appellee rely upon cases where statutes authorizing the Board of Medical Examiners to revoke the certificate of a physician for making "grossly improbable statements" or for "unprofessional or dishonorable conduct" have been held void as being unreasonable, too uncertain and indefinite. *Hewitt* v. *State Board of Medical Examiners,* 148 Cal. 590, 7 Am. & Eng. Ann. Cases, 750; *Matthews* v. *Murphy,* 63 S. W. 785, 23 Ky. L. Rep. 750; *Czarra* v. *Board of Medical Supervisors,* 25 Dist. of Columbia App. Cas. 443.

On the other hand, there are cases upholding statutes impowering boards to revoke the licenses of physicians who are guilty of unprofessional and dishonorable conduct, and the licenses have been revoked or not, according to the proof made. *State* v. *Board of Medical Examiners,* 34 Minn. 391; *Macomber* v. *State Board of Health,* 28 R. I. 3. And the case note to *Hewitt* v. *State Board of Medical Examiners,* 7 A. & E. Ann. Cases, 750, indicates that the weight of authority is to this effect. But we need not decide that question; for we hold that the language of subdivision (d) in question is not too uncertain and indefinite to be upheld and enforced.

In the case of *Thompson* v. *Van Lear, supra,* this court held that an act forbidding physicians and surgeons to solicit patients by paid agents was a valid exercise of the police power. For like reason, a statute forbidding a physician to advertise for patients in newspapers would be upheld; and, by analogy, a statute forbidding them to advertise their ability to treat and cure certain named diseases would be a valid exercise of the police power.

While the particular disease against which the prohibition of the statute is directed is not named, as was the case of *Kennedy* v. *State Board of Registration in Medicine,* 145 Mich. 241, 9 A. & E. Ann. Cas. 125, yet the words "chronic and incurable," when used with reference to diseases of the body, are not variable, but have a settled and generally accepted meaning. The word "chronic" is the antithesis of acute, and a "chronic and incurable" disease is generally understood to be one of long standing, deep-rooted, obstinate, persistent and unyielding to treatment. On this account those afflicted with such diseases become discouraged, and to an extent desperate, and more easily become the prey of conscienceless and unscrupulous practitioners in the medical profession. Such diseases are specifically named and discussed in standard medical works, and are known to all physicians, who may possess a sufficient knowledge of their profession to practice the art of healing, as chronic and incurable diseases. For the board to consult these standard medical works would not be to use them as evidence, as contended by appellee, but such act would be rather done as an aid to the memory and understanding of the members of the board. See *State* v. *Wilhite,* 132 Iowa 226, 11 A. & E. Ann. Cas. 180 and case note.

The decree will be reversed, and the complaint dismissed for want of equity.

SMITH *v.* RUCKER.

Opinion delivered June 27, 1910.

1. BILL OF REVIEW—LEAVE OF COURT.—In order to file a bill of review, leave must be obtained from the chancellor in whose court the decree has been rendered. (Page 520.)

2. SAME—DISCRETION OF CHANCELLOR.—Where a bill of review is asked on the ground of newly discovered evidence, it rests within the sound discretion of the chancellor, subject to review upon appeal. (Page 521.)

3. SAME—NEW MATTER.—The new matter for which a bill of review will lie must be such as was not known to the petitioner or his attorney, or could not have been known by the exercise of reasonable diligence. (Page 521.)

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

Grant Green, for appellant.

Permission to file the bill should have been given. 36 Ark. 532; 33 Ark. 161; 47 Ark. 17; 84 Ark. 203.

J. W. & M. House, for appellee.

The demand on account of cotton was barred by limitation. 37 S. W. 17; 41 Am. St. R. 302; 139 Ala. 586; 64 Ark. 348; 59 Ark. 446; 70 Ark. 319; 75 Ark. 465.

FRAUENTHAL, J. This is an appeal from a decree of the chancery court refusing leave to file a bill of review to reverse a former decree of that court on account of new facts alleged to have been discovered since said decree was entered.

In December, 1906, F. T. Rucker instituted an action in the circuit court against John R. Smith upon a note for $1,500, which it was alleged had been executed by Smith & Ward, a partnership composed of John R. Smith and A. C. Ward, to the Bank of Beebe on March 4, 1904, and by said bank transferred to said Rucker.

To the complaint Smith filed an answer and cross complaint, and also a motion to make the Bank of Beebe a party to the suit and a motion to transfer the cause to the chancery court. The cause was transferred to the chancery court, and the Bank of Beebe was made a party to the action. In his answer and cross complaint Smith denied that there was anything due upon the note sued on, but alleged that it had been paid. He alleged that the firm of Smith & Ward had been engaged in the mercantile business, beginning in the year 1900, and that the note sued on was one of the debts of that firm; that the firm of Smith & Ward became financially embarrassed, and in 1905 filed a petition in voluntary bankruptcy; that shortly after the filing of said petition F. T. Rucker, who was the

cashier of the Bank of Beebe, suggested to the members of said partnership that they should attempt to make a settlement with their creditors, and that said bank would assist them by lending them the money to make the settlement, upon the agreement that the indebtedness due to the bank would be paid in full; that in pursuance of said suggestion a settlement was made with the creditors of the partnership, and that the Bank of Beebe advanced to the firm the money to pay off all other creditors; that, to secure the Bank of Beebe for the money thus advanced, they transferred and turned over to it certain notes and mortgages and the book of accounts of the partnership. He alleged that said Rucker, as cashier of the Bank of Beebe, had entire management and control of the collection of said notes and accounts, and that from these collections and also from amounts paid by Smith all the money advanced by the bank and all the indebtedness due to the bank, including the note sued on, were paid.

The Bank of Beebe and said Rucker made answer to the cross complaint, denying that sufficient collections had been made on said notes and accounts to pay off the indebtedness of Smith & Ward to the bank or to pay the note sued on. They also alleged that, for the money advanced by the bank to pay to the creditors of Smith & Ward, two additional notes had been executed to the bank, secured by mortgage on real estate, and they sought a recovery upon these notes and a foreclosure of the mortgage executed to secure their payment. The testimony which was adduced upon the trial of that cause is quite voluminous. It was introduced for the purpose of showing the collections which had been made upon said notes and accounts and the payments that had been made by Smith upon the indebtedness due by said firm to the Bank of Beebe and upon said note sued on. Upon the trial of the cause the chancellor found that the total indebtedness of the firm of Smith & Ward to the Bank of Beebe and said Rucker amounted to the sum of $6,486.59, and that the total collections made by the bank and Rucker thereon, including all payments made by Smith and others for him, amounted in the aggregate to $4,072.83, and he entered a decree for the balance in favor of the Bank of Beebe and said Rucker. From that decree said J. R.

Smith appealed to this court, and said decree was by this court affirmed on December 21, 1908.

On August 27, 1909, this application or petition was filed in said chancery court for leave to file a bill of review of said decree, upon account of new facts discovered since the entering of said decree. The new matter thus set up consisted of certain collections and payments which it was alleged were made to the Bank of Beebe and said Rucker, and which had never been credited on the indebtedness due to the bank by said partnership, and which had never been presented upon the trial of the case. It was alleged that said Smith had in 1905 delivered to said Rucker thirty-one bales of cotton to be applied upon said indebtedness, which had not been done; that Rucker had assured Smith that credit therefor had been given, and that on account of his confidence in Rucker he had accepted his word that it had been done, but since the rendition of the decree he had learned that this had not been done. On this account it was alleged that no testimony had been introduced relative to the payment of said cotton on said indebtedness upon the trial of the cause. It was also alleged that Smith had in 1905 made two deposits in the Bank of Beebe of $200 each, which were to be applied in payment upon said indebtedness, but which had not been done. That at the time of making the deposits he had received written acknowledgments thereof, or deposit slips, which he had turned over to his attorney, and that they had been lost by the attorney, and on the trial of the case had been forgotten. The other items set out are smaller in amounts, and like allegations are made relative to the payment thereof and the reason why testimony was not adduced relative thereto in the trial of the case.

A bill of review is a bill or complaint seeking, after the lapse of the term, to reverse or modify a decree that has been made and entered in the case. In order to file a bill of review, leave must be obtained from the chancellor in whose court the decree has been rendered. Such bill may be based upon error in law which is apparent on the face of the decree, or on account of new facts discovered since the decree was entered. If it is based upon newly discovered evidence, it rests within the sound discretion of the chancellor to grant or refuse leave to file the bill of review; but this discretion is subject to re-

view upon appeal, if it has been abused. *Jacks* v. *Adair,* 33 Ark. 161; *Webster* v. *Diamond,* 36 Ark. 532; 3 Ency. Pleading & Prac., 588.

It is the policy of the law that a decree, once solemnly entered, should not be set aside or modified except for cogent reasons. The issues that are presented in a suit should be fully developed by the testimony, and it is presumed, when a cause is finally submitted for determination and decree, that the parties have adduced all evidence of which they had knowledge or which they could have known by the exercise of due diligence. Therefore it has been uniformly held that the new matter for which a bill of review will lie must be such as was not known to the petitioner or his attorney in time to be used in the suit, or could not have been known by the exercise of reasonable diligence. *White* v. *Holman,* 32 Ark. 757; *Woodall* v. *Moore,* 55 Ark. 22; *Dumont* v. *Des Moines Valley Rd. Co.,* 131 U. S. Appendix CLX.

In the case of *Bartlett* v. *Gregory,* 60 Ark. 453, the rule is thus stated: "Where a bill of review is for newly discovered matter, the rule now is that the matter must be such as could not have been discovered by the use of reasonable diligence, for, if there be any laches or negligence in this respect, that destroys the title to the relief."

A bill of review will not lie for evidence which was known in time to have been offered before the submission of the cause for determination or decree. It is the duty of the parties to present all such evidence; and if, through design or inadvertence, they do not introduce such evidence, they will not be permitted to wait the determination of the issue and then seek to again try the issue upon evidence which they have designedly or negligently omitted to introduce. *Greer* v. *Turner,* 47 Ark. 17; *State* v. *Hicks,* 48 Ark. 515; *Boynton* v. *Chicago Mill & Lumber Co.,* 84 Ark. 203; 16 Cyc. 530.

The issues that were made by the pleadings in the case upon which the decree was rendered involved the indebtedness that was due by the firm of Smith & Ward to the Bank of Beebe and Rucker, and also all payments that had been made thereon by Smith or by any one for him or said firm, and all collections that had been made upon the notes and accounts of the firm. These matters were extensively developed by the

testimony adduced upon the trial of the case. J. R. Smith gave his testimony and deposed at length and in detail as to payments and collections for which he claimed credit. He was assisted in the preparation and trial of the case by able counsel. He was cognizant at the time he testified in the case of every item for which in this petition for a bill of review he now seeks credit. Before he gave his testimony in the case and before the cause was submitted to the chancellor for determination, he knew the very facts and matters which he now sets up in this petition. These matters can not therefore be said to be newly discovered since the rendition of the decree. Upon an examination of the record in the case upon which the decree was entered, we find that testimony was introduced upon the trial of the cause relative to a great number of the matters and items which are set out in the petition as newly discovered, and we find that some of the items of payment now set out in the petition were not only considered by the chancellor, but that credit was given therefor in said decree. The chancellor in said decree made a finding that Smith & Ward were entitled to credits amounting in the aggregate to $4,072.83. This sum consisted of a great number of different items.

In the testimony it appears that in some instances the different amounts of the credits are given, but the items thereof are not specifically named. It may be that these credits represent the items or a great many of the items of payment which are now set out in the petition for the bill of review. However this may be, it clearly appears that the matters which are now set out as newly discovered were known to petitioner, or by the exercise of reasonable diligence could have been discovered by him, before the rendition of the decree; that these matters were within the issues of the case, and could have been brought out by the use of any degree of diligence.

Under these circumstances we can not say that the chancellor abused his discretion in refusing leave to file a bill of review of said decree.

The decree is affirmed.

McDONALD v. SMITH.

Opinion delivered June 27, 1910.

1. HUSBAND AND WIFE—EFFECT OF CONVEYANCES BETWEEN.—While equity will scrutinize a deed from a wife to her husband with great jealousy, such a transaction, if fairly entered into, is binding, and will convey to him the equitable title. (Page 526.)
2. FRAUD—EXPRESSION OF OPINION AS TO LAW.—A statement which is only an expression of opinion as to the law is not fraudulent. (Page 527.)
3. SAME—EQUALITY OF MEANS OF INFORMATION.—Where the means of information are equally open to both parties, it will be deemed that they have relied upon their own knowledge. (Page 527.)
4. SAME—INADEQUACY OF CONSIDERATION.—Where a vendee agreed to pay $300 and the cost of a fence estimated to be worth from $65 to $140 for land reasonably worth from $500 to $600, the inequality between the agreed price and the value was not so gross as to stamp the transaction as fraudulent. (Page 528.)
5. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will not be set aside on appeal unless clearly against the preponderance of the evidence. (Page 528.)

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

Cockrill & Armistead, for appellant.

Appellees obtained no title by the alleged conveyance of W. H. Smith. 67 Ark. 15; 88 Ark. 56; 80 Ark. 421; 86 Ark. 448; 19 Tex. 303. The weight of the evidence is against the decree and the validity of the conveyance. 119 Fed. 406; 16 Pa. St. 212; 37 La. Ann. 871; 41 N. J. Eq. 167; 27 Pa. St. 333; 14 Ia. 481; 116 Mo. 155; 98 Wis. 559; 7 Wheat. 283. The burden was upon appellees to show that the transaction was freely entered into by Mrs. Smith. 60 Ark. 301; 119 Ala. 641; 8 Conn. 254; 50 Md. 480; 122 Pa. St. 256. The presumptions are against the validity of the conveyance. 94 U. S. 506; 141 Mo. 466; 22 Ala. 532; 71 S. W. 309; 112 Wis. 461; 46 Wis. 419; 66 Wis. 100; 96 Wis. 559; 3 Tenn. Ch. 382; 50 Cal. 558; 46 S. W. 466; 88 Ala. 462. The conveyance is void because of undue influence and misrepresentation. 85 Ia. 580; 63 Md. 371; 57 N. H. 374; 17 Neb. 381; 49 Mich. 290; 73 Am. Dec. 159; 35 S. W. 186; 29 S. W. 242; 51 Ia. 364; 111 Ala. 456; 26 N. Y. 12; 64 S. W. 329; 85 Ark. 363;

26 Ark. 611; 40 Ark. 31; 14 Ves. 273; 15 Am. Dec. 572; 6 N. Y. 274; 25 Am. Dec. 292.

Walter J. Terry, for appellee.

The evidence does not justify the cancellation of the deed. 38 Ark. 428. Upon satisfactory evidence that an adequate consideration has been paid and that no undue influence has been used, the presumption of fraud will be removed. 21 Cyc. 1293.

FRAUENTHAL, J. This was an action originally instituted by Martha Smith to set aside and cancel conveyances executed by her for a tract of land in Pulaski County, upon the ground that they were obtained by fraud. During the pendency of the suit, and after she had given her testimony in the case, Martha Smith died, and this suit was revived in the name of her representative. She had been twice married, and by her first husband she had a son named Corrie McDonald, who at the time of the institution of this suit was 40 years old, and at her death was her sole heir. In 1885 she married her second husband, W. H. Smith, and at that time was the owner of the land in controversy; and also of about 160 acres additional, which was her homestead at the time of her death. The tract of land in controversy contains about 28 acres, and in 1888 the house and fences thereon were partially destroyed by a cyclone. The land had been badly cultivated, and the improvements had been greatly neglected. She desired that the house and improvements upon this tract should be repaired, so that it might bring some returns. At the suggestion of her husband she agreed to convey the tract to him if he would make the repairs, and also in order that he might gain the benefit of his labor and own the land in event of her death. On August 16, 1888, she executed to him a deed for the land, which was recorded on the same day. Smith made the improvements on the land and continued to cultivate and exercise acts of ownership over it from that date until 1901, when he departed from the settlement, leaving his wife there. Several years after obtaining the land he conveyed two acres of it to Corrie McDonald, and Mrs. Smith testified that during all those years she considered and recognized the land as belonging to her husband, and was perfectly satisfied that she had conveyed it to him. She stated that he made her a good husband,

and that she had no reason to complain of him while they lived together. In 1901 the land was rented for fifteen dollars per annum, and it is not claimed that this was not a fair rental value of the land at that time. After this Corrie McDonald built a fence on the land, which he removed about the time of or just after the institution of this suit. About January 1, 1908, W. H. Smith returned, and was endeavoring to sell the land. He told J. M. King he would sell the land for $300. King had lived in the family of Martha Smith from the time he was a child until 1889, when he married. Since that time he had lived in the same community with her, and visited her frequently, but there is no testimony that he transacted any business for her, or that Mrs. Smith either relied upon him to attend to any matters for her or confided to him any of her affairs. King went to the home of Mrs. Smith, and told her that her husband had returned, and was endeavoring to sell the tract of land. She testified that he told her that Smith had come back with the determination to sell the land to some one, and that he had the right to sell it, and that he (King) would buy it and pay her one-third of the purchase money and also pay her son for the fence he had built on the land. She then asked him: "What are you going to give for it?" And he says: "$300." "And I says: '$300'; that looks like a mighty little to me." She stated that, believing the representation that her husband could sell the land, she agreed to execute the deed for the land on the terms named. She also stated that she was at the time suffering from neuralgia, and was greatly influenced by King's statement that Smith could sell the land. King testified that he told her that Smith was trying to sell the land, and was willing to take $300 for it; that he would buy it and pay her one-third of the purchase money, and also pay her son for the fence built on the land by him; and that she told him to go ahead and buy it. On the following day King purchased the land, paying to Smith $200. He had the deed made in the name of his wife, for the reason, as he claimed, that she advanced the money. Mrs. Smith joined in the execution of the deed, and also relinquished all right of dower in the land. Her acknowledgment to the deed was taken before a notary public, who testified that it was fully read over to her. Mrs. King executed her note to Mrs. Smith for $100, bearing inter-

est, which was accepted by Mrs. Smith. At the time of the filing of her answer Mrs. King tendered the $100 and interest to Mrs. Smith, and brought the money into court. At the time of the execution of the deed Mrs. Smith was 60 years old, and, while there is some testimony showing that she was weak in body and not strong in mind, yet we think the preponderance of the testimony shows that she was able to read and write and mentally able to attend to her affairs in the same manner that a woman of her years and experience would ordinarily be able to do. The testimony tends to prove that the land at the time of the execution of the deed to Mrs. King was worth about $500.

The chancellor made a finding of fact in favor of the appellees, and denied the prayer of the complaint, which sought the cancellation of the deeds on the ground of fraud. He ordered that the $100 and interest, which had been brought into court by the appellees in payment of the note for the land, be turned over to the representative of Mrs. Smith.

It is urged by counsel for appellant that King obtained the execution of the deed in 1908 by misrepresentation and undue influence and for a grossly inadequate consideration, and on this account that it was secured by fraud and should be cancelled. While the deed to Mrs. King is not necessarily dependent upon the validity of the deed executed by Mrs. Smith to her husband, nevertheless the legal effect of that deed and the manner in which its validity was considered by the parties will materially assist in determining whether or not the deed to Mrs. King was obtained by false representations or by wrongful influence. The chief ground for the assertion that misrepresentation was made by King, or that improper influence was exerted on Mrs. Smith, to obtain the deed is that she was told that her husband could sell the land, when as a matter of fact (or rather of law) her deed to him was void. But, as a matter of law, the deed executed by her to her husband was not necessarily void. Although courts of law will not enforce contracts made between husband and wife, equity will in many instances recognize and enforce them when they are fair and reasonable. This is especially true of conveyances executed by the one to the other. Equity will scrutinize with great jealousy a conveyance from the wife to the husband, but,

as is said in the case of *Hannaford* v. *Dowdle*, 75 Ark. 127: "After all, the demand for such scrutiny is to ascertain, and not to defeat when ascertained, the real intention of the parties, where the transaction is free from fraud. * * * Transactions between husband and wife, when fairly entered into, are as binding upon the courts as between other parties." The direct conveyance by the wife to the husband or by the husband to the wife will be sustained in equity, in the absence of fraud. The technical reason of the common law, arising from the unity of the two, for not enforcing such conveyances does not prevail in equity. Such a deed by a wife to the husband will convey to him the equitable title. *Pillow* v. *Sentelle*, 49 Ark. 430; *Ogden* v. *Ogden*, 60 Ark. 70; *Bowers* v. *Hutchinson*, 67 Ark. 16; *Carter* v. *McNeal*, 86 Ark. 150; *Mathy* v. *Mathy*, 88 Ark. 56. So that by the deed from his wife Smith, in the absence of fraud, obtained an equitable interest in the land, an interest which could be disposed of because it would be recognized and enforced in equity. There is no testimony adduced in the case tending to prove that King knew that the deed had been obtained by undue influence or by fraud. On the other hand, the testimony tends to prove that for twenty years her conveyance to her husband had been recognized and approved by Mrs. Smith; and for years with her knowledge and consent he held himself out to the world as the owner of the land. When therefore King told Mrs. Smith that her husband was endeavoring to sell the land, and that he could do so, he made no statement which he knew to be untrue or which was necessarily false. Under the circumstances of this case, it is doubtful if the statement was untrue, although it was only an expression of opinion of law, and not strictly a statement of fact. It was therefore not a fraudulent misrepresentation. 2 Pomeroy, Eq. Jur., § 882.

Mrs. Smith had information relative to the entire matter equal to that of King; in fact, she had better information. All persons are bound by their contracts if not laboring under some mental disability; and if the means of information are equally open to both parties, it will be deemed that the parties have relied upon their own knowledge. Under such circumstances it can not be said that the contract has been induced by such misrepresentation that a court of equity will refuse to enforce

the contract or cancel it if executed. *Yeates* v. *Pryor*, 11 Ark. 58; *Righter* v. *Roller*, 31 Ark. 170; *Matlock* v. *Reppy*, 47 Ark. 148; *Arkadelphia Lumber Co.* v. *Thornton*, 83 Ark. 403.

Nor can it be said, from the testimony, that the consideration paid for the land by King was so inadequate as to furnish convincing evidence of fraud. The rule is well settled that before inadequacy of price will be considered a sufficient ground for cancelling a conveyance it must be "so gross that it shocks the conscience." 2 Pomeroy, Eq. Jur., § 927; 6 Cyc. 286; *Storthz* v. *Arnold*, 74 Ark. 68.

The land was reasonably worth from $500 to $600. For this land King had agreed to pay $300 and the cost of a fence which was estimated to be worth from $65 to $140. We do not think that the inequality between the price agreed to be paid and the value of the land as testified to upon the trial of the case was so gross as to stamp this transaction as fraudulent.

Nor were the relations existing between Mrs. Smith and King of such a confidential nature as to taint the transaction with fraud. King had at one time lived in the family of Mrs. Smith, but for twenty years prior to the execution of this deed he had been as a stranger, although a neighbor to the family. There is no testimony indicating that King transacted any business for Mrs. Smith, or that she reposed any special confidence or trust in him. He occupied no relation of confidence or trust with reference to her, and it can not be said from the evidence that he exerted any special influence over her by reason of the trust she placed in him.

Mrs. Smith appeared before the chancellor and gave oral testimony in the case. The chancellor had the better opportunity to observe her intelligence and her capacities. While a chancery case is tried upon appeal *de novo*, and this court passes its own judgment upon the weight of the evidence, nevertheless the findings of the chancellor are persuasive, and more especially is this so when he has had the opportunity to see and hear the witness whose intelligence and mental abilities are also in question.

The chancellor found that the transaction between Mrs. Smith and King which culminated in the execution of the deed by her was not tainted with actual or constructive fraud. We have carefully examined the evidence, and we can not say

that the finding of the chancellor is clearly against the preponderance of the evidence.

Under such circumstances the chancellor's finding will not be disturbed by this court.

The decree is affirmed.

THREE STATES LUMBER COMPANY v. BOWEN.

Opinion delivered June 6, 1910.

1. SALES OF LAND—WHEN TIME OF THE ESSENCE.—Time may be made of the essence of a contract by the express stipulations of the parties or by implication from the very nature of the subject-matter or the avowed objects of the seller or the purchaser. (Page 531.)
2. SAME—FORFEITURE—WAIVER.—Even in cases where the parties to a contract of sale of land have expressly made time of payment to be of the essence of the contract, the right to insist on a forfeiture upon a failure to pay within the time may be waived by conduct on the part of him who has the right to insist on a forfeiture. (Page 532.)
3. SAME—WHEN FORFEITURE WAIVED.—Where a contract for the sale of land stipulated that time should be of the essence of the contract, but contained no provision that, upon a forfeiture for failure to pay part of the purchase money when due, the purchase money already paid should be forfeited, the vendor, by failing to return the money previously paid, will be held to have waived the forfeiture upon the vendee's failure to pay the remainder within the specified time. (Page 532.)

Appeal from Mississippi Chancery Court, Osceola District; *Edward D. Robertson,* Chancellor; affirmed.

