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# ARKANSAS REPORTS
# VOL. 125

CASES DETERMINED

IN THE

# Supreme Court of Arkansas

FROM

JULY, 1916, to October, 1916

JAMES V. JOHNSON
REPORTER

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# JUDGES AND OFFICERS

OF THE

# SUPREME COURT

## OF ARKANSAS

DURING THE PERIOD OF THIS VOLUME

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CARROLL D. WOOD, - - - - - ASSOCIATE JUSTICE

JESSE C. HART, - - - - - - - ASSOCIATE JUSTICE

WILLIAM F. KIRBY, - - - - - ASSOCIATE JUSTICE

FRANK G. SMITH, - - - - - - ASSOCIATE JUSTICE

WALLACE DAVIS, - - - - - - ATTORNEY GENERAL

WILLIAM P. SADLER, - - - - - - - - - CLERK

JAMES V. JOHNSON, - - - - - - - - REPORTER

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# CASES DETERMINED
IN THE
# SUPREME COURT OF ARKANSAS

## ASHLEY, DREW & NORTHERN RAILWAY COMPANY *v.* BAGGOTT & BOYD.

Opinion delivered June 26, 1916.

CONTRACTS—INDEFINITENESS—UNENFORCIBILITY.—Courts neither specifically enforce contracts nor award substantial damages for their breach when they are wanting in certainty; damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain.

Appeal from Drew Circuit Court; *Turner Butler*, Judge; reversed.

*Henry & Harris*, for appellant.

The contract was too uncertain and indefinite to be enforceable, and was wanting in mutuality. 6 R. C. L. 644; 86 Ark. 97; 70 *Id.* 568; 23 *Id.* 63; 100 *Id.* 510; 5 Am. St. 103; 7 Am. and Eng. Enc. Law (2 ed.), 114; 90 Ark. 504; 64 *Id.* 398.

*R. W. Wilson* and *C. H. Moses*, for appellee.

The contract was sufficiently definite to be enforced. On the strength of the contract plaintiffs equipped themselves to do the work, and expended their money on the faith thereof. There was a consideration and mutuality. 70 Ark. 232; 56 *Id.* 188; 91 *Id.* 367; 110 U. S. 338; 95 Ark. 421; 105 *Id.* 580; 9 Cyc. 639 (4), 641 (5), 646 (d), 688 (4).

The introduction of the depositions was consented to by appellee's attorneys but the depositions were excluded by the court as incompetent. It thereupon directed a verdict against appellants and from the judgment thereon, this appeal is prosecuted.

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HART, J. Baggott & Boyd sued Ashley, Drew & Northern Railway Company to recover damages for an alleged breach of contract.

The railway company operated a line of road from Crossett to Monticello, in Arkansas, and R. O. Roy was its president and general manager. Baggott & Boyd formed a partnership to do automobile repairing and located their shop near the terminal of the defendant's railroad in Monticello.

F. T. Boyd testified that soon after Mr. Baggott and himself formed a partnership to do automobile repairing in the town of Monticello and soon after defendant's line of road was completed to that point, R. O. Roy, the president of the road, approached them on the question of doing repair work for the railroad. Boyd further said: he made detailed suggestions to us as to the equipment necessary for that work. At his suggestion I rented another building and purchased a larger forge and anvil and also other machinery which would be needed in repairing engines and cars for a railroad, but would not be needed in repairing automobiles. The defendant railway company constructed a spur track on the lots on which was located the new building leased by us. The spur track was extended to another railroad company's tracks and was used as a transfer track. Our firm equipped itself to do the repair work but the railroad never gave us any work except to repair one engine. The witness stated in detail the expenses his firm had been out preparatory to doing the repair work for the railroad, but the view which we shall hereinafter express renders it unnecessary to further abstract that testimony. On the part of the defendant it was shown that it never made any definite contract with the plaintiff to do repair work on the engines and cars of the railway company.

The jury returned a verdict for the plaintiffs in the sum of $464.00, and from the judgment rendered, the defendant has appealed.

It is contended by counsel for the defendant that the contract was too indefinite to be enforceable and that no breach of the contract could be assigned which could be

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measured by any test of damages from the contract itself. On this point we quote from the testimony of F. A. Boyd as follows:

"Q. State what this contract entered into in the Allen Hotel was?

A. We went over to the Allen Hotel and discussed what we would need, and decided what we would need; and Mr. Roy said that if we would go ahead and put them in the shop, he would give us work, until he could get a shop or fix things more to his liking.