W. J. Lamb, for appellant.

When time is of the essence of the contract, failure to pay promptly will work a forfeiture. *Friar* v. *Baldridge,* 91 Ark. 133; 48 Ark. 413; 54 Ark. 16; 61 Ark. 266. The contract is valid. 104 Am. St. R. 267; 65 Cal. 596; 52 Am. R. 310; 84 Cal. 316; 18 Am. St. R. 187; 24 Pac. 280; 3 C. Greene 128; 54 Am. Dec. 492; 19 N. J. Eq. 350; 31 Pa. 218. Time is of the essence when? 3 Ga. 100; 10 Allen 239; 38 N. H. 400; 2 O. St. 236; 59 Am. Dec. 677; 62 Fed. 654; 144 U. S. 395; 14 Tex. 373; 109 Fed. 280. In such case strict fulfillment is requisite to give a right to specific performance. 70 Ill. 553; 70 Hun 568; 24 N. Y. S. 280; 14 Daly 241; 31 Pa. St. 314; 89 Tex. 235; 34

S. W. 596; 9 Utah 260; 34 Ark. 51. Tender of the balance of the purchase price after the time designated will not entitle the vendee to specific performance. 87 Cal. 203; 22 Am. St. 240.

S. S. Semmes and *W. J. Driver,* for appellee.

If a party to a contract is, without his fault, prevented from a literal execution of his agreement, and a forfeiture is thereby incurred, equity will grant relief from the forfeiture. 25 Ark. 140. One who seeks to rescind a contract must put, or offer to put, the other *in statu quo.* 72 Ark. 364; 70 Fed. 146. Specific performance is purely within the sound discretion of the chancellor. 87 Ark. 593; 91 Ark. 133.

McCULLOCH, C. J. Appellant was the owner of a tract of land in Mississippi County, Arkansas, containing 560 acres, and entered into the following contract for the sale and conveyance thereof to appellee:

"This agreement, made and entered into this 1st day of November, 1906, by and between the Three States Lumber Company, a corporation, of the State of Wisconsin, party of the first part, and H. E. Bowen, of the county of Mississippi, and State of Arkansas, party of the second part, witnesseth:

"That, upon the performance of the covenants and agreements of the party of the second part and the completion of the payments hereinafter set forth, the party of the first part hereby covenants and agrees to sell and convey to the party of the second part the following described real estate, towit: (Here follows description). That, for and in consideration of the covenants and agreements of the party of the first part, the party of the second part hereby covenants, promises and agrees to pay to the party of the first part the sum of twenty-eight hundred ($2,800) dollars, cash in hand, the receipt of which is hereby acknowledged, and the further sum of fifty-six hundred ($5,600) dollars according to the tenor and effect of two promissory notes, amount of each note twenty-eight hundred ($2,800) dollars, of even date herewith, given by the party of the second part to the party of the first part, and payable on or before November 1, 1907, and November 1, 1908, respectively, with interest on both of said notes, payable annually at the rate of six per cent. per annum. * * * And the said Three States Lumber Company hereby agrees that it will for-

ever warrant and defend the title to said lands against the claims of all persons whomsoever, to the extent of fifteen ($15) dollars per acre; it being expressly agreed and understood by the parties hereto that this grantor shall not be liable on this agreement for more than said sum of fifteen ($15) dollars per acre for the whole of said tract, or any part thereof, to which the title may fail. * * * That time is of essence of this agreement, and that the covenants and agreements herein contained shall extend to and be binding upon the heirs, executors, administrators and successors and assigns of parties hereto."

Appellee made the cash payment at the time of the execution of the contract, and took possession of the land. He failed to make the next payment within the stipulated time, but offered, on January 18, 1908, to pay the amount due, and on November 1, 1908, he tendered the amount of the last payment, which became due according to the contract on that date. His excuse for failing to make the second payment within the time specified was that at that time there was a financial stringency prevailing throughout the country, and the banks refused to pay money on checks; that he tendered appellant a check for the amount due, which was refused, and that, as soon as the banks began to pay out money, he procured the necessary amount of currency, which was on January 18, 1908, and tendered it to appellant. Appellee seeks in this proceeding to compel specific performance of the contract, and tenders the full amount of the unpaid purchase price. The chancery court granted him that relief, and appellant brings the case here for review.

It will be noted from an inspection of the contract that it provides in terms that "time is of essence of this agreement." It does not expressly provide, in the event of appellee's failure to pay within the time named, for a forfeiture of his right to have the contract enforced, or for a forfeiture of the amount already paid on the purchase price of the land. "Time may be made of the essence of the contract 'by the express stipulations of the parties, or it may arise by implication from the very nature of the property or the avowed objects of the seller or the purchaser.'" *Cheney* v. *Libby*, 134 U. S. 68.

While equity will not ordinarily enforce forfeitures, still, where the payment of the price of the land is by express letter of the contract made a condition upon which the sale depends,

courts of equity will not refuse to follow the terms of the contract; for to fail to do so would be to make a contract for the parties which they had not themselves made. But, even in cases where the parties have by contract made time of payment to be of the essence of the contract, the right to insist on a forfeiture by failing to pay within the time may be waived by conduct on the part of him who has the right to insist on a forfeiture. Illustrations of implied waivers of the right to insist on forfeiture may be found in many decisions of this court: *Braddock* v. *England,* 87 Ark. 393; *Souter* v. *Witt,* 87 Ark. 593; *Turpin* v. *Beach,* 88 Ark. 604; *Friar* v. *Baldridge,* 91 Ark. 133.

The Supreme Court of the United States, in an opinion by Mr. Justice Harlan, used the following language, which has already been quoted with approval by this court: "The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, may, and of necessity must, often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions." (*Cheney* v. *Libby, supra*).

Now, the evidence in this case shows that appellee was not only a man of considerable means and abundantly responsible, legally, for the obligation as expressed in this contract, but that he had money in bank ready to use in the payment of the note when it fell due. Without fault of his own, he was unable to withdraw this money from the bank, and appellant refused to accept a check and refused to extend the time of payment. As soon as the banks resumed payment, appellee procured the currency and tendered the amount. Appellant refused to accept it, and notified appellee, as it also did about the time of the maturity of the note, that the contract would be treated as rescinded. Nowhere does it appear, however, that appellant has ever offered to return the money ($2,800) which it had received from appellee as the first cash payment on the land. On the contrary, it is clear that appellant intends to retain this money and still insist upon a forfeiture. The contract, to which we have already called attention, contains no provision for a forfeiture, on appellee's part, of the money which he paid; nor does it provide, in the event of his failure to pay the purchase price

within the time named, for the appropriation of the money so paid to the satisfaction of any other obligation, or to the compensation of appellant for the rental value of or damage to the land agreed to be sold. Appellee could not, in an action at law, have recovered the money which he paid, for in such an action he would be met with the plea that the payment was voluntary; and that he had not complied with his own contract. But he is not insisting on a return of the money; he is in a court of equity asking for a performance of the contract and offering to perform his part of it. And he insists, and rightly, we think, that appellant, by retaining the money previously paid, has waived its right to insist on a forfeiture.

Mr. Pomeroy, in his work on Specific Performance of Contracts, § 394, says that "wherever time is made essential, either by the nature of the subject-matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the one who is entitled to insist upon a punctual performance by the other or else that the agreement be ended—may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default."

We are of the opinion that appellant, by failing to return the money previously paid, elected to treat the contract as still subsisting, and this was a waiver of the forfeiture which it had the right to claim by returning the money and declaring the contract to be at an end. This view is based, of course, upon the peculiar language of this contract, in which no forfeiture is expressly provided for, either as to the money paid or the right to carry out the purchase of the land. As the contract only made the payment of the money within the stipulated time a condition precedent, without providing for a forfeiture of the amount already paid on the purchase price, appellant, by keeping the money, treated the contract as still subsisting, and can not insist on a strict performance of the conditions within the specified time. It had the right either to return the money paid and treat the contract as at an end, or to keep the money and

insist on payment of the balance. But it could not keep the money paid and at the same time claim a forfeiture because of appellee's failure to pay the remainder within the specified time.

Decree is therefore affirmed.

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

Opinion delivered June 6, 1910.

1. LIBEL AND SLANDER—EVIDENCE.—In an action for slander where the plaintiff alleged in his complaint that immediately after the slanderous charge he was discharged from defendant's employment, leaving the inference that the discharge was due to the slanderous charge, it was not error to permit defendant to prove that plaintiff was discharged because of his incivility. (Page 540.)
2. SAME—INSTRUCTION—APPLICABILITY TO ISSUES.—In an action for slander, where plaintiff's reputation was not attacked, it was not error to refuse to charge the jury that it was "alleged and not denied that the plaintiff had the reputation in the community in which he lived of being an upright, honest man, and he had never been charged or suspected of any dishonest practice of any kind whatever; therefore you will accept said allegation as proved." (Page 540.)
3. SAME—MALICE—INSTRUCTIONS.—It was not prejudicial error to instruct the jury in a slander case that "in order for plaintiff to recover it must further appear that the slander was uttered with a malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing," if the court further instructed the jury that "if the defamatory words complained of were wrongfully used, and were used intentionally, without just cause or excuse, or in wanton and reckless disregard of the rights and feelings of the plaintiff, then, in the legal sense, they were maliciously used." (Page 540.)
4. SAME—INVITED ERROR.—The plaintiff in a slander case has no right to complain because the court at defendant's instance instructed the jury that "the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof," where the plaintiff requested the instruction that "it is true that malicious intent is not to be presumed, but must be proved." (Page 541.)
5. SAME—LIABILITY OF CORPORATION FOR ACTS OF AGENT.—A corporation is not responsible for a slander uttered by one of its agents not within the scope of his employment unless it authorized, approved or ratified the act of the agent in uttering the particular slander. (Page 541.)

Appeal from Drew Circuit Court; *Henry W. Wells,* Judge; affirmed.

Austin & Danaher and *Patrick Henry,* for appellant.

Actual malice is not necessary when the words published are actionable *per se.* 122 S. W. 449. A corporation is liable for slander. 43 So. 471; 1 Clark & Marshall on Corp. pp. 627, 629; 57 Miss. 759; 34 Am. Rep. 494; 37 Ala. 560; 74 Ala. 85; 49 Am. Rep. 800; 69 Miss. 185; 30 Am. St. R. 528; 13 So. 847; 73 Miss. 161; 31 L. R. A. 390; 55 Am. St. R. 522; 18 So. 922; 142 N. C. 1; 54 S. E. 793; 55 Mich. 224; 54 Am. Rep. 372; 21 N. W. 324; 69 C. C. A. 127; 136 Fed. 129; 15 Serg. & R. 176; 61 Ala. 527; 21 How. 210; 62 U. S. 212; 77 Ark. 64.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton and *James H. Stevenson,* for appellee.

Agency alone is not enough to hold a corporation liable for slander. Cooley on Torts, § 142, p. 209; 150 Ala. 524. The plaintiff can not, in the first instance, give evidence of his own good character. Townshend on Slander & Libel, § 387; Newell on Libel & Slander, § 298; Odgers on Slander & Libel, § 298. A corporation is not liable unless it authorized the words to be spoken. 100 Ga. 213; 59 Ark. 539; 4 Ark. 110; 23 N. J. L. 360; 59 How. Pr. 104; 43 So. 210; 200 Mass. 265; 124 N. C. 100; 39 S. E. 392.

BATTLE, J. O. J. Lindsey charged the St. Louis, Iron Mountain & Southern Railway Company with slandering him. He alleged in his complaint that he was employed by the defendant as station agent at Monticello, in this State; "that while he was so employed, about 21st day of October, 1907, the defendant, through its agents and servants, negligently, recklessly, wilfully and maliciously slandered him by stating in the presence and hearing of L. H. Edwards, P. T. Hammock and Ed Ahrens that two cars of cotton had been stolen out of the yards of the defendant at Dermott and brought to the station of Monticello, and 14 bales had been unloaded in the depot, and that plaintiff got said cotton; and by asking him what he did with it. That the servants of defendant who spoke said slanderous words of plaintiff were O. J. Cantley and C. Perman, who were special agents in the employ of defendant for the

purpose of finding said missing cotton, and said charge was made by them in furtherance of the defendant's business, which they were employed to do for the purpose of ascertaining whether plaintiff was the guilty person or had guilty knowledge of the matter, and of inducing him, if guilty, to confess it. That said slanderous words were wholly false, and were spoken maliciously and without probable cause, and plaintiff had not then or since then received said cotton, and had no knowledge concerning it. That thereafter he demanded of defendant that the slanderous charge be retracted, but defendant failed and refused to retract. That immediately after said slanderous charge defendant discharged him from its employ. That previous to that time he had the reputation in the community where he lived of being an upright, honest man, and had never been charged with or suspected of being engaged in any dishonest practice whatever. That said Edwards, Hammock and Ahrens, before whom the slanderous words were uttered, were citizens and residents of Monticello, where plaintiff lived. That by reason of the said slander plaintiff had been damaged, in his business standing and otherwise, in the sum of $10,000, and that, by reason of the wilful, reckless, and malicious conduct of defendant in uttering said slander, defendant became indebted to him in the sum of $20,000 punitive damages." He asked judgment for $30,000.

The defendant answered, and denied that its servants used the slanderous language complained of, or any other language which amounted to charging plaintiff with larceny or any other crime, or that such language was used for the purpose of ascertaining the guilty knowledge of plaintiff with respect to said cotton and of inducing him to confess. It denies that Cantley and Perman had authority to charge any person with having stolen the cotton, or to use any other language which would injure him in his business standing. Defendant had no knowledge of the truth or falsity of the words alleged to have been spoken, further than that the cotton was taken from the yards at Dermott, and had at no time charged plaintiff with having taken it, or being a party to the publication of such a charge. It denies that he demanded that it retract the charge or that it refused to do so. That, never having made or authorized the charge, it had nothing to retract. "That no language was used

toward or about plaintiff calculated to injure him in his reputation, socially or in business circles, or calculated to charge him with a crime, but all that was said was to give him such facts as had been ascertained concerning the loss of the cotton to enlist his assistance in finding it; that all communications made to him were of privileged character, and without intent to injure him and without any suspicion of his guilt. It admits that it discharged him, but denies that it was on account of said cotton being lost, and says it was solely on account of his insubordination to those in authority over him. It denies that he was damaged as alleged in the complaint or in any other sum, and prays to be dismissed."

A jury tried the issues in the case, and returned a verdict in favor of the defendant, and plaintiff appealed.

Both parties adduced evidence for the purpose of proving the allegations of their respective pleadings.

Among other things plaintiff testified in his own behalf that he was discharged from the service of the defendant immediately after he was accused of having or taking the missing fourteen bales of cotton.

The defendant adduced evidence, over the objection of the plaintiff, to prove that he was discharged from its service on account of incivility while acting as its agent.

George M. Parker testified, in behalf of the plaintiff, substantially as follows: "I am a conductor in the employ of the defendant, and in 1907 ran the freight train between McGehee, Arkansas City and Warren, passing through Monticello. There were two crews on that run. Conductor Weed was the other conductor. I know C. Perman, special agent for defendant. In October, 1907, Perman came into the lunch room at McGehee, and said he wanted to talk to me. We went outside, and he asked me if I didn't take two cars of cotton out of the Dermott yards to Monticello about the 15th of October, and if O. J. Lindsey, the agent at Monticello, didn't unload this cotton there. I told him I didn't take the cars over to Monticello, and had no record of handling them. He turned and asked me what I did with the 14 bales of cotton, and I told him I didn't know anything about the cotton at all. He told me if I was mixed up in these 14 bales of cotton I had better get clear and unload on Lindsey. I told him I knew nothing whatever of the cotton.

He said that he wanted to stick Lindsey for the 14 bales of cotton, that they knew where the cotton was, and could lay hands on it, and wanted me to get in the clear."

The court instructed the jury at the request of the plaintiff, in part, as follows:

"1. A slander is any publication or utterance which accuses a person of a crime punishable by law, or which amounts to a charge of having been guilty of any dishonest business or transaction, the effect of which would be to injure the credit or business standing of the person so slandered.

"8. In order to award punitive or exemplary damages, it must appear that the slanderous words were spoken of the plaintiff by the defendant through its agent acting within the scope of his employment, with malice. Malice, as used in this instruction, does not mean that the agent using the alleged slanderous words must have any personal spite, ill-will or hatred of the plaintiff, but means if the defamatory words complained of were wrongfully used, and were used intentionally, without just cause or excuse, or in wanton and reckless disregard of the rights and feelings of the plaintiff, then, in the legal sense, they were maliciously used.

"9. While it is true that malicious intent is not to be presumed, but must be proved, this proof need not be in the form of direct testimony, but may be shown by circumstantial evidence. It is for the jury to say, after considering the language of defendant's agent complained of, together with all the circumstances attending its utterance, whether such slanderous words were or were not spoken with malice, either express or legal, as hereinbefore defined."

And refused to instruct as follows:

"2. You are instructed that it is alleged, and not denied, that the plaintiff had the reputation in the community in which he lived of being an upright, honest man, and he had never been charged or suspected of any dishonest practice of any kind whatever; therefore you will accept said allegation as proved."

And instructed them at the request of the defendant, over the objections of the plaintiff, as follows:

"1. The court instructs the jury that the burden of proof is on the plaintiff in this case to prove by a clear preponderance of the evidence that the language complained of, as set out in

the complaint, was used and published by the agent or agents of the defendant as alleged, and that such agent was acting under the authority of the defendant and acting within the scope of his employment in using such language, or that the defendant had afterwards ratified the same, and to prove that, as a result of such slanderous publication by the agent of defendants, the plaintiff has been damaged in his character and reputation, and it must further appear that the slander was uttered with the malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing.

"2. The court instructs the jury that, unless it appears to your satisfaction by a fair preponderance of the weight of the testimony after a careful comparison of all the evidence in the case that the language set out in the complaint was uttered or published toward or about the plaintiff by the agent or agents of the defendant, acting within the scope of their authority, you will not be warranted in presuming that any language was used which was detrimental to plaintiff's character or reputation, nor was intended to be used in a slanderous way, but the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof.

"4. The court instructs the jury that the liability of a corporation for oral slander uttered by its agents stands upon a different footing than written or published slander, the law ascribing them to the personal malice of the agent rather than to the act performed in the course of his employment and in the aid of the interest of his employers, and exonerating the company, unless it authorized, ratified or approved the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment.

"5. The court instructs the jury that, although you may find from the evidence in the case that the language set out in the complaint was used by the agent or employee of the company, that such language, in its common acceptation, amounts to charging the plaintiff with a breach of the criminal law, or other dishonest practice, yet, if you further find from the evidence that such language was spoken by the agent of the company to another in the course of his duty, and that it was necessary

or proper in the course of the investigation for such communication to have been made, in the course of duty, and not with a malicious intent to injure the plaintiff, then the court tells you as a matter of law that this would be a privileged communication, for which the agent nor the company would be liable, and your verdict would be for the defendant."

Appellant contends that the trial court committed an error in admitting evidence to prove that he was discharged for incivility. But the evidence was competent. He alleged in his complaint that, immediately after the slanderous charge was made by the detectives against him, the defendant discharged him from its employment. In response to which allegation the defendant denied that he was discharged on account of the loss of the fourteen bales of cotton, but said that his discharge was due solely to his insubordination to those in authority over him. He testified that he was discharged immediately after the alleged slanderous charges were made. The inference to be drawn from his testimony was that his discharge was based upon the charges. The testimony as to incivility was admissible to show the cause of his discharge, and that the defendant did not thereby ratify the charges of its agent.

Appellant complains of the refusal of the court to grant his request as to his reputation in the community in which he lived of being an upright, honest man. It was properly refused. His reputation was not attacked and not involved in the issues in the case. Townshend on Slander and Libel, § 387.

Appellant says that "the first instruction given at the defendant's request was erroneous in this, that the jury were thereby told, in order for plaintiff to recover, 'it must further appear that the slander was uttered with a malicious intent on the part of the defendant company to injure the plaintiff in his business or social standing.'" In this connection the court first instructed the jury at the request of the plaintiff as follows: "While it is true that malicious intent is not to be presumed, but must be proved, this proof need not be in the form of direct testimony, but may be shown by circumstantial evidence. It is for the jury to say, after considering the language of defendant's agent complained of, together with all the circumstances attending its utterance, whether such slanderous words were or were not spoken with malice, either express or

legal, as hereinbefore defined;" which was as follows: "Malice, as used in this instruction, does not mean that the agent using the alleged slanderous words must have any personal spite, ill will or hatred of the plaintiff, but means if the defamatory words complained of were wrongfully used, and were used intentionlly, without just cause or excuse, or in wanton and reckless disregard of the rights and feelings of the plaintiff, then, in the legal sense, they were maliciously used." The words objected to in defendant's instruction are fully explained in instructions given at plaintiff's request, and are in harmony with the same. The words objected to do not say how the malicious intent to injure must appear—that is shown by the instructions given at plaintiff's request. In that respect the jury were instructed as plaintiff requested, and he has no cause to complain.

The objection to instruction numbered 2, given at the request of the defendant, are the words: "the presumption is that no language was used or intended to be used to injure plaintiff's reputation in his business or social standing, and this presumption must be overcome by proof." To the same effect the court instructed the jury at the request of plaintiff by saying: "while it is true that malicious intent is not to be presumed, but must be proved." The plaintiff has no right to complain of the defendant or court repeating his own request for instructions.

The appellant objected to the instruction numbered 4, and given at the instance of the defendant, because a corporation could not, according to it, be held liable for a slander uttered by its agent "unless it authorized, approved or ratified the act of the agent in uttering the particular slander complained of, or the agent was acting within the scope of his employment." Is this a correct declaration of law? Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as can not be anticipated, and for that reason can not be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, "rather than to the act performed in the course of his employment and in aid of the interest of his employer," and the cor-

poration must be exonerated "unless it authorized, approved or ratified the act of the agent in uttering the particular slander." Mere proof of agency will not be sufficient to prove such authority or ratification. *Singer Sewing Machine Co.* v. *Taylor,* 150 Ala. 574; *Redditt* v. *Singer Mfg. Co.,* 124 N. C. 100; *Sawyer* v. *Railroad,* 142 N. C. 1; *Behre* v. *National Cash Register Co.,* 100 Ga. 213; *Kane* v. *Boston Mutual Life Ins. Co.,* 200 Mass. 265; *State* v. *Morris & Essex Railroad Co.,* 23 N. J. Law 360; *Dodge* v. *Bradstreet Co.,* 59 How. Pr. 104; 18 Am. & Eng. Enc. Law (2 ed.), 1059, 1063; 10 Cyc. 1216.

Appellant contends that instruction numbered 5, and given at the request of the defendant, should not have been given, because there was no evidence to support it. We think the testimony of Parker was sufficient for that purpose.

Finding no reversible error in the proceedings of the court, its judgment is affirmed.

FITZPATRICK v. BANK OF FORREST CITY.

Opinion delivered June 6, 1910.

PLEDGES—SALE—NOTICE.—In the absence of any stipulation, a pledge can not be sold by the pledgee except at public sale after due notice.

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

R. W. Nicholls, for appellant.

The sale by the pledgee without notice to the pledgeor of the time and place was illegal and a conversion. 47 Fed. 236; 93 Ala. 599; 41 Cal. 519; 128 Ill. 533; 32 Ark. 742; 22 Ia. 307; Story on Bailments, § 310; 52 Pa. St. 498. The pledgeor was entitled to the excess of what the property brought over and above the indebtedness. Edw. on Bail., 236; 32 Ark. 748. The pledge could not be applied to the payment of any other debt. 90 Cal. 10; 69 Ill. 32. A bill in chancery may be maintained where there is no remedy at law. 80 Ala. 78; 93 U. S. 321; Colebroke on Coll. Sec., 162.

S. H. Mann, for appellee.

The certificate being assignable, the title passed to the assignee. Kirby's Dig., § 7093. The appeal of this case did not have the effect of reviving the injunction, and it is not shown that a reverse would serve any purpose. High on Inj., § 1431.

BATTLE, J. On the 13th day of June, 1904, the east half of section 29 in township 6 north, and in range 2 east, in St. Francis County, in this State, was sold for taxes and purchased by W. J. Lanier, who received a certificate of purchase for the same. On the 12th day of June, 1906, in consideration of the sum of one hundred dollars paid to him by L. A. Fitzpatrick, Lanier assigned the certificate to Fitzpatrick, who borrowed the one hundred dollars from the Bank of Forrest City, and gave it a check for that amount on the Fitzpatrick Drug Company, of Helena, Arkansas, with the certificate of purchase attached as security. The check was protested for nonpayment. Fitzpatrick failing to pay it, the bank or its cashier, Eugene Williams, sold the certificate, on the 28th of June, 1906, at private sale, without notice, to the Jacks Real Estate Company for about $130.

Apprehensive that Eugene Williams, cashier of the bank, might assign it to an innocent purchaser, and that T. C. Merwin, county clerk of St. Francis County, might convey the land to the assignee, and before he learned that the certificate was sold to Jacks Real Estate Company, Fitzpatrick brought suit against the bank, Williams and Merwin in the St. Francis Chancery Court, and asked that a temporary restraining order, restraining Williams from assigning the certificate, and Merwin, county clerk, from executing a deed to the land therein described, be issued, and the chancellor granted it.