Q. Did he say how long that would be?

A. No, sir

Q. Did he say anything about the length it would probably be.

A. No, sir."

Again he was asked what price his firm was to get for work and answered a reasonable price, saying no certain price was set. He stated that he did not remember whether there was anything said as to who was to furnish the materials but that he supposed his firm was to furnish them. Again he stated that no agreement was reached as to the length of time the contract was to run or the price to be paid for the work. Boyd had purchased the interest of Baggott before this suit was instituted. Baggott and Roy both testified that no contract was entered into and that the firm of the plaintiffs was not equipped to do railway repair work.

The verdict of the jury, however, must be tested by the evidence of the plaintiffs. According to the testimony of Boyd when given its strongest probative force, the terms of the contract were not sufficiently definite to enable the court to render it enforceable. Under the testimony of Boyd, Roy did not bind the railroad company to give the plaintiffs his repair work for any particular length of time and it could not be shown that he would ever call upon them to do any repair work. The railroad company could do so or not as it pleased. Nor could it be shown that the parties would ever agree upon the price to be paid for the work. The testimony of Boyd himself brings the case squarely within the principles decided in

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*Somers* v. *Musolf*, 86 Ark. 97. The contract is so indefinite that it is incapable of being enforced. It is evident that courts neither specifically enforce contracts nor award substantial damages for their breach when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain. 6 R. C. L. 644; Page on Contracts, Vol. 1, sec. 28.

It follows that the judgment must be reversed and the plaintiffs' case having been fully developed, their cause of action will be dismissed.

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## DUNCAN v. STATE.

Opinion delivered July 3, 1916.

1. CRIMINAL LAW—WITHDRAWAL OF PLEA OF GUILTY—DISCRETION OF COURT.—It is within the discretion of the trial court to refuse to permit a defendant to withdraw his plea of guilty and to substitute a plea of not guilty.

2. CRIMINAL LAW—WITHDRAWAL OF PLEA OF GUILTY.—Where defendant is charged with a misdemeanor, his plea of guilty before a justice of the peace, is an admission of his guilt, and unless it is withdrawn by leave of the court, the State is entitled to have sentence passed.

Appeal from St. Francis Circuit Court; *J. M. Jackson*, Judge; affirmed.

*J. M. Prewett*, for appellant.

1. The information is defective in that it does not describe or show how the defendant committed the offense. It does not charge any offense in law or in substance or in the language of any statute. By the plea of guilty, defendant only confesses himself guilty in manner and form as charged, and if the information charges no offense against the law none is confessed and on appeal may attack the information for the first time. 12 Ark. 170; 13 *Id.* 752; 16 *Id.* 333.

2. On the facts, the plea of guilty was conditional and the condition was not complied with.

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*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The facts alleged in the information constitute an offense. Kirby's Digest, §§ 2228, 2243, 2053, 6388-2; 103 Ark. 438; 86 *Id.* 436; 94 *Id.* 207; 85 *Id.* 396.

2. On the facts the lower court properly overruled the motion to vacate the judgment. 94 Ark. 198; 88 *Id.* 290.

HART, J. On January 3, 1916, Will Duncan was arrested upon warrants issued by a justice of the peace upon informations filed by the deputy prosecuting attorney. He was placed in jail and on the next day was brought before the justice of the peace and entered his plea of guilty in five separate misdemeanor cases. He was charged with running a disorderly house, with Sabbath breaking, with running a blind tiger and in two cases with gaming. Judgments were entered upon his pleas of guilty.

On January 6, 1916, Duncan prayed and was granted an appeal in each case to the circuit court. At the next term of the circuit court the prosecuting attorney filed a motion to dismiss the appeal of the defendant in each case.

On the part of the State it was shown by the justice of the peace that Will Duncan entered his plea of guilty in five misdemeanor cases before him and that judgment was rendered against him in each case. The justice stated that he made no offer whatever of compromise to the defendant and that the pleas of guilty were voluntarily entered by the defendant and were unconditional. His testimony was corroborated by the testimony of the deputy prosecuting attorney.

The defendant testified for himself as follows: Nine cases were pending against me before the justice of the peace. Five of them were misdemeanors and the rest were felonies. They took me out of jail and brought me before the justice of the peace. They asked me several times how much money I had and I told them $75.00. They asked me if I would waive examination in the felony cases and plead guilty in the misdemeanor cases. I

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understood they were to let me off in the misdemeanor cases upon the payment of the $75.00 and with that understanding I entered a plea of guilty in each case.

Both the justice of the peace and the prosecuting attorney denied that they made any offer of compromise whatever to the defendant or offered to let him off upon the payment of $75.00.