Afterwards on the 28th day of January, 1908, Jacks Real Estate Company was made a defendant, and the prayer of the complaint was amended, asking that the Jacks Real Estate Company be required to deliver the certificate of purchase to plaintiff upon the payment of the amount of money that was due thereon to the Bank of Forrest City or to Eugene Williams when it or he transferred and sold it, together with the interest that has accrued thereon.

The Bank of Forrest City and Eugene Williams answered, and Jacks Real Estate Company answered on the 18th day of

June, 1908, and among other things said that "it is the owner of the land described in the complaint, and that the tax certificate described in the complaint was purchased by E. C. Hornor from the Bank of Forrest City and Eugene Williams for and on its behalf and for the purpose of protecting its title to the land; and it asked that its purchase of the certificate be treated as a redemption.

Upon hearing the court dismissed the complaint for want of equity, and the plaintiff appealed.

Section 7093 of Kirby's Digest in part provides: "The collector shall make out and deliver to the purchaser of any land, or town or city lot, or parts thereof, sold for delinquent taxes as aforesaid, a certificate of purchase. * * * Such certificate shall be assignable in law, and an assignment shall vest in the assignee, or his legal representative, all the right, title and estate of the original purchaser." Under this statute Fitzpatrick acquired a title to the certificate in question by the assignment. The Bank of Forrest City or Eugene Williams acquired no title to it, but only the right to hold it as security for the payment of a debt, and Fitzpatrick did not forfeit his title or interest in the same until it was foreclosed. In the absence of a stipulation of the parties to the contrary, that could not be done without a public sale after due notice. *Sharpe* v. *National Bank,* 87 Ala. 644; *Carson* v. *Iowa City Gas Light Co.,* 80 Iowa 638; *Strong* v. *National Mechanics' Banking Association,* 45 N. Y. 718; Jones on Pledges and Collateral Securities (2 ed.), § § 602, 603; 22 Am. & Eng. Enc. of Law, 890; 31 Cyc. 878.

The Jacks Real Estate Company acquired no right to the certificate, the transfer to it being without right and it having purchased with notice of the rights of Fitzpatrick to the same. The time for redeeming the lands described in the certificate having expired at the time it purchased, it acquired none by redemption.

The decree of the chancery court is therefore reversed, and the cause is remanded with directions to the court to compel the Jacks Real Estate Company to surrender to Fitzpatrick the possession of the certificate of purchase upon payment of the amount of money that was due thereon to the Bank of For-

rest City or to Eugene Williams when it or he transferred and sold the same, together with the interest that has accrued thereon, within a reasonable time to be specified by the court.

COOPER v. WHISSEN.

Opinion delivered June 6, 1910.

1. APPEAL AND ERROR—FINAL JUDGMENT.—A decree perpetually enjoining the defendant from erecting a building "according to the plans shown by the defendant and the testimony" is a final judgment, from which an appeal may be taken. (Page 548.)
2. NUISANCE PER SE—DEFINITION.—A nuisance *per se* is a nuisance in itself, and which can not be so conducted or maintained as to be lawfully carried on or permitted to exist. (Page 548.)
3. SAME—WAGON YARD.—A wagon yard is not a nuisance *per se*. (Page 548.)
4. SAME—INJUNCTIVE RELIEF.—A court will not ordinarily enjoin the erection of a structure that is not a nuisance *per se*, but will leave the plaintiff to assert his rights thereafter in an appropriate manner if the contemplated use of the structure results in a nuisance. (Page 548.)
5. SAME—WHEN INJUNCTIVE RELIEF GRANTED.—To call for injunctive relief against a structure that is not a nuisance *per se*, there must be a strong and mischievous case of pressing necessity or the right must have been previously established at law. (Page 549.)

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

STATEMENT BY THE COURT.

This suit was brought by appellees against appellant to enjoin him from erecting buildings for, and from maintaining, a wagon yard in what is alleged as a residence district of the city of Little Rock, Arkansas. After showing the location of their residences and the value thereof, appellees allege: "that Cooper leased for ten years lots 4, 5 and 6, block 148, Little Rock, being northeast corner of Rock and Fourth streets, for a flat roof wood structure for a wagon yard where farmers and peddlers shelter themselves and teams, with wagons usually loaded with vegetables, chickens and other farm produce; that many vegetables and eggs decay in transit, and chickens die and are left in the yard; that said yard will stable about 100 mules and horses; that two large rooms will be built for him-

self and patrons, who will eat and sleep there and cast their leavings in the yard; that droppings of animals and decayed matter will create a stench and draw flies and mosquitoes and cause disease, depriving them of the comforts of home, creating a nuisance and depreciating their property; that the frame had been erected, covering 150 feet on Fourth and 192 feet on Rock, with four rooms on Rock to be used by both white and colored to sleep in, with a number of small sleeping rooms and two large lobby rooms, with a chimney between for cooking on the north side of said lots; that said lots are without sewer connections, and said frame structure will contain large quantities of feedstuff, dangerous on account of fire; that said fractional lot 3 is within the fire limits, and no proper permit has been obtained to erect said building, and, same being of wood, does not comply with the ordinance. There was a prayer for injunction.

Cooper answered, denying the allegations of the complaint and alleging that said yard will be across a street sixty feet wide from Whissen and across another street sixty feet wide from Comer, and will be in a business part of the city, where the business houses are fast encroaching upon what few residences are left, which are largely boarding houses and flats; that he is erecting the most approved and up-to-date building for said yard, and, when completed, it will be run in a cleanly and first-class condition, and not be a nuisance to any one; that he has a permit from the city to erect same; that his building only covers 183 feet on Rock; that he obtained a permit to erect it on lots 4, 5 and 6, but by mistake commenced to erect it on fractional lot 3, which is within the fire limits; that he is removing his improvements therefrom, and will erect nothing thereon unless he gets a proper permit; that the rooms on Rock will be rented out for stores and not used for sleeping rooms; that he will erect rooms on said lot 3 if he gets a permit, but will not use them for the purposes alleged.

After hearing the evidence the court rendered the following finding and decree: "That the building proposed to be erected in the manner shown by the plans and exhibited by the defendant and the testimony in relation thereto will constitute a nuisance, and will render the property of the plaintiffs uninhabitable as residences. It is therefore considered, ordered, adjudged and

decreed that the defendant, Warren Cooper, his agents, employees, and all persons acting under him, be, and are hereby, perpetually enjoined from erecting on block one hundred and forty-eight, in the city of Little Rock, Arkansas, a building according to the plans shown by the defendant and the testimony herein. To which finding and decree of the court the defendant at the time excepted, and asked that his exceptions be noted of record, which was done, and the defendant prayed an appeal to the Supreme Court, which is granted."

Marshall & Coffman, for appellant.

Where a building to be erected is not a nuisance *per se,* the erection thereof should not be enjoined; but the owner should be permitted to proceed at his peril. 20 Ark. 671; 20 Ga. 350; 22 N. J. Eq. 28; 44 Am. R. 10; 66 Am. Dec. 790; 54 *Id.* 45; 28 Am. St. R. 396; 54 L. R. A. 545; 20 N. J. Eq. 415; 11 Atl. 660. When the injury apprehended is doubtful or contingent, an injunction will be denied. 76 Am. Dec. 332; 68 *Id.* 750; 66 *Id.* 790; 51 Am. R. 463; 44 *Id.* 10; 32 *Id.* 138; 28 *Id.* 378; 45 *Id.* 505; 21 L. R. A. 569; 54 *Id.* 545. A livery stable is not a nuisance *per se.* 85 Ark. 544; 87 Ark. 213; Joyce on Inj., § § 200-202; 52 Ark. 23. Defendants have a remedy at law. 69 Atl. 697; Campbell & Stevenson's Dig. Ord. City of Little Rock, § 1441.

James A. Comer and *John McClure,* for appellee.

A property owner should so use his property as not to injure others. 3 Grant 390. A lawful business may become unlawful if located in the vicinity of private residences. 4 Eng. Law & Eq., 15; 11 Hare 266; 4 C. B. (N. S.) 336; 2 Ch. Div. 697; 42 *Id.* 637; 56 Wis. 512; 20 N. J. Eq. 207; 5 N. Y. S. 885; 10 Ala. 64; 9 Ga. 425; 108 U. S. 334; 59 Mo. 322; 58 Ind. 185. Citizens are not required to move away from a nuisance. 3 Barb. 153; 4 Robt. 469; 51 N. Y. 300; 3 Sand. 283. The locality is a residence section. 143 Ind. 35; 148 Ind. 35; 157 Ind. 593. Residents in the old part of town will be protected. 19 N. J. Eq. 298; 55 Conn. 31. The fact that there are other nuisances in the same vicinity is no excuse for refusing to enjoin appellants. 31 Mich. 293; 23 N. J. Eq. 205. Testimony as to how the wagon yard would be run was incompetent. 50 Mo. App. 63; 68 Ind. 397; 73 Ind. 295; 123 S. W. 376.

WOOD, J., (after stating the facts). 1. The decree was final. It perpetually enjoined appellant from erecting the "building according to the plans shown by the defendant and the testimony." That was the very building the erection of which appellees sought to enjoin. They were not seeking to enjoin the erection of any other kind of a structure than that specifically described in the complaint and shown by the testimony. They did describe the kind of structure that appellant was erecting and proposing to erect, and asked that he be enjoined from erecting same and from maintaining a nuisance therein such as was described in their complaint. Appellant was not proposing or proceeding to erect any other kind of a structure, or to maintain a nuisance in any other than that set forth in the pleadings and shown by the evidence, and it was the erection of this building that was enjoined. The building and inclosure in process of erection was to be used only for the purposes of a wagon yard, and the injunction necessarily prevented the maintenance of a wagon yard in that particular structure. The appellees obtained the relief they sought by the decree, and it was a final judgment on the issues presented, and therefore one from which an appeal could be prosecuted.

2. "A nuisance *per se* is a nuisance in itself, and which therefore can not be so conducted or maintained as to be lawfully carried on or permitted to exist." Joyce on Nuisances, § 12.

The structure for a wagon yard business is not any more a nuisance *per se* than is a building for a livery stable, a steam gin, a planing mill, a railway depot and the tracks connected therewith. See *Durfey* v. *Thalheimer,* 85 Ark. 544; *Terrell* v. *Wright,* 87 Ark. 213; *Swaim* v. *Morris,* 93 Ark. 362; *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 92 Ark. 546.

This court has recently held that it will not enjoin the erection of a structure that is not a nuisance *per se.* *Swaim* v. *Morris,* 93 Ark. 362. It has also held that it will not demolish a structure by mandatory injunction, nor prevent the prosecution of a business that is not *per se* or necessarily a nuisance. *Durfey* v. *Thalheimer,* 85 Ark. 544.

In the former case the facts stated in the complaint and admitted by the demurrer at least tended as strongly to show that the erection of the gin and the maintenance of the ginning

business connected therewith would be a nuisance to the residents adjacent as does the evidence here, on behalf of appellees, tend to show that a structure for a wagon yard would be a nuisance to them. In that case we held that the erection of a gin would not be a nuisance *per se,* and quoted from note to *West* v. *Ponca City Milling Co.,* 14 Okla. 646; 79 Pac. 100; 2 Am. & Eng. Ann. Cas. 249, 254, as follows: "Where an injunction is sought merely on the ground that a lawful erection will be put to a use that will constitute a nuisance, the court will ordinarily refuse to restrain the construction or completion of the erection, leaving the complainant free, however, to assert his rights thereafter in an appropriate manner if the contemplated use results in a nuisance."

This court is in line with those cases, and they are numerous, which hold that ordinarily an injunction will not be granted unless the act or thing threatened is a nuisance *per se.* "When it may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful or contingent," equity will not interpose in advance to prevent by injunction. *St. James's Church* v. *Arrington,* 76 Am. Dec. 332, and other cases cited in appellant's brief.

"It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law." 14 Enc. Pl. & Pr. 1120; 29 Cyc. 1221. We see nothing in the record to make this case an exception to the rule announced in *Swaim* v. *Morris, supra.* The judgment is reversed, and the complaint is dismissed for want of equity.

THOMPSON *v.* KING.

Opinion delivered June 6, 1910.

WILLS—CONTEST—PROOF OF HANDWRITING OF ATTESTING WITNESS.—Under Kirby's Digest, § 8034, providing that where the residence of an attesting witness is unknown the handwriting of such witness may be proved, *held,* that such proof is admissible where the testimony shows that an attesting witness is a wanderer, having no fixed place of residence, and that he can not be located.

Appeal from Lee Circuit Court; *Hance N. Hutton,* Judge; affirmed.

J. M. Vineyard and *H. F. Roleson,* for appellants.

The case should be reversed and dismissed. 57 Ark. 82; *Board of Directors* v. *Barton,* 92 Ark. 406.

S. H. Mann, for appellees.

The findings of the trial judge will not be disturbed, in the absence of gross abuse. 90 Ark. 514; 58 Ark. 371.

HART, J. This is a proceeding to contest the will of Warren Thompson, deceased, late of Lee County, Arkansas. The appellees were the proponents of the will, and the appellants appeared, and contested its probate. From a judgment of Lee Probate Court admitting the will to probate the contestants appealed to the circuit court, and from a judgment rendered against them there they have appealed to this court.

The ground of the contest was the mental incapacity of the testator to make a will at the time it was executed. That issue was submitted to jury upon the evidence adduced at the trial under proper instructions of the court, and, the verdict of the jury being against them, it is not now claimed by the contestants that the proceedings in that respect present any ground for reversal. Hence there is no need to abstract that part of the case.

They seek to reverse the judgment on the sole ground that the court erred in permitting evidence to be introduced of the handwriting of R. R. Clark, one of the attesting witnesses of the will.

R. A. Campbell and R. R. Clark were the subscribing witnesses to the will. The first-named witness was present, and testified when the will was offered for probate. Clark was not present, and proof was made that he had left Lee County, where he resided when the will was executed, because he feared arrest on account of some trouble he had got into. The proof showed that he first went to Woodruff County, Arkansas, and later to some point in Mississippi. The proponents of the will introduced testimony tending to show that they failed to locate him in Mississippi, although he was reported to be at Tupelo in that State. The court, upon that showing, admitted proof of the handwriting of the testator and of the absent witness.

There was no error in this. Under the head of proving wills and contesting their probate, we have a statute providing

that where an attesting witness resides out of the State, or through infirmity is unable to attend the court before which the will is offered for probate, such court may cause his deposition to be taken in the manner directed therein. Kirby's Digest, § 8033. The two succeeding sections of the statutes are as follows:

"Sec. 8034. When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane or absent, and of such other circumstances as would be sufficient to prove such will on a trial at common law.

"Sec. 8035. If it shall appear to the satisfaction of the court or clerk that all the subscribing witnesses to the will are dead, insane or absent, the court or clerk shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will and of such other facts and circumstances as would be sufficient to prove such will in a trial at law."

We think these sections of our statute, when read and construed together, invest the court with a large discretion in the matter. This is necessary in order to facilitate the proving of wills to the end that the executor may take charge of the estate and preserve it for those to whom it is given under the terms of the will. In this case the absent witness had left the county of his residence on account of having become involved in some trouble. An effort was made to locate him in this State at a place to which proponents had been informed he had removed. Upon their arrival there they were informed that he had gone to Mississippi, and an effort was made to locate him at his supposed residence in that State. The effort was unsuccessful.

There was some testimony to the effect that Clark was heard of at Senatobia, Mississippi, a few weeks before the will was offered for probate, but this testimony was hearsay, and, when taken in connection with the other testimony, tends to show that Clark was a wanderer, and that he had no fixed place of abode.

We are of the opinion that no abuse of discretion is manifest because the court treated him as an attesting witness whose residence was unknown.

The judgment is affirmed.

NEECE v. JOSEPH.

Opinion delivered June 6, 1910.

1. CONTRACTS—AGREEMENT TO PROCURE EVIDENCE.—A contract is void as against public policy by which one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. (Page 553.)
2. SAME—ILLEGALITY—ENFORCEMENT.—Where the ground of a promise on the one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party. (Page 555.)

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin,* Judge; affirmed.

Smith & Blackford and *W. E. Beloate,* for appellant.

A written contract will be construed against the party who prepares it. 90 Ark. 88; *Id.* 256. The contract was valid. 15 Am. & Eng. Enc. Law. 979. All facts communicated by a patient to her physician are not privileged. 31 Ark. 693.

J. N. Beakley and *McCaleb & Reeder,* for appellee.

The contract was unlawful and can not be enforced. 48 Cal. 379; 82 Hun 15. It was contrary to public policy. 144 Ill. 422; 36 Am. St. R. 459; 52 Pac. 909; 1 D. Chip. 137; 10 Ala. 206; 14 Mont. 467; 43 Am. St. R. 647; 66 Ark. 535; 84 N. Y. 543; 7 Bing. 369; 67 Ill. 256.

HART, J. T. C. Neece brought this suit in the circuit court against A. W. Shirey to recover an amount alleged to be due him under the following contract:

"Minturn, Ark., Feb. 27, 1906.

"This is an agreement an a contract made bye Dr. T. C. Neece and John Bennett, bye the consent and bye the request of A. W. Shirey, of the town of Minturn, wherein the sed T. C. Neece do agree to go with John Bennett and to find and furnish all the proofs that can be established bye the docttors wherein that thed sed Bell Shirey the wyfe of the sed A. W. Shirey did give birth to one child an oup on sed proofs furnished by the sed T. C. Neece, that Bell Shirey did live the State of Arkansas and give birth to sed child then an thare his fees and truble for such would be five hundred dollars wherein the sed John Bennett as A. W. Shirey agent, by consent of A. W. Shirey do agree to pay the sed T. C. Neece the five 500 hundred dollars as fees time a truble and expenses.

"Written and sind by John Bennett agt an emploid by A. W. Shirey."

The plaintiff testified in his own behalf, and also introduced as a witness John Bennett, who signed the instrument copied above. No evidence was offered by the defendant. The testimony of these witnesses is very voluminous, but its effect is to show that plaintiff knew that there was a divorce suit pending between defendant and his wife when the contract was made; that one of the contentions of defendant in that suit was that his wife had given birth to a child at some place unknown to him, and that he was not the father of it; that the testimony to be procured under the agreement was for use in that suit, and was so used.

The circuit court held that the agreement was contrary to public policy and void; and directed the jury to return a verdict in favor of the defendant, which was accordingly done.

From the judgment rendered the plaintiff has prosecuted an appeal to this court.

The defendant Shirey died testate during the pendency of the appeal, and the case has been duly revived in the name of the executor of his will.

The circuit court was right in holding that the contract was against public policy and void. The vice of the contract does not consist in the fact that the defendant employed the plaintiff to obtain evidence in his divorce suit; but the contract is, on its face, illegal because of the improper provision that the evidence to be procured should be of a given state of facts, of a tendency to enable defendant to win his suit. It will be observed that the contract did not provide for the payment of his services in procuring for use such testimony as actually existed, but it contemplated the procurement of evidence tending to establish a given state of facts, regardless of any other consideration. With reference to such contracts the Supreme Court of Montana held:

"A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to

promote unlawful acts." *Quirk* v. *Muller,* 14 Mont. 467, 43 Am. St. Rep. 647.

In the opinion of the court in that case is contained a quotation from the Supreme Court of Illinois in the case of *Gillett* v. *Board of Supervisors,* 67 Ill. 256, which is so clear a statement of the reason for the rule that we repeat it here. The facts were that the county supervisors desired to overthrow the result of an election in regard to whether the county should subscribe for certain railroad bonds. They made a contract with a person to procure evidence to show that certain votes cast at such election were illegal, and the contract had a scale of prices, varying according to the number of votes that were proved to be illegal. The court said:

"The evidence disproved the actual use by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other 'base appliances' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and to pervert the court of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings, where the attainment of right and justice is the end. Should such contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court for pay, contingent upon success in their suits. In *Marshall* v. *Railroad Co.,* 16 How. 314, it was held that a contract for a contingent compensation for obtaining leg-

islation was void by the policy of the law. With much greater reason, we think, should the contract under consideration be held vicious. We can not sanction them. On account of their corrupting tendency, we must hold them to be void, as inconsistent with public policy." See, also, *Patterson* v. *Donner,* 48 Cal. 379; *Lyon* v. *Hussey,* 82 Hun (N. Y.) 15.

We agree with the reasoning of the court in the above cited cases that contracts like the one under consideration are void as against public policy and as tending to impede the administration of justice.

"Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party." *Mendel* v. *Davies,* 46 Ark. 420. See also *Tatum* v. *Kelly,* 25 Ark. 209; *Ruddell* v. *Landers,* 25 Ark. 238; *Hencke* v. *Standiford,* 66 Ark. 535.

The judgment will be affirmed.

DAVIS v. STATE.

Opinion delivered June 6, 1910.

1. SEDUCTION—INDICTMENT.—An indictment for seduction need not allege that the defendant was a single and unmarried man. (Page 556.)
2. CONTINUANCE—ABSENT WITNESSES—APPLICATION.—An application for continuance on account of the absence of certain witnesses should show where these witnesses reside and that it is probable that their testimony could be obtained in the event that the case is continued. (Page 558.)
3. SAME—WHAT APPLICATION SHOULD SHOW.—An application for continuance on account of the absence of witnesses should show that the desired facts could not be proved by other witnesses. (Page 558.)
4. SAME—WHAT APPLICATION SHOULD SHOW.—An application for continuance on account of the absence of witnesses should specifically set forth the facts expected to be proved by the desired witness, and not in general terms or by indefinite allegations. (Page 558.)
5. MARRIAGE—HOW PROVED.—In a prosecution for seduction it is competent to prove that defendant was already married by showing that he had introduced a woman to his friends and acquaintances as his wife and conducted himself towards her as her husband. (Page 559.)

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

Robert A. Rowe, for appellant.

The indictment is not sufficiently certain. 1 Ark. 171; 5 Ark. 444; 26 Ark. 323; 27 Ark. 493; 29 Ark. 68; *Id.* 165; *Id.* 225; 30 Ark. 496; 33 Ark. 561; 34 Ark. 158; *Id.* 263; *Id.* 275; *Id.* 433; 36 Ark. 242; *Id.* 284; 38 Ark. 519; 43 Ark. 93; 57 Ark. 560; 42 Ark. 73; 47 Ark. 551; 48 Ark. 66; 48 Ark. 94; 55 Ark. 360; 55 Ark. 389; *Id.* 353; 49 Ark. 499; 18 Tex. App. 15; 43 Tex. 414; 7 Tex. App. 623; 65 Cal. 501; 2 Thompson on Trials, 2313.

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

Motions for continuances are addressed to the discretion of the trial judge. 41 Ark. 62; 26 Ark. 323; 54 Ark. 243; 76 Ark. 290; 70 Ark. 521. A case will not be reversed for defects in the indictment which do not tend to prejudice the rights of the defendant. Kirby's Dig., § § 2228, 2241, 2242 and 2243; 84 Ark. 477. A married man may be guilty of seduction. 48 Ga. 192; 34 Kan. 63; 27 Minn. 52. The indictment is sufficient. 47 Conn. 319; 13 Ind. 565; 41 Minn. 41; 33 Miss. 387; 16 So. 264; 98 Ky. 708; 98 Mo. 368.

FRAUENTHAL, J. The defendant, Van Davis, was indicted by the grand jury of Sebastian County for the crime of seduction. In the body of the indictment it was alleged that the defendant "then and there being a man, unlawfully and feloniously did obtain carnal knowledge of one Anna Ragan, a single and unmarried female, by virtue of a false express promise of marriage to her previously made by said defendant, against the peace and dignity of the State of Arkansas." The defendant interposed a demurrer to the indictment, which was overruled. He was then tried upon the indictment and convicted of the crime therein charged against him; and from the judgment of conviction he has appealed to this court.

It is contended that the indictment is fatally defective because it fails to allege that the defendant was an unmarried man. It is urged that if the defendant was a married man at the time the alleged promise of marriage was made he could not legally carry out such promise, and therefore could not be guilty of seduction; and that on this account it was necessary to allege in the indictment that he was a single and unmarried

man. The crime of seduction is created by statute. In this State the statute provides that "any person who shall be convicted of obtaining carnal knowledge of a female by virtue of any feigned or pretended marriage, or of any false or feigned express promise of marriage" shall be guilty of this crime. Kirby's Digest, § 2043. The object and purpose of the statute is to protect the virtue and chastity of the female; and it applies to "any person" who is a male and violates its provisions. It is not limited by reason of the state or condition of the man—whether he be single or married. There is nothing in the statute that requires that the promise of marriage shall be legally valid and binding. The purpose of the statute was to prevent the obtaining of the consent of the female to sexual intercourse by means of the promise of marriage and to protect her from the arts of the man who had gained her confidence and to whose solicitation she might yield because she believed that his promise of marriage was made in good faith and would be observed. The promise of marriage would be as false and feigned if the seducer knew that it was not in his power to perform it as it would be if he was capable of observing it. The statute is leveled at the seducer, whether he be a married man or a single man; and a married man may be guilty of the offense of seduction, if the woman was ignorant of the fact of his marriage. It was not necessary, therefore, that the indictment should allege that the defendant was a single and unmarried man. Bishop on Statutory Crimes, § 638; *Norton* v. *State,* 16 So. 264; *State* v. *Primm,* 98 Mo. 368; *State* v. *Bryan,* 34 Kan. 63; *Davis* v. *Com.,* 98 Ky. 708; *People* v. *Kehoe,* 123 Cal. 224; *People* v. *Alger,* 1 Parker, C. C. 333; *Kenyon* v. *People,* 26 N. Y. 203.