The circuit court dismissed the appeal of the defendant. From the judgment rendered the defendant has appealed to this court.

(1) It is within the discretion of the trial court to refuse to permit a defendant to withdraw his plea of guilty and to substitute a plea of not guilty. *Greene* v. *State*, 88 Ark. 290.

Under the testimony of the justice of the peace and the deputy prosecuting attorney there would be no abuse of discretion in the trial court refusing to allow him to withdraw his plea of guilty. *Greene* v. *State*, *supra*, and *Barwick* v. *State*, 107 Ark. 115. Moreover the informations filed by the deputy prosecuting attorney against the defendant were in the general language of the statute and were sufficient to apprise him of the nature of the accusations made against him. Nothing more than that is required upon a charge of a statutory misdemeanor.

(2) The defendant's plea of guilty before the justice of the peace was an admission of his guilt and unless it was withdrawn by leave of the court, the State was entitled to have sentence passed. *Stokes* v. *State*, 122 Ark. 56; 182 S. W. 521. Under the authority just cited, the circuit court was right in dismissing the appeal of the defendant.

The judgment will therefore be affirmed.

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## ELKINS v. HENRY VOGT MACHINE COMPANY.

Opinion delivered June 26, 1916.

1. CONTRACTS—NOVATION—DEFINITION.—Novation is the substitution by mutual agreement of one debtor, or of one creditor, for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one.
2. CONTRACTS—NOVATION—EVIDENCE.—Appellants were liable to appellee on a note for the purchase of machinery. Under a plea that the

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appellee had accepted the liability of third parties, and relieved the appellants, it is the duty of the court to permit appellants to introduce testimony in support of the allegations in their answer, and of any correspondence, transactions, conduct or admissions of appellee, tending to prove same.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee Machine Company brought suit upon three promissory notes signed by James Elkins, W. D. Raywinkle, C. C. Edwards and H. E. Watson for the aggregate amount thereof.

The notes were given for machinery to be used for the erection of an ice plant by a partnership known as the Kensett Ice & Gin Company, composed of said individuals.

Only the defendants, Elkins and Raywinkle answered, denying the plaintiff's right to recover against them and alleged that they had sold their interest in the machinery to C. C. Edwards, J. M. Devlin and T. E. Devlin, with the understanding that they were to be relieved from the payment of the note and that for a valuable consideration, consisting of the execution of a mortgage by Devlin and others to it, to secure the payment of the said indebtedness that plaintiff had released them from all liability.

The notes were introduced in evidence, read to the jury with the statement by appellee's counsel that there was a balance due of twenty-three hundred and some odd dollars.

Appellants introduced J. M. Devlin, who testified that he had been connected with the Kensett Ice & Gin Co., and bought Messrs. Raywinkle's and Elkins' interest therein some time in March, 1912; that he awrsie he Machine Company several letters about it ttoo certain if his purchase would be satisfactory; that he received from them the following telegram:

"Louisville, Ky., 3-21-12.

James M. Devlin, Kensett, Ark.

Will await payments you mention, July and November, provided Elkins, Raywinkle, all will have satisfactory

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agreement among yourselves without changing notes, etc. It's useless for the short time. Adam Vogt, our secretary, will be Gayoso Hotel, Memphis, tomorrow. If you want to see him, notify him exact time at hotel.

(Signed) Henry Vogt Machine Company."

They offered to show by this witness that appellee company had written certain letters to him indicating a willingness to accept the new debtors upon the giving of satisfactory security and that certain mortgages had been executed by said purchasers of the Raywinkle-Elkins interest to the machine company and foreclosed by it. The mortgages were also offered in evidence but excluded by the court, which likewise refused to permit appellants to show that the mortgages had been foreclosed and what money had been realized therefrom. Certain agreements between the machine company as to the sale of the plant and H. E. Watson, C. C. Edwards, J. M. Devlin and T. E. Devlin were also offered in evidence and likewise the deposition of Adam Vogt, the secretary of the machine company, containing statements tending to show its knowledge of the proposed transaction and consent thereto upon the execution of certain security by the purchasers of the Raywinkle-Elkins interest.

*John E. Miller* and *Rachels & Yarnell*, for appellants.

1. The company by its acts and conducts released the defendants. The answer set up a valid defense—really a novation. 29 Cyc. 1130, 1132-3; 64 N. E. 435; 48 *Id.* 919; 61 N. Y. Supp. 1046.