It is urged by counsel for defendant that the evidence on the part of the State shows that the defendant was willing to carry out his promise of marriage, and has not refused to do so; and that therefore there is not sufficient evidence adduced in the case to support the verdict. But we do not think that this contention is correct. In September, 1909, the defendant came to the home of the mother of the prosecuting witness and claimed to have known the family in Georgia, in which State he said that he had lived. He introduced himself as Chester Davis, and claimed to be a second cousin of the prosecutrix through relation with her father. He soon made love to her,

and asked the consent of her mother to marry her, which was given. Shortly thereafter he obtained carnal knowledge of her by promising marriage on the following day. On the following day he started to the county seat with the prosecutrix in order to secure the marriage license; but, after proceeding only a portion of the way, he told her that he would not marry her; and then for the first time claimed that he could not marry her because they were cousins. He then insisted that she tell her mother and acquaintances that they had married and promised that he would later go with her to Memphis and there marry her. Overcome by his entreaties, his threats and promises, she consented. But the defendant never did take further steps to carry out his promise of marriage; and later it developed that his name was not Chester Davis, which he had assumed; but that he was Van Davis and a married man. We think that the evidence was sufficient to warrant the finding of the jury that the promise of marriage made by the defendant was feigned, and that he did not intend to perform it; and upon the whole case we think there was sufficient evidence to sustain the verdict of the jury. *Carrens* v. *State,* 77 Ark. 16; *Lasater* v. *State,* 77 Ark. 468; *Rucker* v. *State,* 77 Ark. 23.

It is urged that the court erred in overruling the defendant's motion for a continuance. It appears that the defendant announced ready for trial, and entered his plea of not guilty, and thereupon a jury was impanelled to try the case. After a portion of the testimony had been taken the defendant filed a motion for continuance in order to obtain two witnesses. He stated in the motion that the two witnesses had resided in the district, but, in effect, stated that they were at that time without the jurisdiction of the court, and that he did not know their then residence. He stated further that these witnesses would testify that the prosecuting witness "had had sexual intercourse with men before she became acquainted with the defendant in this case." The application for continuance should have shown where these witnesses resided, and that it was probable that their testimony could be obtained in event the case was continued. It was also defective in not showing that the desired facts could not be proved by other witnesses. *Jackson* v. *State,* 54 Ark. 243. The motion did not state that these two witnesses would testify that either of them had been criminally

intimate with the prosecuting witness, and did not name any man who had been thus intimate with her. An application for continuance should specifically set forth the facts expected to be proved by the desired witness, and not in general terms or by indefinite allegations the effect of such testimony. The allegations in the motion as to what the defendant expected to prove by these two witnesses were vague, general and uncertain, and were in the nature of conclusions rather than of specific facts. On this account therefore we do not think that the lower court abused its discretion in refusing to continue the case. *Puckett* v. *State*, 71 Ark. 62; *Taylor* v. *State*, 72 Ark. 613; *Rucker* v. *State*, 77 Ark. 23; *Russell* v. *State* (Tex.), 26 S. W. 990; 9 Cyc. 201.

Counsel for defendant also claim that the lower court committed error in allowing the introduction of certain testimony relative to the marriage of the defendant. But we do not think this contention is well founded. At the time the testimony was introduced the defendant did not interpose objection thereto, nor did he make any exception to any ruling of the court upon the introduction of this testimony. And we do not think that the testimony was incompetent. The witness stated that she lived at the time of the defendant's marriage in the same community with the defendant, and she named the person whom he married, and that in the community he introduced the lady as his wife to his friends and acquaintances and conducted himself towards her as her husband. This was in effect original evidence of facts from which the marriage could be inferred. We think this testimony was competent and admissible. 3 Wigmore on Ev., § 2083; 1 Greenleaf on Ev., § 140c.

It is also urged that the court erred in its refusal to give certain instructions requested by defendant. We have examined these instructions and all the instructions given in the case. The instructions requested by the defendant were fully covered by the instructions given by the court. We think the court fully and correctly instructed the jury upon every phase of the case.

Upon an examination of the whole case we do not find any error committed in the trial of the case which was prejudicial to the rights of the defendant.

The judgment is affirmed.

GRAHAM v. THRALL.

Opinion delivered June 6, 1910.

1. TRIAL—DIRECTING VERDICT.—In determining upon appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to give to the testimony in behalf of the party against whom the verdict is directed its strongest probative force in his favor. (Page 561.)
2. MASTER AND SERVANT—ASSUMED RISKS.—A servant assumes all obvious risks of the work in which he is employed, including the risk of injury from the manner in which he sees that the work is being done. (Page 562.)
3. SAME—NEGLIGENCE OF FELLOW SERVANT.—The common law rule that a master is not bound to indemnify one servant for injuries caused by the negligence of a fellow servant has not been changed in the case of a partnership employing servants. (Page 563.)
4. SAME—ASSUMED RISKS.—Where a servant knows the place where he is required to work and the methods which are employed by the master in accomplishing the work, and continues in the employment without complaint, he assumes the risks which may result therefrom. (Page 564.)
5. SAME—ORDINARY RISKS.—Where the risks in the work in which a servant is engaged are constantly changing in regard to the increase or diminuation of his safety, such risks are regarded as being the ordinary dangers of the employment, and are assumed by him. (Page 565.)

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

W. P. Feazel and *McMillan & McMillan,* for appellant.

A master is liable for the negligence of a vice principal concurring with that of a fellow servant. 88 Ark. 37; 67 Ark. 1. Appellant did not assume the risk of the danger. 77 Ark. 374; 90 Ark. 228; *Id.* 567; 89 Ark. 427; 88 Ark. 548; 87 Ark. 321; *Id.* 396; 79 Ark. 56; 86 Ark. 514. Directing a verdict for defendant was error. 88 Ark. 28; 73 Ark. 560; 71 Ark. 447; 76 Ark. 522; 89 Ark. 534; 89 Ark. 222; *Id.* 372.

T. D. Wynne, for appellee.

There was no controverted fact to be passed upon by the jury. 41 Ark. 382; Wood on Master and Servant, § § 326-8 and 335; 57 Ark. 461; Hughes on Inst. 120; 127 Wis. 550; 7 Am. & Eng. Ann. Cas. 457; 58 Ark. 217.

FRAUENTHAL, J. This was an action instituted by G. N. Graham, the plaintiff below, to recover damages for a personal

injury which he alleged he sustained while in the employment of the defendants. The defendants, F. E. Thrall and Stephen Shea, were the members of a partnership, which was doing business under the firm name of Thrall & Shea. They were engaged in the construction and equipment of a large sawmill plant, and had employed a number of laborers in doing this work, amongst whom was the plaintiff. One of these laborers permitted a large chain to fall from a considerable height upon plaintiff's hand, injuring his fingers to such an extent that one of them had to be amputated.

Upon the trial of the case, the lower court, after the introduction of all the testimony, directed the jury to return a verdict in favor of the defendants, which was done; and from this action of the court the plaintiff has appealed. In testing the trial court's action in thus directing a verdict for the defendants we will upon this appeal consider the testimony in its most favorable aspect to the plaintiff. For, in determining, upon appeal to this court, whether or not the trial court was correct in directing a verdict in favor of either party, the rule is to give the testimony in behalf of the party against whom the verdict is directed its strongest probative force in his favor. *Neal* v. *St. Louis, I. M. & S. Ry. Co.*, 71 Ark. 447; *Rodgers* v. *C. O. & G. Ry. Co.*, 76 Ark. 522; *Oliver* v. *Fort Smith Light & Traction Co.*, 89 Ark. 222; *Jones* v. *Lewis*, 89 Ark. 372.

Considering the testimony adduced on the trial in this manner, the case, in substance, is this: The plaintiff had been in the employment of the defendants in the construction of the mill plant some time prior to the day of the injury. He was employed as a laborer to carry piping and timbers and to assist in raising the same to the place where they were desired in the building. On the day of the injury he was working with a crew of men who were engaged in raising and adjusting some piping which was necessary for the equipment of the boilers to be used in the operation of the plant. A pile of this piping was placed a short distance from the building, and the men of this crew carried the piping to the boiler, whence it was raised to the place desired. A piping was carried to the boilers by a number of the laborers by means of hand sticks or spikes placed thereunder. It was then raised by tackle blocks by means of a chain which was let down and attached to the piping. It

appears that above the boilers were iron girders about four inches in width extending from one side of the building to the other, and sometimes the chain was carried upon these girders from one point to another as it was needed in raising the piping. On this occasion the plaintiff and other members of his crew had carried a piping to the boiler, and the plaintiff had left his hand stick lying thereunder. These men then went to a place on top of the boilers, but were soon directed to go down and get another piping. At this time one of the members of the crew named Sullivan was moving the chain along the girder above the boilers from one end to the other in order to use the chain in raising the piping which had been placed at the foot of the boilers. In going after the second piping the other men went down from the top of the boilers by means of a stairway, but the plaintiff went down between the boilers by means of hand holds and proceeded, as he claimed, to the first piping, which had been laid at the foot of the boilers in order to get his hand stick. This first piping was immediately under the girder upon which Sullivan was moving the chain. The plaintiff testified that Sullivan moved the chain along the girder with his feet while he held to the rafters above him with his hands; and that he saw him thus begin to move the chain as he started down after the hand stick and saw him afterwards move it along the girder. The plaintiff went immediately under this girder to get his hand stick, and while he was in the act of getting it the chain fell from the girder on plaintiff's hand, injuring it as above stated.

In their answer the defendants pleaded, and now contend, that under the uncontroverted testimony in the case the injury which the plaintiff received was due to the risk which was ordinarily incident to the employment in which he was engaged, and which he therefore assumed; and also that plaintiff was himself guilty of negligence which contributed to the cause of the injury. It is well settled that a servant does, in accepting and continuing in the employment, assume all the ordinary and usual hazards incident thereto and also all the risks which he knows to exist. By his contract of service he impliedly agrees to bear the risk of all dangers that are ordinarily incident to the employment, and consequently he can not recover for injuries which result to him therefrom. He thus assumes all

obvious risks of the work in which he is employed, including the risk of injury from the manner in which he knowingly sees and observes that the business is being operated and the work done. *Southwestern Tel. Co.* v. *Woughter,* 56 Ark. 206; *St. Louis, I. M. & S. Ry. Co.* v. *Tuohey,* 67 Ark. 209; *Archer-Foster Construction Co.* v. *Vaughan,* 79 Ark. 20; *Choctaw, O. & G. Ry. Co.* v. *Thompson,* 82 Ark. 11; *Arkansas Mid. Ry. Co.* v. *Worden,* 90 Ark. 407; 1 Labatt on Master and Servant, § 259.

It has been usually held that one of the ordinary risks incident to the employment, and one assumed by the servant, is the negligence of a fellow servant. But, whether based upon that ground or from other reasons, the rule of law is well settled that a master is not bound to indemnify one servant for injuries caused by the negligence of a fellow servant. This rule has been modified in this State by the act of the Legislature of March 8, 1907 (Acts 1907, p. 162), when applied to a corporation employing servants; but this act does not affect this rule when the employers, as in the case at bar, are the individual members of a partnership. In the case of *Hough* v. *Texas & Pac. Rd. Co.,* 100 U. S. 213, the Supreme Court of the United States approves the following rule relative to the exemption from liability of a master for injuries caused by the negligence of a fellow servant, announced by Chief Justice Shaw in *Farwell* v. *Boston & W. Rd. Corp.,* 4 Met. 49: "The general rule, resulting from considerations as well of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment." *Railway Co.* v. *Triplett,* 54 Ark. 289; *St. Louis S. W. Ry. Co.* v. *Henson,* 61 Ark. 302; *Kennefick-Hammond Co.* v. *Rohr,* 77 Ark. 290; *McGrory* v. *Ultima Thule, Ark. & Miss. Ry. Co.,* 90 Ark. 210; 2 Labatt on Master and Servant, § 470.

The evidence in the case most favorable to the plaintiff shows that the injury which he sustained was caused by the negligence of Sullivan, who was a fellow servant. These two servants were employed by the same master to accomplish one

object. They were both engaged in the discharge of the duty of placing the piping at the points upon the boilers where desired, and were under the control of the same directing official. While thus engaged in the performance of duties which were directed to the attainment of the same end, Sullivan negligently let the chain fall upon the plaintiff's hand. The cause of the injury was therefore due to the negligence of a fellow servant.

But it is urged by counsel for plaintiff that, while the servant assumes the risks ordinarily incident to the employment, he does not assume the risk of danger caused by the master's negligence. It is contended that it is the duty of the master to furnish to the servant a safe place in which to work and safe appliances with which to work, and in failing to observe this duty the master is guilty of negligence. It is urged that the iron girder upon which Sullivan moved the chain was not a safe place upon which to do the work; that a platform or scaffold should have been furnished; and that the defendants, in failing to furnish this servant such a place on which to carry the chain, was guilty of negligence that caused the injury. But, even if the failure to furnish such a platform should be considered an act of negligence on the part of the defendants, still the uncontroverted evidence shows that the plaintiff knew the method in which the work was being done; that he was aware of the manner in which the chain was being moved along the girder and appreciated all risks that arose therefrom; and after such knowledge he still continued in the employment without objection. In *Emma Cotton Seed Oil Co.* v. *Hale*, 56 Ark. 232, this court said: "If, having sufficient intelligence and knowledge to enable him to see and appreciate the dangers to which he will be exposed, he knowingly assents to occupy a place set apart for him by the master, and he does so, he thereby assumes the risks incident thereto, and dispenses with the obligation of the master to furnish him with a better place. It is then no longer a question of whether such place could not with reasonable care and diligence be made safe. Having voluntarily accepted the place occupied by him, he can not hold the master liable for injuries received by him because the place was not safe." The servant assumes the risks of his employment which are open to ordinary observation; and where he knows the methods that are adopted, the place furnished in which to do the work

and the manner in which it is done, and continues in the employment without complaint, he assumes the risks which may result from such known methods and defects, if any. *Railway Company* v. *Kelton,* 55 Ark. 483; *Patterson Coal Co.* v. *Poe,* 81 Ark. 343; *St. Louis, I. M. & S. Ry. Co.* v. *Mangan,* 86 Ark. 507; *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424; *St. Louis, I. M. & S. Ry. Co.* v. *Goins,* 90 Ark. 387.

Furthermore, in the progress of the work in which the plaintiff and his co-laborers were engaged, the risks were constantly changing in regard to the increase or diminution of safety; the place of work was necessarily changed frequently in the progress of the work; the safety of such place of work was necessarily at times increased or diminished. The risks which thus arise as the work progresses are regarded as being the ordinary dangers of the employment; and the failure under such circumstances on the part of the master to furnish a safe place is one of the risks assumed by the servant in his acceptance of and continuing in the employment. If it could be said, under the testimony of the plaintiff, that the injury was due to any negligence on the part of the defendants or their representatives in charge of the work or in control of this crew of men, still the uncontroverted evidence shows that the plaintiff was fully aware of such negligence and appreciated the dangers arising therefrom.

Under the testimony adduced in this case most favorable to the cause of the plaintiff, we are of opinion that the injury which he received occurred by reason of a risk which under the law he assumed.

The lower court did not err in directing a verdict in favor of defendants.

The judgment is affirmed.

INDEPENDENCE COUNTY *v.* TOMLINSON.

Opinion delivered February 7, 1910.

1. APPEAL AND ERROR—NECESSITY FOR MOTION FOR NEW TRIAL.—A motion for a new trial is as necessary in trials by the court as in those by a jury and as well where the facts are agreed upon as where they

are proved by witnesses; but it is not necessary where the errors appear from the judgment record itself. (Page 566.)

2. SAME—WAIVER OF MOTION FOR NEW TRIAL.—Where a motion for new trial is necessary to a review of a case on appeal under the rules of the Supreme Court, it can not be waived by the parties. (Page 566.)

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

Oldfield & Cole, for appellant.

Sam M. Casey, for appellees.

HART, J. The only question involved in this appeal is the liability of Independence County for fees and costs in a case before a justice of the peace. Appellee Tomlinson was a justice of the peace. He and the other appellees presented to the county court a claim for fees and costs in a criminal case in his court. The claim was disallowed, and an appeal was taken to the circuit court, where the case was tried upon an agreed statement of facts. The circuit court found for the claimants, and the appellant, Independence County, has appealed to this court.

No motion for a new trial was made in the court below. "A motion for a new trial is as necessary in trials by the court as in those by a jury, and as well where the facts are agreed on as where they are proved by witnesses; but it is not necessary at all when the errors complained of do not grow out of the evidence or instructions, but appear from the record itself, without the intervention of a bill of exceptions." *Smith* v. *Hollis,* 46 Ark. 17, and cases cited. In the present case the errors complained of do not appear from the record itself. Hence there is nothing presented by the record for our review. This is conceded by counsel for both sides; and they attempt to overcome it by entering into a stipulation waiving a motion for a new trial and a bill of exceptions, and joining in a request for us to decide certain questions which they have agreed were involved in the trial of the cause in the court below.

We regret that we can not accede to their request. As early as 1853, in the case of *State Bank* v. *Conway,* 13 Ark., page 344, this court said: "But it is to be understood that if a party merely excepts to the finding of the court or jury setting out the testimony, without any motion for new trial, and with-

out any exception whereby he shall put his finger upon the alleged error of law as to any ruling or decision of the court below, there is no case presented for the consideration of this court. Such a practice, if allowed to extend itself, would break down the efficiency and dignity of the circuit courts, and they would become in effect so many commissioners to certify evidence up to this court in any given cause for revision." This rule has been steadily adhered to ever since.

The judgment will therefore be affirmed.

COOLEY v. LOVEWELL.

Opinion delivered July 11, 1910.

1. JUDGMENTS SUMMARY—CONSTRUCTION OF STATUTE.—Kirby's Digest, § 94, authorizing summary judgments on motion by sureties against their principals, by clients against their attorneys, by plaintiffs in execution against sheriffs, constables and other officers, and in all other cases specially authorized by statute, is penal in its character, and must be strictly construed. (Page 568.)
2. EQUITY—PENALTIES.—Courts of equity will not lend their aid in the enforcement of penalties. (Page 568.)

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

J. T. Coston, for appellant.

The demand was sufficient. 73 S. W. 234; 34 Atl. 265; 32 Atl. 229; 10 N. W. 562; 9 Ore. 418; 11 Ala. 535; 19 Mass. 544. The denial constituted a negative pregnant only. 32 N. W. 382; 48 N. E. 772; 17 Pac. 890; 31 Pac. 804; 77 Am. Dec. 511; 82 *Id.* 82; 74 Pac. 503; 54 Pac. 400; 32 Ark. 105; 46 Ark. 134; 45 Pac. 204; 13 Pac. 536; 19 Pac. 446; 120 S. W. 393. The law presumes that the person to whom a letter was properly addressed and mailed received it. 111 U. S. 194; 124 S. W. 513; 69 S. W. 53; 26 N. E. 738; 3 N. E. 486; 29 Am. R. 503; 43 N. Y. Sup. Ct. 344.

W. J. Lamb, for appellee.

The presumption that a letter was received by the addressee is no more than an inference of fact. 105 Mass. 392; 124 S. W. 513; 69 S. W. 53. It must be proved that the letter

was received. 58 Ark. 8; 11 Ark. 212; 56 S. E. 429; 114 N. W. 1098. The failure of a party to testify should raise no presumption against him. 119 S. W. 672; 34 Mo. App. 454.

McCULLOCH, C. J. Appellants, as assignees of a decree rendered by the chancery court of Mississippi County against one Bowen and the sureties on his retaining bond in replevin, filed in that court against John A. Lovewell, sheriff of the county, a motion for summary judgment against the latter and his bondsmen for the penalty prescribed by statute for failing to pay over money and for failing to execute and return process placed in his hands. A penalty is first sought to be recovered under section 4487, subdivision 7, Kirby's Digest, for failure to pay on demand moneys received by him; second, the penalty prescribed by subdivision 1 of the same section for failing to return an execution; and, third, the penalty prescribed by subdivision 3 of the same section for failing to make the money on said execution.

As to the first penalty sought to be recovered, this can be disposed of on the ground that the evidence is not sufficient to overturn the finding of the chancellor that there was no refusal to pay over the money. The money came into the hands of the sheriff by virtue of a sale of property made by him pursuant to an order of the chancery court, and he held it subject to the orders of the court. He tendered the amount with his answer to appellant's motion, subject to the order of the court, and the court directed him to pay it over to appellant. This is the full measure of relief they are entitled to against the officer.

The proceedings were brought under chapter 94 of Kirby's Digest, which authorizes summary judgment on motion by sureties against their principals and against co-sureties; by clients against attorneys; by plaintiffs in execution against sheriffs, constables and other officers; and in all other cases specially authorized by statute. Section 4487 of Kirby's Digest provides the penalties which may be recovered by summary judgment against officers and their sureties.

The statute is penal, and must be strictly construed. *Milor* v. *Farrelly*, 25 Ark. 353. Courts of equity will not lend their aid in the enforcement of penalties. 2 Story, Eq., 1319, 1494; *Mississippi Railroad Commission* v. *Gulf & Ship Island Rd. Co.*;

78 Miss. 750; *Broadnax* v. *Baker,* 94 N. C. 675; *Gordon* v. *Lowell,* 21 Me. 251.

The decree is therefore correct, and the same is affirmed.

COOPER *v.* ROLAND.

Opinion delivered July 11, 1910.

SPECIFIC PERFORMANCE—SALE OF CHATTELS.—Under the general rule that contracts for the sale of chattels will not be enforced specifically, a contract for the sale of county warrants will not be enforced, as the remedy at law is adequate.

Appeal from Hot Spring Chancery Court; *Alphonzo Curl,* Chancellor; affirmed.

Richmond & Berger and *Morris M. Cohn,* for appellant.

The county judge may, at the suit of a taxpayer, be enjoined from doing something prohibited by law. 54 Ark. 645; 73 Ark. 523; 80 Ark. 108; 52 Ark. 541; 77 Ark. 570; 75 Ark. 52; 46 Ark. 25; 48 Ark. 544; 37 Ark. 286; *Id.* 164; 34 Ark. 410; 30 Ark. 278; 15 Ark. 24; 14 Ark. 50; 30 Ark. 56; 57 Am. Dec. 435. The county judge can not derive any advantage from his position. 49 Ark. 245; 68 Ark. 542; 77 Ark. 31. Specific performance will be enforced in such cases as to personalty. 13 Col. 280; 22 Pac. 461; 43 Am. Dec. 621; 51 Am. Dec. 589; 69 Md. 51; 13 Atl. 625; 51 Ark. 489. The statute of frauds has no application. 85 Ia. 112; 52 N. W. 108; 17 N. W. 495; 64 Ark. 627; 16 Neb. 21; 21 N. W. 451; 7 Ia. 163; 107 Ind. 432; 8 N. E. 167; 82 Ala. 622; 2 So. 520; 10 Me. 374; 25 Am. Dec. 242; 121 Mo. 169; 25 S. W. 192; 26 L. R. A. 751.

Duffie & Duffie and *A. I. Roland,* for appellees.

This court will not exercise original jurisdiction to grant injunctions. 2 Ark. 93; 12 Ark. 102; *Id.* 84; 16 Ark. 195; 19 Ark. 411; 25 Ark. 288. It is only in cases of irreparable injury that this court will grant injunctions pending appeals. 54 Ark. 118; 48 Ark. 331; 54 Ark. 539; 29 Ark. 340. Unless all the evidence is brought up in the record, the decree of the chancellor will not be disturbed. 90 Ark. 393; *Id.* 214; 89 Ark. 349; *Id.* 64; *Id.* 41; 88 Ark. 467; 87 Ark. 232; 86 Ark. 368; 84 Ark. 429; *Id.* 73; 81 Ark. 427.

McCULLOCH, C. J. This is an appeal from a decree of the chancery court of Hot Spring County dismissing appellant's complaint for want of equity. The action was instituted against A. I. Roland, as county judge of that county, and against certain bridge commissioners of the county and the county clerk; also against the Illinois Steel Bridge Company, a corporation. The complaint alleged in substance that the county court had ordered the construction of two bridges, and that the contract for the construction of same was let by the county commissioners to said bridge company; that, before the letting of the contract, and as an inducement to bidders, the county judge had procured from appellant a written proposal to take the county scrip issued in payment for the work and to pay the contractors therefor at the rate of 80 cents on the dollar, and that the bridge company, at the time its bid for the work was accepted, had accepted the terms proposed by appellant and agreed to let him have the scrip at that price; that subsequently the county judge procured from J. E. Stanley a bid of 81 cents on the dollar, and was about to issue the scrip to the latter (the bridges having been completed) and pay off the bridge company at the agreed price of 80 cents on the dollar, turning the balance of one per cent. back into the county treasury. It is also alleged that, while this is sought to be done by the county judge ostensibly for the purpose of giving the county the benefit of the additional one per cent., it is in fact for the purpose of gaining some personal advantage for the county judge in controlling the scrip. The complaint does not, however, state how any personal advantage is to be gained, nor does it state any facts to base the charge upon.

The complaint alleges that, unless restrained, the county court will allow the claims for constructing the bridges, and that the county clerk will issue the scrip to Stanley; and the prayer is that such proceedings be restrained and, upon payment of 80 cents on the dollar to the bridge company, which appellant offers to pay, that the latter be required to turn over the scrip to him.

The action is in substance one to require the bridge company to specifically perform its alleged contract with appellant for the sale of the scrip when issued, and, incidentally, to restrain the county officials from issuing the scrip to any other

person. The last mentioned incidental relief does not, however, strip the action of its character as one to compel specific performance of a contract; for, if the bridge company has bound itself by a contract with the county to allow the issuance of the scrip to another person and accept 80 cents on the dollar in lieu thereof, the remedy of appellant would still be against the bridge company, and not against the county. The contract of appellant, as stated in the complaint, is with the bridge company, and he must look alone to that company for performance of the contract or for compensation in damages for its nonperformance. The question then presented is whether or not the allegations of the complaint are sufficient to justify a court of equity to decree specific performance of the alleged contract for the sale and purchase of the scrip.

The general rule, subject to some exceptions, undoubtedly is that courts of equity will not enforce specific performance of executory contracts for the sale of chattels, and this court has announced its adherence to that general rule. *Collins* v. *Karatopsky*, 36 Ark. 316. The rule established by the authorities is well stated in a note in volume 5 of American & English Cases Annotated, p. 269: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a plain, adequate and complete remedy. Therefore a court of equity will not generally decree performance of a contract in respect of personalty, not because of its personal nature, but because damages at law are as complete a remedy as the delivery of the property itself, inasmuch as with the damages like property may be purchased."

Professor Pomeroy in his work on Specific Performance (§ 11) stated the rule as follows: "The doctrine is equally well settled that in general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels, because there is not any specific quality in the individual articles which gives them a special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of like kind and quality."

In the other sections of the volume he states the various exceptions to this rule, as where chattels have some peculiar

value above the market value, such as heirlooms, paintings or other works of art, etc. For cases applying the general rule stated above to contracts for the sale of stocks and bonds, see the same note in 5 Am. & Eng. Ann. Cas., where all the authorities on the subject are collected. *Memphis* v. *Brown*, 20 Wall. 289, is a case of that kind, and the court decided that specific performance would not be decreed of a contract for the return and cancellation of city bonds.

An exception to this rule is found in some cases where stocks and bonds which are the subject of the contract have no market value, and also where shares of stock in private corporations have peculiar value in excess of the market value by reason of the control over the corporation which the ownership of the stock would give. The latter ground could not of course apply to county warrants, which are mere evidences of the county's indebtedness. The fact that the value of the scrip is fluctuating and speculative affords no grounds for equitable interference.

The complaint contains an ambiguous allegation to the effect that the scrip has no market value; but, taking the whole allegation together, it means that the scrip has no stable market value, and that its value fluctuates from time to time according to the assessable value of the taxable property in the county.

The complaint does not allege insolvency on the part of the bridge company, therefore it is unnecessary to discuss the effect of such an allegation in an action of this kind.

It is further insisted that, according to the allegations of the complaint, a trust relation subsisted sufficient to give jurisdiction to a court of equity by reason of the fact that Roland, the county judge, acted as the agent of appellant in negotiating for the purchase of the scrip. There is, however, no relation of trust between appellant and the bridge company, and the question of Roland's alleged agency does not enter into the controversy.

We discover nothing in the allegations of the complaint which can be held sufficient as a statement of grounds for equitable interference. Therefore the demurrer was properly sustained. The case was submitted on motion for temporary restraining order, but the questions are fully argued on both sides, and the controversy may as well be finally decided now.

The decree is affirmed.

ANDERSON *v.* JOSEPH.

Opinion delivered July 11, 1910.

MORTGAGES—CONVERSION BY MORTGAGEE—LIABILITY.—Where a mortgagee of a chattel, authorized to sell at public sale, sold at private sale, he will be held liable as for conversion for the value of the property at the time of sale, less the amount of his mortgage debt.

Appeal from Lawrence Circuit Court, Eastern District; *Charles Coffin,* Judge; reversed.

Smith & Blackford, for appellant.

The law will not permit a man to take advantage of another who is in prison or war. 24 Ark. 224.

J. N. Beakley and *McCaleb & Reeder,* for appellee.

A mortgage of personal property passes the whole legal title to the mortgagee conditionally, and a sale thereof by the mortgagee is not conversion. 33 Ill. App. 297; 8 Johns. 96; 2 Den. 170; 35 Cal. 404; 27 Cal. 258; 2 Gray, 303; 3 Cush. 322. Plaintiff, being neither in possession nor entitled to possession, can not maintain trover. 10 Cal. 392; 138 Mass. 513; 38 Md. 242; 6 H. & J. 100; 47 Minn. 433; 64 S. W. 942; 65 Ark. 316. The measure of damages can not exceed the difference between the value of the property and the mortgage debt. 51 Ark. 25; 36 Ark. 268. But the mortgagor can not maintain a suit to recover the property until the debt is paid. 71 Ark. 484; 34 Ark. 346.

BATTLE, J. J. A. Anderson brought an action against A. W. Shirey, in his lifetime, to recover the difference in the value of two mules and the amount of an account that plaintiff owed the defendant.

On the 15th day of March, 1906, Sam Golden and plaintiff executed to the defendant a mortgage on two mules and two horses and certain crops of corn and cotton to secure the payment of a promissory note executed by Sam Golden and plaintiff to the defendant for $250, due October 15, 1906, and all other indebtedness they should contract with the defendant on or before the 15th day of October, 1906. In case of default in the payment of the note and other indebtedness, the mortgagors by the mortgage authorized the mortgagee to take possession of the property mortgaged, and sell and dispose of the same at public

sale of Minturn, in Lawrence County, Arkansas, for cash in hand, after giving certain notice of the sale, and out of the proceeds of the sale retain sufficient to pay mortgagor's indebtedness to him. The two mules were the property of plaintiff, and the horses were the property of Golden.

Anderson, the plaintiff, having been convicted of a felony, was imprisoned in the State penitentiary. While in this condition, his mules were delivered to the defendant. The defendant, Shirey, alleges that the mules and horses were delivered to him in payment of the indebtedness of Anderson and Golden to him. He sold the mules at private sale as his own property for $200. The evidence is conflicting as to their delivery. Plaintiff adduced evidence to prove that they were not delivered in payment of any debt; that they were worth about $250; and that he was indebted to the defendant only in the sum of $81.11. This action was brought to recover $168.89, the difference between these two amounts.

The court after saying: "This ought to have been an action for an accounting, and not one in trover for conversion of the property," instructed the jury as follows: "Gentlemen of the jury, the evidence in this case shows that these mules were turned over to Mr. Shirey under the mortgage lien, and he would have a legal right to the possession of the mules under that condition. By this form of action that they have brought here the lien would lie. You will find a verdict for the defendant, and one of you sign it as foreman." Which they did, and the court rendered judgment accordingly; and the plaintiff appealed.*

The manner in which Shirey could dispose of the property was prescribed by the mortgage, and he was confined to its provisions. In selling the property at a private sale he asserted a power which was not given by the mortgage, to the exclusion of appellant's right to redeem and to a public sale. Shirey had the legal title and the right to the possession of the property, but was not the absolute owner. Notwithstanding default, the plaintiff might have redeemed. By selling the mules as his own property and converting the proceeds to his own use, he

*Upon Shirey's death the cause was revived in the name of Joseph, his executor. (Rep.)

appropriated more than he was entitled to, and was guilty of conversion. *Howery* v. *Hoover,* 97 Iowa 581; *Colby* v. *Kimball Co.,* 99 Iowa 321, 324; *Jones* v. *Horn,* 51 Ark. 19, 25; 2 Cooley on Torts (3 ed.), 866.

In *Jones* v. *Horn,* 51 Ark. 19, 25, it is said: "Where the defendant is a mortgagee, who was entitled to the possession, with power to sell at the time of the seizure or conversion, and who has become a wrongdoer by reason of the manner of acquiring possession, or in the irregularity of the sale, he is liable to the mortgagor (in the absence of proof of special damages) only for the value of the property at the time of the conversion, less the amount of mortgage debt. *McClure* v. *Hill,* 36 Ark. 268."

Reverse and remand for a new trial.

WEBSTER *v.* FERGUSON.

Opinion delivered July 11, 1910.

1. MUNICIPAL ORDINANCE—VALIDITY IN PART.—If an ordinance creating a district for the purpose of constructing and establishing sewers, and for the purpose of managing and operating such sewers, is invalid in respect to the latter purpose, it is valid as to the former, the two objects being severable. (Page 579.)
2. IMPROVEMENT DISTRICT—COST OF IMPROVEMENT.—Where the property owners in a proposed improvement district asked for the construction of a system of improvements not to exceed in cost a sum named, it will be presumed that they intended the actual cost of the improvement, exclusive of interest. (Page 579.)
3. SAME—LIMITATION AS TO COST.—Under Kirby's Digest, §§ 5683, 5716, providing that no single public improvement shall exceed in cost 20 per centum of the real property in the district, this limitation depends upon the cost of the improvement, and it is not material that the total assessment of benefits exceeds 20 per centum of the value of the property. (Page 579.)
4. SAME—IRREGULARITY—LIMITATION.—Under Kirby's Digest, § 5685, providing that all persons who shall fail to begin legal proceedings within 30 days after publication of a city ordinance fixing the assessment of property within an improvement district for the purpose of correcting or invalidating such assessment shall be forever barred and precluded, property owners within an improvement district who have failed to institute such proceeding within the time prescribed are barred by this statute from attacking the assessment because the assessors did not take the proper oath. (Page 579.)

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

C. M. Erwin, for appellant.

Incorporated towns have authority to assess real property for the purpose of constructing sewers only. Kirby's Digest, § 5664; 56 Ark. 191; 59 Ark. 356; 2 Dill. on Mun. Corp., § 769. The council could not go beyond the limitations prescribed in the petition. 71 Ark. 556; 59 Ark. 344. The interest is part of the cost of construction. 55 Ark. 148; 24 O. St. 249. An assessment greater than the cost of improvement is void. 20 Minn. 468; 55 S. E. 800; 46 Atl. 312.

Joseph W. Phillips, for appellees.

Improvement districts may maintain and operate sewer systems. Kirby's Digest, § § 5664, 5674 and 5675; 28 Ark. 208. The defect in the oath is not jurisdictional. 71 Ark. 24.

BATTLE, J. In the month of June, 1908, ten owners of real property in the city of Newport, in this State, and in a certain territory in the city, petitioned to the city council of that city to make and declare said territory, which they described by metes and bounds, an improvement district, to be known as "Sewer District No. 1" for the purpose of constructing, operating and managing a sewer system in said district. In the same month the city council of the city of Newport, by ordinance duly passed, granted their petition, and laid off said territory by metes and bounds in an improvement district for the purpose of establishing, constructing, maintaining and managing sewers therein, and designated the same as "Sewer Improvement District No. 1 of the City of Newport, Arkansas."

Within three months after the publication of such ordinance, a majority in value of the owners of real property within said district presented to the city council of the city of Newport a petition asking it to establish and construct a system of sewers, the aggregate cost of constructing the same not to exceed the sum of $42,500, and to maintain, manage and operate the same, and that the cost thereof be assessed and charged upon the real property within said district. The city council thereupon appointed three owners of real property therein to constitute a board of improvement of the district, who took the oath prescribed by law, and formed plans for the improvement asked

for by petitioners, and made estimates of the cost thereof, and reported the same to the city council as follows:

Construction	$38,500.00
Engineers	1,850.00
Purchase of lot for pump house	300.00
Right-of-way	500.00
Stationery, printing and advertising	250.00
Miscellaneous and sundry items of expense	1,100.00
Total	$42,500.00

They further reported that it would be necessary to borrow the sum of $38,000 with which to build said sewer system, and that the interest on the money so borrowed would amount to about the sum of $21,000, estimating that a portion of the principal of said indebtedness would be paid each year until the end of twenty years, which interest added to the cost of construction makes a total cost of $63,500.

After the filing of the report of the board of improvement the city council appointed a board of assessment, who, after taking the oath prescribed by law, assessed the value of the benefits to accrue to the real property in said district by reason of such improvement, and deposited a list of the same in the office of the recorder or city clerk of the city of Newport. Within due time the city council by an ordinance ordained that the real property in the district be assessed according to the assessment list for the district as the same now remains in the office of the recorder of said city, "and that five per centum of assessed betterment on each of said blocks, lots and parcels of real property shall be paid annually on or before the 1st day of February until the whole of said local assessment shall be paid."

The board of improvement brought this suit against David Webster and Alice Webster, in the Jackson Chancery Court, and alleged in their complaint that the defendants are the owners of lot 4, block K, in Chastain's Addition to the city of Newport, Jackson County, Arkansas, and that the lot is embraced in said improvement district; that the board of assessors of said sewer improvement district assessed the benefits on said lot, together with all other real property in said district subject to assessment for such improvement, which assessment on the lot amounts

to the sum of $3.50; that the first annual installment of said assessment amounts to the sum of 17½ cents; that the defendants failed to pay the first installment within the time required by law, and the collector for the district added a penalty of three and a half cents, and returned the lot delinquent, and the assessment on the lot is still delinquent and unpaid. The board asked that the lot be charged with the assessment of 17½ cents and the penalty of 3½ cents, and be condemned and sold to pay the same.

The defendant answered, and admitted the allegations of the complaint, but say that the assessment on their lot is illegal and void for the following reasons:

"First. That the petition of the majority of the property owners of the district asked the city council of the city of Newport to establish, maintain and operate a system of sewers in said district, and that there is no authority of law for the maintaining and operating of sewer systems by said district.

"Second. That the petition praying that the district be established asked that a system be established, 'the aggregate cost of constructing same not to exceed the sum of $42,500,' and that the board of commissioners of said district has adopted plans and specifications for a system of sewers the actual cost of which in cash is $42,500, and that it will be necessary to issue bonds to the amount of $38,000, 90 per cent. of the estimated cost of said sewer, to obtain the money to build said sewer system, and that the interest on said bonds will amount to the sum of $21,000, making the system cost $63,500, or $21,000 in excess of the limitation placed upon the cost of construction of said system by the original petition.

"Third. That the board of assessors has assessed the benefits accruing to the real property in said district at the sum of $98,700, which exceeds the estimated cost of constructing said system, including interest thereon, by the sum of $35,200, and the city council, acting upon said assessment list, has passed an ordinance levying an assessment on the $98,700 benefits.

"Fourth. Because the board of assessors of said district failed to take the oath as prescribed by law, they having taken the oath required by section 5677 of Kirby's Digest, and not the oath required by said section 5677 of Kirby's Digest, as amended by act 167 of the Acts of Arkansas, 1907."

The plaintiff, the board, demurred to the defendants' answer, which the court sustained, and, the defendants refusing to plead further, condemned and ordered the lot sold according to the prayer of the complaint; and defendants appealed.

The defendants' first ground of defense is untenable. Conceding that the city council had no authority to create a district to manage and operate a sewer district, the remainder of its ordinance to create a district for the purpose of constructing and establishing sewers is valid. The ordinance may be void in part and valid in part, it being severable. *Eureka Springs* v. *O'Neal,* 56 Ark. 350, 353.

The second ground is equally untenable. The property owners, in asking for the construction of a system of sewers not costing exceeding $42,500, meant that the actual cost should not exceed that amount. No mention was made by them of borrowing money, and none was made until after the creation of the district; and the board of improvement estimated the actual cost to be $42,500. Under the circumstances the presumption is that the actual cost was intended; the actual cost being as much as that specified ($42,500) indicates that it was intended.

The total assessment of the benefits of the improvement to the real property in the district does not control the cost of the improvement; for, when the expenses of the improvement are paid, the authority to collect taxes for that purpose ceases to exist. The statute provides: "No single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment," and beyond that limit taxation can not go for such purposes. Kirby's Digest, § § 5683, 5716.

The defendants were barred and precluded from attacking the assessments of benefits on the ground that the assessors did not take the oath prescribed by law. It was the duty of the city clerk or recorder to publish in some newspaper in the city of Newport a copy of the ordinance, which ordered that the real property in the district be assessed according to the assessment list deposited in the recorder's office and that five per centum shall be paid annually until the whole of the local assessment shall be paid, within thirty days after its passage; and the statute provides that all persons who shall fail to begin legal

proceedings within thirty days after such publication for the purpose of correcting or invalidating such assessment shall be forever barred and precluded. Kirby's Digest, § 5685. So the defendants, having failed to begin such proceedings within the time prescribed, are barred by this statute from attacking the assessment because the assessors did not take the proper oath; it not being jurisdictional. *Stiewel* v. *Fencing District,* 71 Ark. 17, 24.

Decree affirmed.

LASER *v.* FORBES.

Opinion delivered July 11, 1910.

SALE OF LAND—BREACH OF VENDOR'S AGREEMENT—DAMAGES.—Where the vendor of land agreed to expend one-fourth of the purchase money in making certain improvements upon the property and failed to do so, the vendee in an action for breach thereof will be entitled to recover as damages not the purchase money which he had paid, but the amount which the property was injured by reason of the breach of contract.

Appeal from Garland Circuit Court; *W. H. Evans,* Judge; reversed.

S. W. Leslie, for appellant.

Contradictory instructions should not be given. 83 Ark. 205; 72 Ark. 41; 91 Ill. 63; 34 Ia. 375. They are calculated to confuse the jury. 95 Ill. 383. The jury have no right to indulge in conjectures not supported by evidence. 71 Ill. 391.

C. Floyd Huff, for appellee.

The failure of one party to comply with a contract releases the other. 65 Ark. 320; 64 Ark. 228; 67 Ark. 156; 22 Ark. 258; 38 Ark. 174.

BATTLE, J. William O. Forbes sued David Laser for damages. He alleged in his complaint that he entered into a contract with the defendant on the 24th day of January, 1908, by which the defendant bargained and sold to plaintiff certain blocks for $6,900, of which he has paid $1,530; that the defendant, by the terms of the contract, undertook to expend twenty-five per cent. of the moneys paid in by him, as fast as

it was received, in surface grading and laying sewer pipe in front of the property and in building a four-foot cement sidewalk along the street line of the property; and that defendant has failed to make such improvements, to his damage in the sum of $2,530; and asked for judgment for that amount.

The defendant, David Laser, answering, admitted the execution of the contract as alleged by the plaintiff, and that plaintiff made payments as alleged, except that $340 was paid by note, which is past due and wholly unpaid; and denied that he or his codefendant, Ed L. Wheeler, has failed and refused to comply with their agreement to surface grade and lay sewer pipe in front of the property, or failed or refused to do any part of such work or expend any part of the $1,500 in compliance with their contract; and alleged that plaintiff is now owing to the defendant the sum of $1,700 on account of a part of the purchase money, for which the blocks were sold, remaining unpaid, and asked for judgment against plaintiff for that amount.

Much evidence was adduced in the trial of the issues in this action, and improvements were shown to have been made by the defendants in the vicinity of the blocks sold to the plaintiff.

The court instructed the jury, in part, over the objection of the defendant, as follows: "The court instructs the jury that the obligations of the contract sued on are mutual; and if the defendant Laser has failed to comply with the obligations imposed on him by said contract, then the plaintiff had a right to refuse to make further payments and to rescind said contract and recover from defendant any amount paid by him to defendant under said contract."

And the court refused to instruct the jury, at the request of the defendant, as follows:

"You are further instructed that if you find from the evidence that the defendant in this cause entered into a written contract with the plaintiff whereby he agreed to expend 25 per cent. of the moneys by him received from the sale of the property in the Central Park Addition, the property in controversy, and has failed to perform his part of the contract by such expenditure of the money, then plaintiff will be entitled to recover against the defendant for the breach of contract on the part of the defendant.

"The jury are further instructed that, if you find in favor of the plaintiff and against the defendant according to the above instruction, then the amount of recovery that the plaintiff would be entitled to against the defendant in this case would be such sum as you might find, from the evidence in this case, the plaintiff, as owner of the property purchased from the defendant, has been damaged by reason of said breach of the contract on the part of the defendant."

The jury returned a verdict in favor of the plaintiff for $1,530, the amount paid by him for the blocks; and the court rendered judgment for that amount against the defendant, and he appealed.

This action was brought to recover damages occasioned by an alleged breach of contract and not to rescind. The question in the case was, what damages had the plaintiff suffered? He is not entitled to recover the money paid for the blocks purchased by him and to hold the blocks. The blocks were not shown to be worthless, and the damages were not shown to be $1,530, or any approximate amount. The plaintiff did not ask to rescind. The instruction given and copied in this opinion should not have been given, and the instructions refused should have been given.

Reverse and remand for a new trial.

MANCHESTER v. GOESWICH.

Opinion delivered July 11, 1910.

1. SALES OF LAND—BONA FIDE PURCHASE—ELEMENTS.—The essential elements of a *bona fide* purchase of land are three, viz., a valuable consideration, the absence of notice, and the presence of good faith. (Page 586.)
2. SAME—BONA FIDE PURCHASE—BURDEN OF PROOF.—Where a purchase of land is shown to have been for a valuable consideration, the burden of proving notice of irregularities therein devolves on those who attack it. (Page 586.)
3. MORTGAGES—IRREGULARITIES IN TRUSTEE'S SALE—NOTICE.—Where a mortgage, with power in a trustee to sell on default, provides that the trustee's deed shall be taken as *prima facie* true, and the trustee's deed recites a regular appraisement and sale of the land, and there is no proof that a purchaser of the land had notice of irregularities in the appraisement or sale, the latter's title will be upheld. (Page 586.)

Appeal from Mississippi Chancery Court, Osceola District; *Edward D. Robertson,* Chancellor; affirmed.

J. T. Coston, for appellant.

Before land can be sold under a power contained in a mortgage, it must be appraised by three disinterested householders in the county appointed by a justice of the peace who also lives in the county. 69 S. W. 551. They must actually view the property. 94 S. W. 715. And a sale without complying with the statute in these respects is invalid. 105 S. W. 586. The burden was on defendant to show that he was an innocent purchaser. 35 Ark. 102. The recitals in the deed are *prima facie* evidence only. 41 S. W. 488; 66 S. W. 62; 61 Ark. 473; 121 S. W. 357; 14 Ark. 9; 15 Ark. 187; 6 So. 841; 18 So. 46; 28 Pac. 769. Appellee is not an innocent purchaser. 43 Ark. 467; 50 Ark. 327; 121 S. W. 355; 46 N. W. 1135; 10 Ill. 456; 6 La. 39; 22 Am. St. Rep. 725; 126 S. W. 833; 122 S. W. 933; 38 Fed. 486; 15 Pet. 43; 6 Minn. 456.

W. J. Lamb, for appellee.

The debtor must do equity before a void sale will be set aside. 117 N. W. 112; 61 S. E. 12. In such case a deed from the mortgagee to the purchaser clothes him merely with the mortgagee's lien on the land. 116 Mass. 108; 1 Mich. 338; 51 Am. Dec. 95; 33 Mich. 392; 47 Barb. 212; 25 N. Y. 320; 54 S. W. 1011. Such sale does not discharge the debt and mortgage. 169 Mass. 179; 47 N. E. 602; 117 Mo. 508; 70 Ill. 46. Appellee is an innocent purchaser for value. 84 Ill. 319; 98 572; 12 Allen 412; 44 N. E. 532; 84 S. W. 417; 23 Atl. 522; 120 Mo. 423; 119 Mo. 280; 92 N. W. 1117; 7 N. W. 826; 79 Ark. 1.

BATTLE, J. Mary Manchester, Nettie Manchester and Jessie Manchester, three sisters, for cause of action against Oscar Goeswich, state: That J. S. Manchester departed this life some time in 1898, intestate, leaving the plaintiffs his only children and heirs surviving; that at the time of his death he was the owner of an undivided three-fourths interest in certain land; that the defendant, Oscar Goeswich, claims to be the owner of the land under the following chain of title.

"1st. By a trust deed executed thereon by J. S. Manchester, January 10, 1896, to W. J. Bowen, trustee, to secure an in-

debtedness mentioned therein to J. H. Hale for the sum of $175 and 10 per cent. interest thereon, due and payable December 1, 1896. * * *

"2d. A sale of said land January 28, 1899, by said W. J. Bowen, trustee, to John A. Lovewell, to satisfy the indebtedness described and set forth in the trust deed.

"3d. A deed June 28, 1900, by said W. J. Bowen, trustee, purporting to convey said land to John A. Lovewell in pursuance of the sale. * * *

"4th. A deed January 17, 1901, by John A. Lovewell, purporting to convey the land to the defendant. * * *

"That the trust deed provided that a sale thereunder must be advertised at least twenty days, and in truth and in fact the sale was not advertised for that time. That the land was not appraised before the sale, or, if appraised at all, the appraisers were not appointed in writing; did not qualify by taking the oath and making a report in writing, and they did not go and view the premises. That the land was, at the time of the sale, worth $1,000, but it was sold to John A. Lovewell for the sum of $200.50, which was a shockingly inadequate consideration for the land. That the defendant has sold, cut and removed from the land $1,500 worth of good and merchantable timber, and has received and collected thereon $1,000 in rents and profits.

"Wherefore plaintiffs pray that the sale be set aside and annulled, that the plaintiffs may have a decree against the defendant for timber cut and removed from the land, and the rents and profits thereon," etc.

The defendant answered and admitted the death of J. S. Manchester, and denied that he was the owner of the land at the time of his death; admitted that the trust deed provided that the sale must be advertised at least twenty days, but denied that the sale was not advertised for that time; denied that the land was at the time of the sale worth $1,000; admitted that it was sold to John A. Lovewell for the sum of $200.50; and denied that it was a shockingly inadequate price for the land; denied that he has sold, cut and removed from the land $1,500 worth, or any other amount, of good merchantable timber, or that he has received and collected thereon in rents and profits the amount of $1,000, or any other sum.

"Further answering the complaint, the defendant stated that the trust deed executed by J. S. Manchester for the benefit of J. H. Hale, and described in the complaint, does not purport to convey but one hundred and one and one-fourth acres of land, the same being the interest of the grantor of the trust deed in the estate of George Manchester, deceased, and simply purports to convey the undivided three-fourths interest of said Manchester in and to the southeast quarter of section 5, less twenty-five acres formerly conveyed to Eliza Yarboro, and the defendant alleged that, since his purchase of the interest of George Manchester under the deed set out in the complaint, he has purchased, and is the owner in fee simple of, the other undivided fourth of said one-fourth section, less the twenty-five acres previously sold.

"Defendant further stated that, from the recitals in the deed for the trustee, W. J. Bowen to John A. Lovewell, it appears that the law was complied with, and that the sale was regular in all respects, and that he believes that the sale was regular and in accordance with the law, and he further stated that the land was not worth more than the price bid therefor by John A. Lovewell at the date of the sale. That he purchased the land about two years after the sale by the trustee, and when land had enhanced in value, and, after Lovewell had made valuable improvements thereon, he paid Lovewell as the consideration therefor the sum of $500; that he made the purchase in absolute good faith, and believing that the title of Lovewell was good, and believing that he was getting a perfect title thereto, and without any notice of any claim by plaintiffs."

The court, having heard the evidence adduced by the parties, found that the defendant was a *bona fide* purchaser for value without notice of the irregularities of the trustee's sale, and was therefore not bound thereby, and dismissed the complaint for want of equity; and the plaintiffs appealed.

The land in controversy, consisting of about one hundred and one acres, was conveyed by J. S. Manchester to W. J. Bowen, in trust to secure the payment of an indebtedness described in the pleadings. The deed was executed on the 10th day of January, 1896. The debt secured by the deed not being paid, the land was appraised by three appraisers, T. J. Lowery.

W. A. Hall and John Jones, on the 28th day of January, 1899, at $300, and sold on that day by the trustee at public sale to John A. Lovewell for $200.50. The land, not having been redeemed, was conveyed to Lovewell by the trustee, W. J. Bowen, on the 28th day of June, 1900; and Lovewell, on the 17th day of January, 1901, sold the land to the defendant for $500, which he paid, and Lovewell conveyed the land to him. Plaintiffs attack the good faith of this sale and conveyance, and seek to set it aside on account of irregularities in the sale by the trustee to Lovewell.

"The essential elements," said Pomeroy on Equity Jurisprudence, "which constitute a *bona fide* purchase are three—a valuable consideration, the absence of notice, and the presence of good faith." (2 Pomeroy's Eq. Jur. (3 ed.), § 745). The court found that the defendant was a *bona fide* purchaser for value without notice of the irregularities of the trustee's sale. The evidence as to the consideration is conflicting, but we think that the preponderance of it sustains the findings of the chancellor. It being shown that the purchase was made for a valuable consideration, the burden of proving notice, in cases like this, devolves on the plaintiffs. 2 White & Tudor's Leading Cases in Equity, 49, 99, 105. Without notice the good faith of the defendant is without question. He purchased the land for a home, and paid full value for it.

The appraisers were not appointed in writing, did not take the oath prescribed by law, did not view the land before appraising it, and made no report in writing of their appraisement. The trust deed under which the land was sold provides that, in the event of sale, the trustee's "deed of conveyance shall be taken as *prima facie* true." The trustee's deed recites that the land was previously appraised as the law provides, and that the sum for which it sold was two-thirds of its appraised value. These recitals are *prima facie* true, and were a sufficient basis upon which the defendant could act, in the absence of notice to him to the contrary. But plaintiffs say that he testified that he did not rely on the recitals. This is true, but he did not say, and there is no proof, that he had notice or evidence to the contrary. He relied upon the trustee's deed in full faith of its sufficiency to convey title, and plaintiffs have failed to discharge the burden resting upon them by showing

that he did not act in good faith, because he had notice at the time he purchased of the irregularities of the sale by trustee.

Decree affirmed.

SMITH v. WILLIAMS.

Opinion delivered July 11, 1910.

ESTRAYS—NECESSITY FOR EXHIBITING ANIMAL.—Title to any of the animals mentioned in Kirby's Digest, § 7852, cannot be acquired by virtue of the estray laws unless the person taking it up exhibits it in the stray-pen of the county on the first day of the next term of the circuit court of his county.

Appeal from Prairie Circuit Court, Northern District; *Eugene Lankford,* Judge; affirmed.

W. A. Leach, for appellant.

A person, in order to acquire title to property under the estray law, must do everything required by those laws. 2 Cyc. 363; 100 Ala. 631; 8 Mo. 344.

J. G. & C. B. Thweatt, for appellee.

If different conclusions may be drawn from the evidence, it should be passed upon by the jury. 6 Ency. Pl. & Pr., 687. The finding of the jury should be given the strongest inference in its favor that is deducible therefrom. 74 Ark. 478.

HART, J. This is an action of replevin instituted in the circuit court by L. A. Smith against S. M. Williams to recover possession of a mare valued at $125.

The defendant denied that plaintiff had any title to the mare, and in addition set up title in himself under the estray laws. There was a trial before a jury and a verdict for the defendant. From the judgment rendered the plaintiff has appealed to this court.

He first contends that the defendant did not comply with section 7852 of Kirby's Digest by exhibiting the mare in the stray pen on the first day of the next term of the circuit court of his county; and that therefore defendant acquired no title to the mare in controversy by reason of the estray laws.

The defendants admit (and properly so) that plaintiff is right in this contention. *Conditt* v. *Holden,* 92 Ark. 618.

As stated by the defendant, the verdict being for him, the only question for our determination is, does the evidence support the verdict? We think not. The undisputed evidence shows that the mare belonged to the plaintiff. The plaintiff and one other witness positively identified the mare as belonging to him. They identified her by brand, color and otherwise. It would do no good to set forth their testimony. It is sufficient to say that it was not contradicted.

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

VULCAN CONSTRUCTION COMPANY v. HARRISON.

Opinion delivered July 11, 1910.

1. WRITS AND PROCESS—SERVICE ON FOREIGN CORPORATION.—Where a foreign corporation sends its agents and officials and its property into this State, and carries on a business here, service of process for it may be made upon the Auditor of State if it fails to designate an agent upon whom such service may be had. (Page 590.)
2. APPEAL AND ERROR—PRESUMPTION IN ABSENCE OF EVIDENCE.—Where the evidence upon a motion to quash service of process was not properly preserved, it will be presumed on appeal that the trial court's finding that the service was in compliance with the statutes was supported by evidence. (Page 591.)
3. SAME—PRESUMPTION.—Where service was had upon the superintendent of defendant, a foreign corporation, and a motion to quash the service was overruled, but the evidence heard upon such motion was not brought up, it will be presumed on appeal that such superintendent was such an agent as was authorized to receive summons on behalf of the foreign corporation. (Page 591.)
4. WRIT AND PROCESS—OBJECTION TO SERVICE—WAIVER.—Where, after moving to quash the service of summons, the defendant filed a general answer which failed to preserve the objection to the service of summons, the objection will be held to be waived. (Page 591.)
5. MASTER AND SERVANT—DUTY OF SERVANT TO MAKE INSPECTION.—It is not ordinarily the duty of a servant to make inspection to discover latent defects or dangers in his place of work, and he may presume that the master has exercised ordinary care in furnishing a safe place for him to work in. (Page 591.)

Appeal from White Circuit Court; *Hance N. Hutton*, Judge; affirmed.

Cypert & Cypert, for appellant.

Service of summons on defendant was not legally made. Kirby's Digest, § 6048; 59 Ark. 583; 59 Ark. 593; 106 U. S. 350. It was plaintiff's duty to inspect the material of which the scaffold was built. 88 Ark. 292; 76 Ark. 69; 89 Ark. 50; 68 Ark. 316; 65 Ark. 98.

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

When a foreign corporation fails to designate an agent upon whom service of summons may be had, such service may be had upon the Auditor. Kirby's Dig., § 835. Besides, service on H. H. Button was sufficient service. 69 Ark. 396. The question as to sufficiency of service comes too late. 90 Ark. 317; 85 Ark. 246; 38 Ark. 102. Appellant was not required to inspect the material of which the scaffold was built. 88 Ark. 187; 51 Ark. 467; 48 Ark. 334.

FRAUENTHAL, J. This was an action instituted by M. J. Harrison, the plaintiff below, to recover damages for a personal injury which he sustained while in the defendant's employment. The defendant is a foreign corporation, organized under the laws of the State of Missouri, and for some time prior to the time of the alleged injury it was engaged in business in the State of Arkansas of building and constructing depots at the stations along the line of railroad of the Missouri & North Arkansas Railroad Company. It had appointed a superintendent, who managed and conducted its work in this State. The plaintiff was employed by the defendant as a carpenter in erecting a depot at Searcy, Arkansas. He was working upon a scaffold which broke on account of a defective plank, and plaintiff was thrown to the ground from a considerable height, and was severely injured. He instituted this suit in the White Circuit Court, and service of process of summons against the defendant was made upon its superintendent, who was in control of its business and work at Searcy, Arkansas, and also upon the Auditor of the State.

At the January term, 1909, of the circuit court, the defendant appeared specially, and filed a motion to quash the service of summons upon the ground that it was a foreign corporation, and that service of process had not been made upon any agent of defendant authorized by law as the person upon

whom service may be had for it. The motion was heard by the court at the same term upon the testimony of witnesses and the affidavit of defendant's superitnendent, and was overruled. Neither the testimony nor the affidavit introduced upon that hearing has been preserved in the bill of exceptions. At the following term of the circuit court the defendant filed an answer in which it set forth its plea in bar to the action; but in this answer it did not plead by way of abatement any objection to the service of the summons.

Upon the trial of the case a verdict was returned in favor of the plaintiff for $500, and from the judgment entered thereon the defendant has prosecuted this appeal.

It is urged by counsel for defendant that the court erred in overruling the motion to quash the service of the summons. This motion was heard by the court upon testimony that has not been preserved in the record, and we must therefore indulge the presumption that there was sufficient evidence to sustain the finding of the court if it is not contrary to law.

The defendant was a foreign corporation created by the laws of the State of Missouri, but it sent its officials and agents to the State of Arkansas, and in this State carried on its business. By section 825 of Kirby's Digest it was required to designate an agent upon whom service of summons might be made before it would be authorized to transact business in this State. It failed to comply with the provisions of said statute, and still it availed itself of the privilege to do business in this State. It brought its property into this State, and was protected by its law while it transacted its business. By this act it must be held to have assented and submitted itself to the laws of the State whose protection it had. In the case of *Merchants' Mfg. Co.* v. *Grand Trunk Ry. Co.*, 13 Fed. 358, it is said: "Accordingly, it has been held that a foreign corporation consents to be amenable to suit by such mode of service as the laws of the State provide when it invokes the comity of the State for the transaction of its affairs. It waives the right to object to the mode of service of process which the State laws authorize." *St. Clair* v. *Cox*, 106 U. S. 350; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Libbey* v. *Hodgdon*, 9 N. H. 394; 13 Am. & Eng. Ency. Law, 895.

By section 835 of Kirby's Digest it is provided that "where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this State, whether in tort or otherwise, and such foreign corporation has not designated an agent in this State upon whom process may be served, * * * service of process of summons and other process may be had upon the Auditor of State, and such service shall be sufficient to give jurisdiction of the person" of such foreign corporation. Where a foreign corporation sends its agents and officials and its property into this State, and carries on a business in this State, service of process for it may be made upon the Auditor of State, if it fails to designate an agent upon whom such service may be had.

As none of the evidence adduced upon the hearing of the motion was properly preserved, we indulge the presumption that it was sufficient to warrant the lower court in finding that the service of the summons upon the Auditor was in full compliance with the provisions of the statutes of this State. We also indulge the presumption that the evidence warranted the court in finding that the defendant's superintendent in the county of the venue in this case had such management and control of its business in the State as to be authorized to receive service of summons upon behalf of the defendant. *Lesser Cotton Co.* v. *Yates,* 69 Ark. 396.

In addition to this, the defendant at the following term of the court filed its answer in which it only set up a plea in bar to the action. It did not in said answer preserve its plea in abatement for the want of sufficient service of summons. It thereby waived any objection to the mode of the service of the summons, and duly entered its appearance in the case. *Boyer* v. *Robinson,* 6 Ark. 552; *Hibbard* v. *Kirby,* 38 Ark. 102; *Erb* v. *Perkins,* 32 Ark. 432; *Trigg* v. *Ray,* 64 Ark. 150.

It is urged by the defendant that the court erred in failing to instruct the jury that it was the duty of the plaintiff to inspect the material of which the scaffold was made, and by reason of such failure he was guilty of negligence or assumed the risk of the danger arising therefrom. In support of this contention the case of *Murch Bros. Const. Co.* v. *Hays,* 88 Ark. 292, is cited. But we do not think that the facts in that case and in the case at bar are similar. In the one case the injured

employee constructed the scaffold himself, and had the exclusive supervision of the platform in which was the defective plank that caused the injury. In the case at bar the undisputed evidence proved that defendant's superintendent or foreman built the scaffold with the aid of other workmen, and that it was not one of the plaintiff's duties to construct it. The plaintiff was not present when it was built, and did not know the character of the material of which it was constructed. The testimony tended to prove also that, during the progress of the building of the scaffold, the attention of the defendant's foreman was called to the defective plank and to the danger of using it in the scaffold, but that he insisted on putting it therein. The evidence tended further to prove that this defective plank was covered, and the defect and danger were not obvious. Without any knowledge of the defect, the plaintiff went on this scaffold, which was furnished by the defendant as the place upon which he was to work.

It is the duty of the master to exercise ordinary care to provide his servant with a reasonably safe place in which to work, and it is his duty, in the exercise of that care, to make reasonable inspection to see that the place is safe. In the absence of knowledge on his part, the servant has a right to presume that the master has performed the duty which he has assumed. It is not ordinarily the duty of the servant to make inspection to discover latent defects or dangers; that is ordinarily the obligation of the master, and, in the absence of knowledge to the contrary, the servant has a right to presume that the master has exercised ordinary care to fulfill that obligation. 1 Labatt on Master & Servant, § § 7-14; 26 Cyc. 1204; *St. Louis, I. M. & S. Ry. Co.* v. *Holmes,* 88 Ark. 181; *Ozan Lumber Co.* v. *Bryan,* 90 Ark. 233; *St. Louis S. W. Ry. Co.* v. *Lewis,* 91 Ark. 343; *Woodson* v. *Prescott & N. W. Ry. Co.,* 91 Ark. 389; *Little Rock, M. R. & T. Ry. Co.* v. *Leverett,* 48 Ark. 334.

Under the testimony adduced in this case, it was not a part of the duties of the plaintiff to build or supervise in any way the construction of the scaffold; it was not a part of his duties to discover or remedy defects in the scaffold; it was only his duty to exercise ordinary care to discover patent or obvious defects in the place where he worked.

The court did not err, therefore, in failing to instruct the jury that it was the duty of the plaintiff as a matter of law to inspect the material of which the scaffold was built to discover latent defects therein.

We have examined the testimony relating to the extent and character of the injury sustained by the plaintiff, and we can not say therefrom that the amount of the verdict is excessive.

The judgment is affirmed.

JONES v. SEYMOUR.

Opinion delivered July 11, 1910.

1. TRIAL—ATTACHMENT—INTERVENTION—BURDEN OF PROOF.—In the trial of an intervention in an attachment suit to enforce a landlord's lien wherein the intervener claims title as subtenant of defendant and as having paid the rent due on the subleased land, the intervener becomes in effect the plaintiff, and is entitled to the opening and conclusion of the argument, as the burden of proof is upon him in the whole case. (Page 595.)
2. TRIAL—RIGHT TO OPEN AND CLOSE.—One who intervenes in a landlord's attachment suit claiming to be a subtenant and entitled to the attached property is entitled to open and close the argument by virture of having the burden of proof, though the landlord answers that the alleged subtenancy was a fraudulent scheme to defraud him. (Page 595.)
3. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—An issue not raised in the lower court will not be determined on appeal. (Page 597.)
4. INSTRUCTIONS—NECESSITY OF REQUEST.—One who fails to request an instruction upon an issue cannot complain because it was not submitted to the jury. (Page 597.)
5. APPEAL AND ERROR—RAISING ISSUES IN LOWER COURT—PURPOSE.—The object of requiring a party to present all questions and issues to the lower court before presenting them to this court is to have the lower court pass thereon, and that the opposite party may not be taken by surprise. (Page 597.)

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

J. T. Coston, for appellant.

Appellant was entitled to open and close the argument. 61 Ark. 628; 44 Ark. 264; 57 Ark. 141.

W. J. Driver and *Terry & Lasley,* for appellee.

The intervener was the party entitled to open and close the argument. 57 Ark. 136; 92 Am. Dec. 545; 37 S. W. 193; 51 Kan. 566; Kirby's Digest, § 2928; 58 Ark. 556; 45 Ark. 492. It is not error to refuse prayers for instructions not responsive to the issues. 77 Ark. 234; 75 Ark. 76; 75 Ark. 373; 77 Ark. 455; 81 Ark. 561; 89 Ark. 308.

FRAUENTHAL, J. This was an action instituted by H. L. Jones, the plaintiff below, against George Seymour, seeking to recover upon a rent note and to enforce a landlord's lien therefor. A writ of attachment was sued out, which was levied upon a lot of cotton and corn. This cotton and corn were claimed by Albert Seymour, who filed an intervention therefor in the case. The defendant admitted that he had rented the land from plaintiff, and had executed the rent note therefor which was sued on. He alleged that he had made payments thereon, and that he had sustained damages by reason of the failure of plaintiff to make certain repairs, which he sought to recoup. The intervener, Albert Seymour, alleged that he had rented a portion of the land from the defendant, and that the amount of the rent due from him had been paid to the plaintiff; that the cotton and corn attached in the case were raised by the intervener on the land thus rented by him, and that he was the sole owner thereof. To this intervention the plaintiff filed an answer in which he denied that the attached corn and cotton were raised by intervener on land rented by him, and denied that intervener had rented any of the land from the defendant; and that he was the owner of the attached cotton and corn. He also alleged that the cotton and corn were raised by the defendant, and that the intervener, who was a son of the defendant, was claiming title thereto under a fraudulent and collusive arrangement with defendant in order to defeat the plaintiff in the collection of his rent.

The plaintiff rented to the defendant a tract of land containing 160 acres for $750 for the year of 1907. The testimony tended to prove that about 122 acres of this land were in cultivation. On the part of the intervener the testimony tended to prove that the defendant sub-rented to him 45 acres of the land at $5.50 per acre, and that he had paid the full amount of the rent due from him, and that this had been paid to the plaintiff. The testimony tended further to prove that the corn and cotton

were raised by the intervener on the land rented by him, and that the defendant had no interest therein. The defendant had during the same year sub-rented other portions of the land to other parties, but had not raised or cultivated any crop on the land himself.

Upon the trial of the case the jury returned a verdict in favor of the intervener for the attached cotton and corn. They also rendered a verdict in favor of plaintiff and against defendant for the balance due on the note. The plaintiff has appealed from the judgment rendered upon the verdict in favor of the intervener.

Before any evidence was introduced the plaintiff requested the court to allow him to open and close the argument in the case, and again made this request after the introduction of all the testimony. The court refused this request, and ruled that the intervener was entitled to the opening and conclusion of the argument.

It is urged by counsel for plaintiff that the court erred in this ruling. Our statute provides that in the argument the party having the burden of proof shall have the opening and conclusion. Kirby's Digest, § 6196. It further provides that the burden of proof in the whole action lies on the party who would be defeated if no evidence was given on either side. Kirby's Digest, § 3107. Ordinarily, the plaintiff in an action has the burden of proof, and is therefore entitled to the opening and conclusion of the argument.

In the trial of an intervention in an attachment suit the intervener becomes in effect the plaintiff, and is entitled to the opening and conclusion of the argument when the burden of proof is upon him in the whole case. He asserts ownership of the attached property, and the *onus* is upon him to prove his title. *State* v. *Spikes,* 33 Ark. 801; *Stephens* v. *Oppenheimer,* 45 Ark. 492; *Excelsior Mfg. Co.* v. *Owens,* 58 Ark. 556.

But it is contended that the burden of proof in the matter of the intervention in this case was upon the plaintiff because he alleged a fraudulent combination between the intervener and defendant under which intervener was claiming the property; and he relies upon the case of *Mansur & Tebbetts Implement Co.* v. *Davis,* 61 Ark. 627, to sustain this contention. But we do not think that the pleadings or issues presented in that case

are similar to those made in this case. In the case relied on the plaintiff admitted the sale and delivery of possession of the attached property to the intervener, and to defeat that sale alleged that it was fraudulent. In that case, if no evidence had been introduced, the intervener necessarily would have recovered the property. In the case at bar the plaintiff denied that the defendant had sub-rented the land to the intervener, and in effect denied that intervener had raised the attached cotton and corn. He thereby denied that intervener had any title or interest in the property. It is true that he also alleged that there was a collusive and fraudulent arrangement between defendant and intervener to defeat plaintiff in the collection of his rent. But, if no evidence had been introduced under these pleadings, the intervener must necessarily have failed to recover. Thus in the case of *Railway Company* v. *Thomasson,* 59 Ark. 140, the railway company was sued for killing stock, and admitted the killing by its train and the value thereof. It was there held that the railway company was entitled to open and conclude the argument, because the plaintiff would have been entitled to a recovery in accordance with his pleading if no evidence had been introduced. But in the case of *Railway Company* v. *Taylor,* 57 Ark. 136, where a railway company was sued for the killing of stock, and admitted the killing thereof by its train, but denied the value of the animal, it was held that the plaintiff was still entitled to begin and reply because he was not entitled to a recovery in accordance with the prayer of his complaint if no evidence had been introduced. In the case at bar it was incumbent upon the intervener, under the pleadings, to prove that he had sub-rented the land from the defendant and had raised the attached cotton and corn before he was entitled to recover the property. And this *onus* of proof was on him in the whole case. He was therefore entitled to the opening and conclusion of the argument.

It is urged by the plaintiff that the intervener was not entitled to recover because he had not paid the full amount of the rent that was payable to plaintiff for the land sub-rented by him. It is contended that there were 122 acres of land in cultivation, which was rented from plaintiff by the principal tenant for $750, and this would have been at the rate of $6.15 per acre. That the intervener subrented from the principal ten-

ant 45 acres of the land at $5.50 per acre, and only paid that sum; and that therefore he did not pay to the landlord the proportionate amount of the principal rent which was due from him as a sub-tenant. But, if it shall be conceded that the intervener should have paid the amount of rent now claimed by the plaintiff, he is not entitled to insist upon this contention because he did not make it an issue in his pleading, and did not present the question in the lower court. He can not raise this issue for the first time upon his appeal to this court. He did not ask any instruction upon this issue, and can not complain that it was not submitted to the jury. It was not submitted by a request for a peremptory instruction. The object of requiring the parties to present all questions and issues to the lower court before they can be presented to this court is to have the lower court pass thereon, so that this court upon appeal may determine whether or not such ruling was erroneous. The purpose is also in furtherance of justice to require the party to first present the question he contends for in the lower court, so that the other party may not be taken by surprise. Had this question been suggested in the lower court or this issue there made, it may be that the intervener could have shown that $5.50 per acre for the land subrented by him was the *pro rata* amount of rent for which the land cultivated by him would have been liable to the plaintiff. However this may be, the plaintiff is not entitled to raise this question for the first time in this court. *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76; *Ward Furniture Mfg. Co.* v. *Isbell,* 81 Ark. 561; *Shinn* v. *Platt,* 82 Ark. 260; *Kansas City So. Ry. Co.* v. *Skinner,* 88 Ark. 189; *Price* v. *Greer,* 89 Ark. 308.

The judgment is affirmed.

EMERSON v. TURNER.

Opinion delivered June 6, 1910.

1. VENUE—CONVERSION OF TIMBER.—An action for the conversion of timber is not an action "for an injury to real property" within Kirby's Digest, § 6060, requiring such an action to be brought "in the county in which the subject of the action or some part thereof is situated." (Page 601.)
2. INSTRUCTIONS—APPLICABILITY TO EVIDENCE.—The giving of an abstract and misleading instruction will be ground for reversal. (Page 602.)

3. AGENCY—LIABILITY OF AGENT—DAMAGES.—Where plaintiff's agent was sued for converting or allowing to be converted the timber of the plaintiff, and there was evidence that defendant had knowledge that timber had been wrongfully cut from the plantiff's land and neglected to report same to the latter, it was error to instruct the jury that, if defendant knew of such cutting, they should find for plaintiff the value of the timber so cut and removed unless defendant notified plaintiff of said cutting and removal, in the absence of proof of any damage from defendant's neglect to inform plaintiff of the cutting. (Page 603.)

4. PLEADING—VARIANCE.—Under a complaint which alleged that defendant as plaintiff's agent had converted defendant's timber it is not admissible for plaintiff to recover damages for defendant's negligent failure to notify plaintiff that the timber had been converted by another. (Page 603.)

5. NEGLIGENCE—RECOVERY OF DAMAGES—EVIDENCE.—Under a complaint which alleged that it was the defendant's duty as agent to report depredations upon plaintiff's timber, that the conversion of certain timber was known to defendant and that he never reported same to plaintiff, plaintiff could not recover more than nominal damages without showing that he sustained actual damages from defendant's negligence. (Page 603.)

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

STATEMENT BY THE COURT.

The appellee alleges in his complaint that he owned certain lands in Columbia and Nevada counties, Arkansas, and had owned these lands for a number of years; that the appellant, R. L. Emerson, was the agent of the appellee to look after these lands, and, while he was acting as agent of the appellee, he cut or allowed to be cut, converted or allowed to be converted, 650,000 feet of pine timber growing on lands belonging to the appellee in Nevada County, and that on the 10th day of July, 1903, the appellant cut, converted and allowed to be converted, pine and oak timber amounting to 1,450,000 feet upon his lands lying in Columbia County, Arkansas, and asks judgment for the conversion of said timber in the sum of $4,587.50.

Appellant admitted that appellee "employed him to manage and control said lands for him the said plaintiff; that under said employment he took charge of said lands for the plaintiff, and has since said time had control of same and paid taxes thereon; he admits that plaintiff is still the owner of 160 acres of land in the county of Nevada and about 220 acres in the

county of Columbia." Appellant denies "that he converted to his own use the property of appellee." He further alleges: "that, under his contract of agency with the appellee, he was to manage and control said lands and was impowered to sell same, or any part thereof, or interest therein belonging to the said appellee in like manner as if he was the owner thereof, and to keep the taxes paid thereon; from time to time it was agreed that he report his actions in respect to said lands to the appellee. And further alleges a full compliance on his part with the contract with the appellee, and alleges that, during the time that he was employed as agent, he paid taxes on said lands to the amount of $43.42, during all of which time he was unable to hear from the appellee; that the appellee wholly failed to reimburse him for this amount; and further alleges that, during the time he was acting as agent and had full management and control of said lands, the said appellee sold nearly all the lands that he owned in Columbia and Nevada counties, receiving therefor the sum of $4,550, for which he never compensated the appellant for his services rendered in this respect, and alleges that ten per cent, or $450, would be a reasonable compensation therefor. He further alleges that in the year 1903, after he had made repeated efforts and was unable to locate the appellee, he as such agent sold to the Camden Lumber Company the pine and oak timber on 220 acres of land lying in Columbia County, Arkansas, receiving therefor about $250, which was the reasonable cash market value for said timber at that time. The appellant further pleads the statute of limitation as to all claims of the appellee. The suit was brought in Columbia County. The facts are as follows:

"In the year 1882, the appellee, W. D. Turner, purchased from the State of Arkansas, several hundred acres of land lying in the counties of Columbia and Nevada, Arkansas. Soon after he purchased these lands he employed the appellant, as his agent to look after the lands, see that the taxes were paid and to find a purchaser. Emerson testified that he was given full authority to sell the lands. Turner testified that he was to find purchasers and the price to be submitted to him before sale was made. He also testified that he gave him authority to sell the lands at $2.50 per acre. Emerson testified that he had full authority to sell the timber or the land, and Turner testified that he had no such authority. In the year 1891

Emerson discovered that Turner's title to these lands in controversy was defective, and went to work and cleared the title to same, and got a new deed, which was made to Turner. This title deed was left by Turner in the possession of Emerson, so that Emerson could exhibit same to purchasers and thereby make a sale of the land. This deed still remains in the possession of Emerson. In 1891 Turner, without the knowledge of Emerson, sold nearly all the lands that he owned in Columbia and Nevada counties, Arkansas, receiving therefor the sum of forty-five hundred dollars. No commissions were paid to Emerson on this sale. Turner claims that he reserved the right to make a sale himself. He also claims that he knew nothing about the value of the land, and was depending upon Emerson for his information as to the value of same. Emerson straightened the title to these lands and got the deed in 1895, and Turner settled the expenses of same in the year 1897. Turner testified that he wrote several letters to Emerson in regard to the lands in the year 1897, but received no reply. He had no further correspondence with Emerson in regard to the matter for ten years after 1897. Emerson testified that he wrote several times to Turner in 1897, 1898, but received no reply, and did not know anything about the whereabouts of Turner. He continued, however, to pay the taxes on this land for ten years after 1897. In 1903 Emerson sold the timber on a large body of land owned by himself to the Camden Lumber Company, and in this deed to the timber he included the timber on the lands owned by Turner in Columbia County, Arkansas. It appears from the evidence that pine timber had been cut from the lands owned by Turner in Nevada County, Arkansas. One witness testified that he came down to see Mr. Emerson in the year 1891 in regard to buying some land, and that, in this conversation he had with Emerson, Emerson told him that if any one cut the timber on these lands in Nevada County he would pay him for the information. This witness states that in that conversation he told Emerson that the timber had already been cut on these lands. Emerson denies that this man ever gave him any such information. This is the only evidence of any knowledge on Emerson's part that timber had been cut from the lands in Nevada County. There is no evidence to show Emerson au-

thorized any one, either directly or indirectly, to cut any of the timber on the lands in Nevada County."

As to the land in Nevada County the court instructed the jury at the request of appellee and over the objection of appellant as follows:

"2. The court instructs the jury that if they believe from the evidence R. L. Emerson was agent of W. D. Turner to manage his lands in Columbia and Nevada counties; that his duty as such agent was to pay taxes, find purchasers and report depredations on timber; and if you further find from the evidence that, while he was so acting as agent, the timber was cut from part of the lands in Nevada County, and removed away, and that he knew of the cutting and removal, then the said R. L. Emerson is liable for the value of the timber at the time same was cut and removed, and they will so find for plaintiff, unless they further believe from the evidence R. L. Emerson notified said Turner of the said cutting and removal."

Exceptions were duly saved. And the court refused the following prayer of appellant:

"2. The jury are instructed that as to the lands in Nevada County your verdict will be for the defendant."

It is unnecessary to set forth other instructions. As to what the rulings of the court should have been on other prayers will appear in the opinion.

From a judgment based on a verdict in favor of appellee for $993.86 this appeal has been duly prosecuted.

Powell & Taylor, and *C. W. McKay,* for appellant.

An action for damage to land must be brought in the county where the lands is situated. 33 Ark. 31. Before appellant could be held for conversion of the timber, he must have authorized the cutting of it. 11 Am. Rep. 28; 15 Ill. App. 532; 23 Ann. Rep. 184; 9 Wend. 167; 16 Johns. 74; 3 Taunt. 117; 11 Am. St. 407; 21 Wend. 610; 50 N. Y. 17. The action was barred by limitations. 10 Ark. 230; 46 Ark. 25; 58 Ark. 90; 52 Ark. 168; 81 Ark. 527; 58 Ark. 91; 25 Ark. 467.

Stevens & Stevens, for appellee.

WOOD, J., (after stating the facts). 1. The appellant contends that the Columbia Circuit Court had no jurisdiction of the subject-matter as to the timber cut from the land in Nevada

County upon the authority of section 6060 of Kirby's Digest and *Jacks* v. *Moore,* 33 Ark. 31. Section 6060 of Kirby's Digest provides: "Actions for the following causes must be brought in the county in which the subject of the action or some part thereof is situated.

* * * * * * * * * * *

"Subdiv. 4: For an injury to real property."

In *Jacks* v. *Moore, supra,* the complaint alleged "that the defendant entered upon the following land" (describing it) "and cut the timber growing thereon, and otherwise injured the same, to the damage of the plaintiff $200."

That was a suit for trespass upon the land and injury to it. But such is not the nature of this suit. It is simply a suit for the value of timber, which appellee alleged belonged to him, and which his agent, appellant, had converted to his own use. There is no allegation that the land itself was injured or damaged, or that appellant had trespassed thereon in order to convert the timber. The Columbia Circuit Court had jurisdiction, under the allegations of this complaint, to render judgment for the value of timber, if any, that was converted by appellant from the land in Nevada County.

2. The court erred in giving prayer number 2 of appellee and in refusing prayer number 2 of appellant. Prayer number 2 of appellee was abstract. There was no testimony tending to prove that appellant converted to his own use any of the timber of appellee on the land in Nevada County. No evidence that appellant entered upon these lands himself and cut the timber therefrom, nor that he authorized any one else to do so. There is no evidence that he sold the timber on these lands. There is no affirmative tortious act shown on the part of appellant, by which the timber on the land in Nevada County was lost to appellee. That would be necessary before appellant could be held liable as for conversion.

"Trover does not lie by a principal against his agent, unless he has converted the property of his principal to his own use or disposed of it contrary to his instructions. Trover does not lie for an omission of duty by the agent, though the property is lost by his negligence; nor does it lie where, though wanting in good faith, he has acted within the general scope of his powers."

McMorris v. *Simpson,* 21 Wend. 610, and other cases cited in appellant's brief.

However, since all forms of action have been abolished in this State, it would be wholly immaterial whether the loss of appellee's timber was caused by some tortious act committed by appellant, or by some duty on his part with reference thereto which he omitted or neglected to perform. In either case, upon proper allegations and proof of the facts set up, appellant would be liable. *Fordyce* v. *Nix,* 58 Ark. 136. But here appellee has set up affirmative and positive acts on the part of appellant constituting conversion, and he has failed to prove any of these acts. It is not charged in the complaint that the timber of appellee in Nevada County was lost to appellee by reason of the negligence of appellant in failing to notify appellee that such timber had been cut. It is not alleged that such notice would have been effectual in preventing the loss of the timber. Furthermore, even if such allegations had been made, or the complaint be treated as so amended, still there is no evidence in the record to warrant a finding that appellee lost the timber in Nevada County because appellant failed to notify him that such timber had been removed from the land. There is an allegation that it was the duty of appellant to report depredations upon the timber, and that the cutting and conversion of the timber aforesaid was known to the appellant, and that he never reported same to appellee. But this allegation, when proved, would only go to establish negligence on the part of the appellant. The presumption would be that the principal had suffered at least nominal damages from such negligence. But the burden would still be upon the appellee, the principal, to show that he sustained actual damages from such negligence, and the amount that it would require to compensate him for such damages, before he could recover for such. Tiffany on Agency, p. 398; 1 Clark & Skyles on Agency, 398.

The evidence entirely fails to establish that appellee sustained any actual damage by reason of appellant's negligence, if he was negligent, in failing to notify appellee of depredations upon his timber. Before appellee could recover for the value of the timber cut in Nevada County, it was incumbent upon him to prove that he lost the timber by reason of the failure of appellant to notify him of the cutting and removal of such tim-

ber. Suppose appellee had notice of the depredations upon his timber through some other source than appellant. Then the failure of appellant to give him notice could not have been the cause of any actual damage to appellee. To justify actual or compensatory damages, the loss sustained must be the direct and proximate result of the negligence alleged. Instruction number 4 given at appellant's request† has reference to a failure on the part of appellant to prevent a trespass upon the lands, and not to his failure to notify appellee after the trespass had been committed. It does not cover the same ground as instruction number 2, *supra,* given at request of appellee. The instruction under consideration allows appellee to recover of appellant "unless appellant notified appellee of said cutting and removal." The instruction was prejudicial. The error in giving it is not waived by appellant or cured by any other instruction. It follows also that the court erred in not giving appellant's prayer for instruction number 2.

3. The statute of limitations, under the evidence, did not bar appellee of any right he might have had to recover. There was no error in giving appellee's prayer number 3.*

4. As it is impossible for us to determine from the evidence here what amount of the verdict represents the timber from the lands in Nevada County, we are unable to eliminate the error of the ruling of the court upon the instructions indicated.

The cause therefore, for this error, must be reversed and remanded for new trial.

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†Instruction number 4, given at appellant's request, was as follows: "4. You are instructed that if you find from the evidence that the timber was cut on any of the lands described in plaintiff's complaint, and without the authority of Emerson, then you are instructed that plaintiff cannot recover for such timber so cut unless you further find from the evidence that it was Emerson's duty to look after said land and prevent trespasses upon the same and that he was negligent in the performance of his duty."

*Appellee's prayer number 3 was as follows: "3. The court instructs the jury that upon a plea of the statute of limitations filed herein they will find for the plaintiff."

WILSON WATER & ELECTRIC COMPANY v. ARKADELPHIA.

Opinion delivered June 20, 1910.

1. MUNICIPAL CORPORATIONS—REGULATION OF WATER COMPANY—METERS.—Under Kirby's Digest, § 5442, 5445-7, which give municipal corporations the power to provide a supply of water and to regulate same, to fix reasonable charges for water, and to require the water company to adopt such rates, an ordinance of a city of the second class, providing that if the water company should become dissatisfied with its flat rate it could, after installing a meter at its expense, require the consumer to pay at meter rates, is valid. (Page 611.)

2. SAME—WATER COMPANY—RIGHT TO CHARGE FOR METER.—Where there is nothing in the charter of a water company authorizing it, when it on its own motion puts in meters, to charge the cost of same to the consumer, it cannot charge such cost to the consumer under an ordinance which permits it, if dissatisfied with the flat rate, to install meters *at its own expense.* (Page 613.)

3. SAME—WATER COMPANY—COST OF METER.—Acts 1905, p. 700, providing that water companies in cities of the first and second class, if they furnish meters (and in cities of the first class such meters shall be furnished upon demand without extra charge) shall furnish tables showing the price charged for water, etc., does not prohibit a city of the second class from requiring a water company to furnish meters to its patrons at its expense. (Page 614.)

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

Suit for an injunction by the city of Arkadelphia and others against the Wilson Water & Electric Company.

STATEMENT BY THE COURT.

The appellees alleged in their complaint the following: "That appellant, the Wilson Water & Electric Company, was a domestic corporation, holding a charter from the city for supplying it and its inhabitants with water for all purposes; that plaintiffs have been for many years consumers of water furnished by the water company; that they have incurred large expense in putting in pipe lines and fixtures for conducting water from the mains of the water company to their premises, relying on the water company to furnish them water on a flat rate as fixed by the water company, or as might be fixed by the city; that many of the inhabitants of the city, including plaintiffs, have filled up their wells, relying upon the water company for their water supply, and many have done away with surface privies and

have equipped their premises with underground sewers, connected with the water company's water system, upon the contract with the water company that it would furnish water for flushing said sewers, etc.; that plaintiffs have regularly paid for all water furnished, and are ready to continue to pay for said water on a flat rate basis; but the water company, in disregard of its duties and obligations, threatens to cut off the water supply of the city and its inhabitants and these plaintiffs, to their irreparable loss and damage; that it has already cut off the water supply of some of the plaintiffs, and now has its employees going over the premises of plaintiffs, and other customers, cutting off their water supply; that many of the plaintiffs have no other means for obtaining water for any purpose; that plaintiffs have no other adequate remedy.

The prayer of the complaint was that the water company be restrained from cutting off the said water supply, and that it be required to turn on the water supply to those whose water has been cut off, etc.

The answer is as follows: It denies that, in disregard of its duties and obligations under its franchise, it threatens or has threatened, to cut off the water supply of the city, etc., and of the plaintiffs herein.

It states that the defendant heretofore adopted rules and regulations governing the use of water by its patrons, etc., which rules were printed and distributed among its patrons, etc.; that in the said printed rules and regulations, under the head "Meter Rate for Water," the following rule appears: "Meters will be put in whenever deemed proper by the company." Section thirteen of defendant's franchise is as follows: "The maximum rate to be charged by the grantee for water shall be as follows: When the quantity used averages from one hundred to one thousand gallons per day, thirty cents per thousand gallons; when the quantity used averages over one thousand gallons, twenty-five cents per thousand gallons. Flat rates shall be based upon the above consumption; provided, however, that in no case shall the rate for private residence occupied by one family, one connection without hose bib, water for domestic purposes only, exceed $2.25 per quarter; and provided further that if the flat rate in any case should exceed the rate established by the water company, as evidenced by its book of rules, * * * the con-

sumer may demand metered service according to the rules and regulations of the grantee, but in no case shall measured water be furnished at a less rate than $2.25 per quarter for each taker so furnished."

The city council of the city on the 1st of March, 1909, passed and published the following ordinance, towit:

"Section 1. That the maximum rate to be charged by the water company, its successors and assigns, for measured water shall be as follows: When the quantity used averages from one gallon to one thousand gallons per day, thirty cents per thousand gallons; when the quantity used averages over one thousand gallons per day, twenty-five cents per thousand gallons; but in no case shall measured water be furnished at a less rate than seventy-five cents per month. Flat rates shall be based upon the above consumption, provided however that in no case shall the flat rate for private residence, occupied by one family, one connection without hose bib, water for domestic purposes only, exceed seventy-five cents per month; and provided further that, if any consumer or taker shall be or become dissatisfied with the flat rates at which water is being supplied him, he may, after installing and connecting a meter of some standard make on his premises, demand measured water, or metered service, according to the prices hereinabove fixed for measured water; and provided further that, in case the water company shall become dissatisfied with the flat rate paid for water by any consumer, it may require the said consumer to install a meter of some standard make and charge for measured water the prices above fixed. In event said meter so installed gets out of repair, or fails to register, the consumer shall be charged at the average daily consumption as shown by the meter when in order, until same can be repaired or replaced. The minimum rate for measured water will be seventy-five cents per month.

"Sec. 2. And the water company, its successors and assigns, are hereby required to accept and adopt the above rates."

In pursuance of this ordinance, the defendant, about the 1st of September, 1909, gave notice by publication that all customers and consumers of water furnished by defendant would be required to furnish, pay for and install water meters, to measure the water used by them, on or after the 1st day of November, 1909.

Defendant, in order to facilitate the enforcement of its rules and the above ordinance, divided its consumers into classes as follows, towit: Class A. All parties who own their residence property and pay more than seventy-five cents per month for water. Class B. All persons who rent residence property and pay more than seventy-five cents per month for water. Class C. All business houses and firms who pay more than seventy-five cents per month for water. Class D. All other consumers of water.

All the plaintiffs, except the city, belong to class A customers.

In addition to the printed notice above referred to, the defendant gave to each of the plaintiffs, except the city, written notice, notifying them, that they would be required to pay for and install at their expense, meters on their respective premises on or before the 1st day of November, 1909, which notice was sent to them by United States mail, properly addressed to each of them, more than thirty days before the 1st of November, 1909.

Plaintiffs failed to put in said meters, not because they were not given sufficient time to do so, but because they were disposed to question the right of defendant to require them to install meters at their own expense; and defendant proceeded to cut off their water supply because they failed to comply with the reasonable rules and regulations of the defendant, as above stated. Defendant states that it was compelled, for its own protection, to require said meters to be installed, as it had discovered that large quantities of water had been wasted, and were being wasted, without any regard to the rights of the company; that it was costing defendant a large sum of money for fuel and other purposes to furnish water for its customers. That without the installation of meters the defendant had no means of stopping the needless waste of water by its customers.

The decree recites: "That the court, having heard the testimony and being advised, finds: That the city is a municipal corporation of the second class; that all other plaintiffs are citizens of said city, and are patrons of defendant water company; that on the 15th of August, 1904, the city granted to the water company a charter authorizing it for a term of thirty years to supply water to the said city and its inhabitants, upon the terms and conditions there named. That section thirteen of said charter is as follows: 'The maximum rate to be charged by the grantee

for water shall be as follows: When the quantity used averages one hundred to one thousand gallons per day, thirty cents per thousand gallons; when the quantity used averages over one thousand gallons per day, twenty-five cents per thousand gallons. Flat rates shall be based upon the above consumption; provided however, that in no case shall the rate for private residence, occupied by one family, one connection without hose bib, water for domestic purposes only, exceed $2.25 per quarter; and provided further that if the flat rate in any case should exceed the rate established by the water company as evidenced by its book of rules * * * adopted in 1897, * * * the consumer may demand metered service according to rules and regulations of the grantee; but in no case shall measured water be furnished at a less rate than $2.25 per quarter for each taker so furnished.'

"That the printed rules and regulations * * * referred to in section thirteen, copied as above, were filed and copied with the said charter. That on the ..... day of October, 1909, * * * the water company published in *The Siftings-Herald,* a newspaper regularly published in said city, the following notice to the patrons of the water company to require them to install water meters at their own expense towit: 'All water users are hereby notified that they will be required to put in water meters on or before the 1st day of November, 1909, according to the rules of the company. The consumer to pay for the meter and to pay for keeping same in repair. All who desire to continue the service on a flat rate may do so by paying double the price paid now. The city will be the only exception to this rule. This action on the part of the company is made necessary by the condition that the receipts will not pay expenses and a reasonable return on the investment, due largely to the wanton waste of water, which we have been unable to control. The approximate cost of installing a meter of any standard make, complete with meter box for residence use, will be about $16.50.'

"On the 6th of September, 1909, the city passed and published an ordinance, as follows:

"'AN ORDINANCE.

"'Be it ordained by the City Council of the city of Arkadelphia, Arkansas.

"'Section 1. That section one of an ordinance entitled, 'An ordinance to fix and regulate the price and rates to be

charged for furnishing water * * * in the city by the water company,' * * * which was passed March 1, 1909, be amended so as to read as follows:

"'Section 1. The maximum rate to be charged by the water company, * * * for measured water shall be as follows: When the quantity used averages from one gallon to one thousand gallons per day, thirty cents per thousand gallons; when the quantity used averages above one thousand gallons per day, twenty cents per thousand gallons; but in no case shall measured water be furnished at a less rate than seventy-five cents per month, for each taker so furnished. Flat rates shall be based upon the above consumption, provided, however, that in no case shall the flat rate for private residence occupied by one family, one connection, without hose bib, water for domestic purposes only, exceed seventy-five cents per month. And provided that if any customer shall become dissatisfied with the flat rate at which water is being supplied him, he may, after installing a meter of some standard make on his premises, demand measured water, meter service, according to the prices as hereinabove fixed for measured water. And provided further, that, in case the water company shall become dissatisfied with the flat rate paid for water by any customer, it (the water company) may, after installing and connecting a meter of some standard make, at its (the water company's) expense, on the consumer's premises, require the consumer to pay for measured water at the rates above fixed for measured water. * * *

"The plaintiffs, other than the city, prior to the 1st of November, 1909, received and had notice that the water company would require its patrons to install meters on their respective premises, at their own expense, and, failing to do so, their water supply would be cut off. That said plaintiffs refused to comply with that rule, or request, because of their contention that the water company should install the said meters at its own expense. That on the 1st of November, 1909, the water company proceeded to cut off the water supply of plaintiffs because of their refusal to install meters at their expense.

"The court finds that the said ordinance is valid, and that the above cited rule adopted by the water company, requiring its patrons to put in meters at the consumer's expense, is in conflict with said ordinance, and is therefore unreasonable and

void; that the water company has the right, if desired, to install meters at its expense."

Upon these findings the court rendered the following decree:

"That the relief prayed in plaintiff's complaint is hereby granted, and the defendant, etc., do absolutely desist and refrain from shutting off the water supply, obstructing or interfering with the water supply of plaintiffs. And the defendant is hereby required to continue to supply water to plaintiffs upon the terms and at the rates provided by said ordinance of the said city upon the payment to the defendant of the rates fixed by the said ordinance, or upon tender to the defendant of the said amount, or in the event the defendant shall at its own expense furnish a meter, to the service pipes of the plaintiffs or any of them, and supply measured water, then the defendant is required to continue to furnish and supply said plaintiffs water at the meter rate, as fixed by said ordinance, upon payment by plaintiffs of the amounts authorized to be collected."

The appellant has duly prosecuted this appeal.

Hardage & Wilson and *John H. Crawford,* for appellants.

The court should have specified some amount in which bond should be given before the injunction order was made. Kirby's Dig. § 3975; 108 La. 204; 61 L. R. A. 781. In the absence of a bond the order is void. 42 Kan. 739; 22 Pac. 735; 45 Kan. 523; 24 Pac. 960; 82 Cal. 167; 22 Pac. 1086; 75 Tex. 180; 12 S. W. 180; Kirby's Dig. § § 3975, 3977, 3979, 3981; 114 N. C. 474; 19 S. E. 367; Const. § 20, art. 7; 12 Ark. 657; 87 Ark. 45. The water company may require the consumer to provide a meter at his own expense. 199 Mass. 118; 18 L. R. A. (N. S.) 746; 116 Wis. 606; 61 L. R. A. 33; 25 Ch. Div. 443.

McMillan & McMillan, for appellee.

The expense of the meter cannot be imposed on the consumer. 45 N. J. L. 246. The company cannot make arbitrary charges with the penalty of forfeiture of the right to use the water. 2 Stew. Eq. 77; 1 Allen 361; 104 Mass. 95; 2 Dutcher 298. The ordinance was valid. 34 Ark. 603; 70 Ark. 221. The injunction order was properly issued. 104 Ala. 315; 16 So. 123; 49 Neb. 579; 68 N. W. 945. The meter is for the benefit of the company. 82 Cal. 286; 6 L. R. A. 756; 52 Mo. App. 312.

WOOD, J., (after stating the facts). The decree was correct. Sections 5442, 5445, 5446 and 5447 of Kirby's Digest, inclusive, give to municipal corporations the power to provide "a supply of water" and "to regulate same," and authorize the city council "to determine whether the prices charged for water are reasonable," and "to fix such prices to be paid for water as they may deem to be a reasonable charge," and require the water company "to adopt such rates to be charged for water as shall be fixed by the city council." Under these provisions of our statute the ordinance of the city council of Arkadelphia, passed September 6, 1909, was valid. That was an ordinance "to fix and regulate the price and rates to be charged for furnishing water in the city by the water company." The provision permitting the water company, in case it became dissatisfied with the flat rate, to install a meter at its expense and to require the consumer to pay at the rates fixed for measured water was but a means of regulating the distribution and "supply of water" and of fixing the price that should be paid for same. In *Red Star Steamship Company* v. *Jersey City,* 45 N. J. Law (16 Vroom) 246, it is said:

"A meter is a contrivance to regulate the distribution of water by adjusting the quantity and price. It is therefore within the province of the city board's duties to enable them to fix their rates with exactness, instead of by uncertain estimate, and to deal justly with the consumers. The idea advanced on the argument in behalf of the city was that the meter was for the advantage of the consumers, to protect themselves against the overcharge of the commissioners, and from excessive estimates of the quantity of water used. The only duty of the consumer spoken of in the charter is the payment of rent for the use of the water, and there is nowhere an intimation that the city may, without his consent, supply fixtures for the distribution or use of water and charge him with the cost. Section 87 of the act of 1871, under which the right to make this charge is claimed, enables the board of public works to make by-laws, rules and regulations for the security and proper management of the waterworks and drainage, for the introduction of water into the houses and to regulate the use thereof, as may seem to them necessary and proper; but it is not said that by such by-laws, rules and regulations they may, on their own motion, procure

expensive devices for regulating the supply of water and impose the cost on the consumer."

There is nothing in appellant's charter authorizing it, when it puts in meters, to charge the consumer for the cost of such meter. There is a provision in the charter that, if the flat rate should exceed the rate established by the company's rules, "the consumer may demand metered service according to the rules and regulations of the grantee" (water company). But this provision of the charter is for the benefit of the consumer, and is only to be invoked by him. The charter refers to the "rules and regulations of the grantee." But there is nothing in these "rules and regulations" that gives the water company the right to charge the consumer with the cost of meters. The rule that "meters will be put in whenever deemed proper by the company" does not authorize the appellant to charge the consumer with the cost of the meter when it is "put in." The ordinance of the city council of March, 1909, § 1, provided * * * "that, in case the water company shall become dissatisfied with the flat rate paid for water by any consumer, it may require the said consumer to install a meter of some standard make," etc. This probably did authorize the company to have the consumer install a meter at his own expense. But this section of the ordinance was expressly amended by the ordinance of September 6, 1909, allowing the water company, if it became dissatisfied with the flat rate paid for water by any customer, to install a meter *at its own expense.* So in the case under consideration there is a valid ordinance passed by the city council under authority of statutory provisions permitting the appellant, on becoming dissatisfied with the flat rate paid by the consumers of water, to install and connect a meter *at its own expense,* and to require the consumer thereafter to pay "for measured water." The appellant is therefore not warranted in demanding that the consumers of water shall put in meters at their own expense. The case before us does not call for a discussion of what is, or should be, the rule in cases where the city council, having the authority to do so, has passed an ordinance requiring the consumers of water generally, or a certain class of consumers, to pay for installing meters. Such are the cases of *Shaw Stocking Co.* v. *Lowell,* 18 L. R. A. (N. S.) 746; *State* v. *Gosnell,* 61 L. R. A. 33. These cases, however, are authority for the position that where a city council

is authorized to pass an ordinance requiring the consumer to furnish meters, and the council makes such a regulation, it will be enforced. The same rule is necessarily applicable where the city council is authorized, as in the case at bar, to pass and does pass an ordinance permitting the water company, where it is dissatisfied with the flat rate, to put in meters at its own expense. The ordinance in the latter case will be enforced upon the same principle as the former. Nor is the case at bar one in which the city council, although having authority, has not passed any ordinance upon the subject. Here the city council, having authority, has spoken, and has said that the appellant, if it becomes dissatisfied with the flat rate being paid by its consumers, may put in meters at its own expense. This necessarily excludes the idea that appellant may put in meters at the expense of appellees.

In addition to the authorities above cited, see in note to *State* v. *Gosnell, supra,* 61 L. R. A. at page 112, "Meters."

Act 282, Acts of 1905, p. 700, provides: "That all persons, partnerships or corporations, owning or operating any company or enterprise for the furnishing of water * * * to the general public, in cities of the first and second class, * * * in case they furnish meters to their patrons for the purpose of measuring such water * * * (and in cities of the first class such meters shall be furnished upon demand without charge), are hereby required to supply printed tables to their patrons semi-annually, on the 1st day of January and July of each year, which said tables shall show the price charged per thousand units for such water."

There is nothing in the above statute prohibiting city councils in cities of the second class from passing an ordinance requiring water companies to furnish meters to their patrons at the expense of the companies, nor is there anything in the statute prohibiting cities of the second class from passing an ordinance requiring the patrons of water companies who demanded meters to pay for same. The law in this respect as to cities of the second class has not been changed by the passage of the above act. The council has precisely the same power in these cities with reference to "meters" as it had before.

Having reached the conclusion that the judgment of the chancery court granting the injunction is correct, the questions incident to the regularity of the proceeding for temporary restraining order necessarily pass out. The decree is affirmed.

DODSON v. BUTLER.

Opinion delivered July 11, 1910.

APPEARANCE—FORM OF PROCEEDING—WAIVER.—Where the parties to a summary proceeding appeared at the trial by their attorneys, and the issues of fact were without objection submitted to a court having jurisdiction, the objection as to the form of the proceeding will be treated as waived.

Appeal from Ashley Circuit Court; *J. M. Wells,* Judge; affirmed.

Greaves & Martin, for appellant.

The motion for restitution should have been denied. 77 Ark. 234; 13 Ark. 234; 132 N. Y. 363; 10 Wend. 355; 24 Wend. 32; 3 Denio 130; 1 Sand. 209; 29 Barb. 87; 29 Hun 18; 110 N. Y. 616; 95 Pa. St. 333; 7 J. J. Marsh. 241; 84 N. C. 215; 80 N. C. 26; 90 N. Y. 199; 6 Ill. 435; 17 Am. Dec. 99; 9 T. B. Mon. 79; 7 N. H. 485; 28 Am. Dec. 363; 139 U. S. 276.

Turner Butler, E. O. Mahoney, and *G. W. Norman,* for appellees.

The motion for restitution was properly granted. 78 Ark. 574; 60 Neb. 205; 82 N. W. 622; 77 Ark. 238; 13 Serg. & R. 41; 10 *Id.* 103; 2 Ves. Jr. 572; 4 Biss. 126; 6 Paige 418; 60 N. Y. S. 404; 28 Abb. N. C. 155; 65 Ark. 556.

HART, J. This is the second appeal in this case. For a detailed statement of the facts upon which the opinion in the former appeal was based, reference is made to the case of *Butler* v. *Dodson,* 76 Ark. 569.

A recapitulation of the facts is as follows: T. M. Dodson and C. W. Dodson brought an action for debt in the Ashley Circuit Court against Joseph Meehan, and also sued out a writ of attachment, which was levied upon certain personal property belonging to him.

Mrs. Malinda M. Plair intervened, claiming the property attached by virtue of a mortgage executed in her favor by Joseph Meehan. During the progress of the suit, Joseph Meehan died. His death was suggested and admitted; and Turner Butler was appointed administrator of his estate. He filed an answer to the complaint, controverting the grounds of the attachment.

Upon final hearing, the attachment was dissolved. The court rendered judgment in favor of the Dodsons against the estate of Joseph Meehan, deceased, for the sum of $1,840, and in favor of Malinda Plair against the estate of Meehan for $940; and adjudged that the money in the hands of the sheriff arising from the sale of the attached property be divided between the Dodsons and Malinda Plair in proportion to the amounts for which they recovered judgment. No appeal was taken from the order dissolving the attachment.

In disposing of the case, the court said: "After consideration of the matter, we are of the opinion that the judgment in favor of plaintiffs for $1,840 should be affirmed; that in other respects the judgment should be reversed, and the cause remanded for further proceedings to determine the amount due on the mortgage of Mrs. Plair; that, upon such amount being ascertained, the money in the hands of the court be applied to the payment of the same; and that the balance of the money, if any, be turned over to the administrator or legal representatives of Joseph Meehan, deceased."

Upon the remand of the case to the circuit court, a judgment was rendered which it is not necessary here to set out, for the reason that it was set aside on the application of the Dodsons as having been procured by fraud. Subsequently, at the January term, 1910, of the Ashley Circuit Court, the following judgment was rendered in said cause:

"T. M. and C. W. Dodson, plaintiffs, *v.* Turner Butler as administrator of the estate of Jos. Meehan, defendant; Malinda Plair, intervener.

"Now on this day come the plaintiffs by their attorneys, Greaves & Martin, and the defendant, Turner Butler, as administrator of the estate of Jos. Meehan, comes in person and by his attorneys, Norman & Norman and E. O. Mahoney, Esq., and the intervener, Malinda Plair, by George & Butler, Norman & Norman and E. O. Mahoney, Esq., her attorneys. And the court submits to the jury, upon the directions of the Supreme Court of Arkansas, the question of the amount due from the estate of Jos. Meehan to the intervener, Malinda Plair, upon the mortgage of said intervener; and also directs the jury to ascertain what sum, if any, was paid to the plaintiffs, T. M. Dodson & Son, by order of the court out of the fund arising from the sale of the property attached in this action. And the jury,

after hearing the evidence, returned into court the following verdict, towit:

"'We the jury, find for the intervener, Malinda Plair, and find that the amount due her secured by the mortgage in this case is $2,591.32, with interest from the 18th day of January, 1910, at 6 per cent. per annum until paid. We further find the sum of $1,232.75 was paid to T. M. Dodson & Son by order of the court out of said fund of $1,660, arising from said attached property. F. S. Cannon, Foreman."

"And thereupon the court proceeded to hear the motion of the defendant and intervener to require the defendant, Dodson, to pay the money into court; and, after hearing the evidence of witnesses and the argument of counsel, the court doth order and adjudge that the plaintiffs, T. M. Dodson and C. W. Dodson, shall, within thirty days from this date, pay into court the said sum of $1,232.75, to be distributed, after being so paid into court, according to the further order thereof to be made herein; and that the intervener, Malinda Plair, have and recover of and from the defendant, Turner Butler, administrator of Jos. Meehan's estate, judgment for the sum of $2,195.82, with 6 per cent. interest thereon from the 18th day of January, 1910, until paid."

To reverse that judgment T. M. and C. W. Dodson have appealed to this court.

The judgment recites that the respective parties were present at the trial by their attorneys. This constituted an appearance of the parties. The judgment also recites that the case was heard upon evidence, and that the issue of the amount arising from the attached property that was paid to T. M. Dodson & Son by order of the court was submitted to a jury for its determination. T. M. and C. W. Dodson having appeared to the suit, and the issues of fact involved therein having been without objection submitted to the jury for their determination upon the evidence adduced at the trial, it becomes immaterial for us to decide whether the action should have been brought by an independent suit as contended by the appellants; or whether a summary proceeding for restitution, as claimed by appellees, was sufficient. *Hawkins* v. *Taylor,* 56 Ark. 45.

The question of whether the judgment can be enforced by contempt proceedings is not presented by the record; and we do not decide that point.

The judgment will be affirmed.

GLADISH v. LOVEWELL.

Opinion delivered July 11, 1910.

1. EQUITY—JURISDICTION OF COURTS OF CHANCERY.—While the Legislature was vested by Const. 1874, art. 7, § 15, with power to create courts of chancery and to vest such courts with jurisdiction "in matters of equity," it has no authority to enlarge their jurisdiction when created. (Page 620.)
2. SAME—JURISDICTION TO OUST OFFICER.—Equity has no jurisdiction to oust the incumbent of a public office whose title thereto has been forfeited for any cause. (Page 621.)
3. SAME—ENLARGEMENT OF JURISDICTION.—Kirby's Digest, § § 7199, 7201, authorizing a taxpayer to bring suit in chancery against an officer who has corruptly deprived the State or any county of its just revenues and providing that if the officer shall be found to have defrauded the State or any county he shall be ousted from office, is unconstitutional in so far as it confers jurisdiction on the chancery court. (Page 621.)
4. SAME—SUIT FOR ACCOUNTING BY TAX COLLECTOR.—A suit by a taxpayer against a tax collector to compel the latter to account for taxes collected by him will not lie in equity, in the absence of an allegation of refusal of the proper officers to sue. (Page 621.)

Appeal from Mississippi Chancery Court, Osceola District; *Edward D. Robertson,* Chancellor; affirmed.

W. J. Driver and *J. T. Coston,* for appellant.

The statute of limitation does not run against the State. 13 Wall. 99; 98 U. S. 489; 16 Tex. 305; 21 Tex. 753; 27 Tex. 32; 14 S. W. 251; 124 S. W. 389; 94 S. W. 1014; 79 N. E. 580; 96 Pac. 673; 52 S. W. 516; 33 S. E. 328; 2 Ill. 106; 37 Ala. 495; 34 Ia. 85; 90 Ind. 359; 12 La. Ann. 645; 26 *Id.* 243; Kirby's Dig. § 7039; *Id.* 7040. The complaint stated a cause of action. 24 Ark. 147; 58 Ark. 599; 15 Pac. 295; 55 Pac. 579; 53 N. E. 1049; 14 S. W. 668; 46 S. W. 625; 67 S. W. 693; 63 Ark. 568. If the statute of limitation runs at all against the right of the taxpayer to maintain this suit, it does not begin until two years have elapsed since the filing of the collector's settlements. Kirby's Dig. § 7174; 16 Ark. 480; 49 Ark. 317; 30 Ark. 604; 21 Ark. 99; 160 Fed. 611; 116 N. W. 82; 61 N. W. 1096; 103 Ill. App. 333.

W. J. Lamb, for appellee.

The statute of limitation does run against a county. 65 Pac. 710; 56 Pac. 254; 39 Ark. 262; 54 Ark. 168; 41 Ark. 45;

58 Ark. 151; 37 Ala. 495; 56 Tex. 520; 62 Tex. 16; 22 Mo. 525; 56 O. St. 165; 58 Ala. 569; 62 S. W. 557; 63 S. W. 155; 52 Kan. 622. The right to prosecute this action is barred. 46 Ark. 35; 35 Ark. 555; 33 S. W. 80.

HART, J. This appeal is prosecuted from a decree of the Mississippi Chancery Court for the Osceola District, sustaining a demurrer to, and dismissing, the complaint of the plaintiff, S. L. Gladish, a taxpayer of said county, in a suit filed by him on the 11th day of September, 1909, against John A. Lovewell as collector of said county and the sureties on his bond.

The complaint alleges, in substance, the following: That, at the general election held in 1902, John A. Lovewell was elected sheriff of Mississippi County, Arkansas; that he duly qualified and served as such sheriff for the term for which he was elected; that in 1904 said John A. Lovewell was again elected and served as such sheriff for the term for which he was elected; that, during the entire period of time he served as such sheriff by virtue of his office, he qualified and acted as collector of taxes for said county; that said John A. Lovewell, while acting and serving as such collector, collected certain taxes, for which he corruptly failed to account in his settlements with the county court of said Mississippi County.

The prayer of the complaint is that a master be appointed to take proof and report the amount of his shortage; that plaintiff be granted a decree therefor, and for general relief.

Counsel for the plaintiff states that the action was brought under section 7199 of Kirby's Digest. It reads as follows:

"If any taxpayer in any county in this State shall have knowledge of such corruption in office, whereby the State of Arkansas, or any county therein, has been deprived of its just revenues, he shall have the right, in his own name, as a taxpayer, to institute legal proceedings against such officer by a petition to the circuit judge sitting in chancery, setting forth the facts and nature of such corrupt acts, together with exhibits and proofs, and the same shall be verified by affidavit of the petitioner, and, upon ten days' notice to the defendant, the cause shall proceed as other causes, but shall be heard, tried and determined at the first court after the same shall have been filed; provided the required notice shall have been given."

The two succeeding sections bearing on the question are as follows:

"Sec. 7200. The proceedings authorized by this act shall be summary; but, if it shall appear to the court that the ends of justice require it, a continuance may be granted to either party to the next term of the court, but not thereafter; and the party to whom the continuance is granted shall be required to enter into additional bond, the amount to be fixed and the security to be approved by the court."

"Sec. 7201. Upon such trial, if it shall appear that the official acts of such officer are corrupt and fraudulent, and by such acts and doings he shall have defrauded the State of Arkansas, or any county therein, of its just revenues, a decree shall be entered against him, ousting him of his said office, and declaring the same to be vacant, and for all moneys which he may have unlawfully detained; but if, upon the hearing of the said cause, it shall appear that the defendant is not guilty, and has not committed the fraudulent acts complained of, and that the State and county have not been deprived of their revenues as complained of by the petitioner, a decree shall be entered according to the facts, and also a decree shall be entered against the petitioner and his securities for any sums of money which the defendant may have actually lost by reason of said proceeding." (Act of March 18, 1897.)

We are of the opinion that the chancery court had no jurisdiction. The statute provides that the suit shall be brought at the instance of a taxpayer, and that the proceedings shall be summary. The primary object of the suit under the statute is to oust the collector from office, if it shall appear that the official acts complained of are fraudulent; and the decree for the moneys which he may have unlawfully detained is a mere incident to the main suit.

"Until the General Assembly shall deem it expedient to establish courts of chancery, the circuit courts shall have jurisdiction in matters of equity, subject to appeal to the Supreme Court, in such manner as may be prescribed by law." Constitution of 1874, art. 7, § 15.

In construing a similar provision of the Constitution of 1836, this court held that it meant such jurisdiction as a court of

chancery could properly exercise at the time of the adoption of the Constitution. *Hempstead* v. *Watkins,* 6 Ark. 317.

Hence it follows, as held in the case of *Hester* v. *Bourland,* 80 Ark. 145, that, while the Legislature is vested with power to create courts of chancery, and to vest such chancery courts with jurisdiction "in matters of equity," it has no power to enlarge their jurisdiction when created.

Equity has no inherent power to oust an incumbent whose title to the office has been forfeited by misconduct or other cause. Quo warranto is the proper remedy in such cases unless the Legislature by express enactment or by necessary implication has placed the jurisdiction elsewhere. Mechem on Public Officers and Offices, § 478, and cases cited.

In this State the Legislature could not confer such jurisdiction upon the chancery courts for the reason that equity had no such jurisdiction when our present Constitution was adopted. *Hester* v. *Bourland, supra;* 5 Pomeroy's Equity Jurisprudence, § § 333, 337.

The reason for the rule is that such cases involve political rights, with which equity has nothing to do.

The statute in question conferred the jurisdiction upon the circuit judge, sitting in chancery. That is to say, it conferred the jurisdiction in such cases upon the circuit court when it exercised chancery jurisdiction.

Having determined that there was no jurisdiction in equity at the time of the adoption of our present Constitution to oust an incumbent from office and that being the source of jurisdiction in the present case, the action of the court in sustaining the demurrer was right.

It is conceded that this suit was brought under section 7199 of Kirby's Digest; and the general jurisdiction of courts of equity can not be invoked because there is no allegation in the bill of the refusal of the officers, whose duty it is to bring suits like this, to act in the matter. *Griffin* v. *Rhoton,* 85 Ark. 89.

The decree will therefore be affirmed.

APPENDIX

I.

OPINIONS NOT REPORTED.

Forrester *v.* Linebaugh; appeal from Randolph Circuit Court; John W. Meeks, Judge; reversed May 16, 1910; *per* Battle, J.

Robinson *v.* Taliaferro; appeal from Lincoln Chancery Court; John M. Elliott, Chancellor; cause stricken from docket; *per* Battle, J.

Stephens *v.* Hovey; appeal from Clay Chancery Court, Western District; Edward D. Robertson, Chancellor; affirmed May 23, 1910; *per* Battle, J.

Moore *v.* Ouachita Valley Bank; appeal from Ouachita Chancery Court; E. O. Mahoney, Chancellor; affirmed May 23, 1910; *per* Battle, J.

Sisk *v.* Bluff City Bank; appeal from Independence Circuit Court; Charles Coffin, Judge; appeal dismissed May 30, 1910; *per* Wood, J.

Doniphan Lumber Co. *v.* Fix; appeal from Cleburne Circuit Court; Brice B. Hudgins, Judge; reversed May 30, 1910; *per* Woods, J.

Brown *v.* State; appeal from Columbia Circuit Court; George W. Hays, Judge; affirmed June 6, 1910; *per* Wood, J.

Strickland *v.* Strickland; appeal from Faulkner Chancery Court; Jeremiah G. Wallace, Chancellor; reversed June 6, 1910; *per* Hart, J.

Coley *v.* Martin; appeal from Crittenden Chancery Court; Edward D. Robertson, Judge; affirmed June 13, 1910; *per* Wood, J.

St. Louis & S. F. Rd. Co. *v.* McEvers; appeal from Crawford Circuit Court; Jeptha H. Evans, Judge; affirmed June 20, 1910; *per* McCulloch, J.

Tucker *v.* Ross-Attley Lbr. Co.; appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor; affirmed June 20, 1910; *per* Battle, J.

Cotton *v.* Steel; petition for mandamus to Little River Circuit Court; James S. Steel, Judge; petition dismissed June 27, 1910; *per* Battle, J.

Stewart & Alexander Lumber Co. *v.* Worley; appeal from Grant Chancery Court; Alphonso Curl, Chancellor; affirmed July 11, 1910; *per* Battle J.

Winn *v.* Scraper; appeal from Washington Circuit Court; J. S. Maples, Judge; affirmed July 11, 1910; *per* Wood, J.

II.

CASES DISPOSED OF ON MOTION.

The State of Arkansas *v.* The Home Accident Insurance Company; Dallas Chancery Court; J. M. Barker, Chancellor; appeal dismissed because no final judgment was rendered by the lower court, May 2, 1910; *per curiam.*

Nashville Lumber Company *v.* W. P. Feazel; Howard Chancery Court; James D. Shaver, Chancellor; appeal dismissed by consent, May 9, 1910; *per curiam.*

J. A. Butler *v.* Don B. Hoops *et al.;* Logan Chancery Court; J. Virgil Bourland, Chancellor; appeal dismissed for non-compliance with Rule IX, May 23, 1910; *per curiam.*

Union Sawmill Company *v.* J. W. Burnside; Union Circuit Court; George W. Hays, Judge; appeal dismissed for non-compliance with Rule IX, June 6, 1910; *per curiam.*

E. B. Mitchell *v.* A. W. Shirey; Independence Circuit Court; Charles Coffin, Judge; appeal dismissed for non-compliance with Rule IX, June 6, 1910; *per curiam.*

Ozark Insurance Company *v.* S. D. Johnston; Lee Circuit Court; Hance N. Hutton, Judge; settled and appeal dismissed on appellants' motion, June 6, 1910; *per curiam.*

A. W. Shirey *v.* W. P. Smith *et al.;* Lawrence Circuit Court, Eastern District; Charles Coffin, Judge; dropped from the docket on account of the death of the appellant, no application having been made to revive, June 13, 1910; *per curiam.*

Hampton Stave Company *v.* B. R. Walker, Administrator; Bradley Circuit Court; George W. Hays, Judge; affirmed under Rule VII, June 20, 1910; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* T. J. Batsel; Monroe Circuit Court; Eugene Lankford, Judge; reversed on confession of error, June 20, 1910; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Mrs. Mamie Gowdy, Administratrix; Saline Circuit Court; W. H. Evans, Judge; affirmed by consent for amount remaining after entry of remittitur by appellee, July 11, 1910; *per curiam.*

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