2. It is estopped by its conduct. 16 Cyc. 787-8, 791-2; 99 Ark. 263; 91 *Id.* 141, 148; 47 *Id* 317; 35 *Id.* 365; 33 *Id.* 465.

3. It was error not to allow appellants to introduce and read to the jury the deposition of Adam Vogt and the deeds of trust. Also in refusing to permit witness Devlin and defendants to answer the questions propounded to them. This was competent testimony and relevant to the issue.

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*Brundidge & Neelley*, for appellee.

1. There was no novation and no estoppel. 3 Words & Phr. (2 series), 664; 3 Ark. 220; 28 *Id.* 193; 46 *Id.* 166; 45 *Id.* 313; Am. Cases, 1915, A. p. 1092; 62 Ark. 316; 72 *Id.* 62.

2. The evidence offered was properly excluded. 15 Ark. 345; 92 *Id.* 275; 85 *Id.* 263. The court properly instructed a verdict as there was no legal evidence to go to the jury showing release or novation.

KIRBY, J., (after stating the facts.) The answer sufficiently alleged a defense to the suit, but the burden of proof was upon the defendants, appellants, to establish the truth thereof.

"Novation is the substitution by mutual agreement of one debtor, or of one creditor for another whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished," * * * * 29 Cyc. 1130.

"It is not essential that the assent to and acceptance of the terms of the novation be shown by express words to that effect, but the same may be implied from the facts and circumstances attending the transaction, and in the conduct of the parties thereafter. Such consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor." * * * * 29 Cyc. 1132-1133. *Logan* v. *Williamson*, 3 Ark. 220; *Brewer & Son* v. *Winston*, 46 Ark. 166; see also *Union Cent. Life Ins. Co.* v. *Hoyer*, (O.) 64 N. E. 435; *Walker* v. *Wood* (Ill.) 48 N. E. 919; *DeWitt* v. *Monjo*, 61 N. Y. Supp. 1046.

They had the right to introduce testimony in support of the allegations of their answer and any correspondence, transactions, conduct or admissions of appellee company or its authorized agent tending to prove it and also the deposition of its said secretary taken in the case by appellee, its attorneys having consented thereto, and the court erred in the exclusion of such testimony from the

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jury. It was substantial testimony which would have supported a verdict in favor of appellee under proper instructions, had the jury seen fit to give it credit and the court erred in its rulings excluding the testimony and in directing the verdict. *Williams* v. *St. L. S. F. Ry. Co.*, 103 Ark. 401; *Brigham* v. *Dardanelle, etc., Ry. Co.*, 104 Ark. 267.

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

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## HOLLAND BANKING COMPANY *v.* HAYNES.

Opinion delivered June 26, 1916.

1. BILLS AND NOTES—ACTION ON NOTE—BONA FIDES—BURDEN OF PROOF.—When the holder of a negotiable instrument shows that he purchased it before maturity in the usual course of business, for a valuable consideration, a *prima facie* case is made, and it becomes the duty of the defendant, who has alleged it, to show that the purchaser had knowledge of such facts as required him to take notice of the defense existing in favor of the makers.
2. SALES—SALE OF STALLION—BREACH OF GUARANTY.—The purchasers of a stallion executed a note in payment, the seller giving a guaranty as to performance, but the contract providing the way in which the guaranty should be enforced. *Held,* in an action on the note by an innocent holder, that the maker could not set up as a defense that the horse was not worth the price paid, or was not a sure breeder, when he failed to follow the course prescribed by the contract in the event such was the case.

Appeal from Franklin Circuit Court, Charleston District; *James Cochran*, Judge; reversed.

STATEMENT BY THE COURT.

This suit was instituted by the appellant to recover on three certain promissory notes aggregating $2,800, the amount thereof less credits of $200.00.

The notes are dated June 10, 1910, and due and payable in equal amounts on the 1st day of September, 1912, 1913 and 1914. They were given for the purchase money of a Percheron stallion, sold and delivered by the Holland Stock Farm of Springfield, Mo., to Wallace Haynes, et al.

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The appellant banking company purchased the notes on September 17, 1910. At the time of the sale of the stallion, the seller and the makers of the notes entered into a written contract, in which the seller guaranteed the horse to be a satisfactory sure breeder and gave the buyers the privilege of returning him to the seller at Springfield, Mo., within a certain specified time, provided the horse with proper care and treatment failed to fulfill the warranty, as to being a satisfactory sure breeder, in which event the buyers were to select another horse of like kind and price from the seller, without expense to themselves and it was also agreed that if the buyers would have the horse insured for one year for the sum of $1,000, that the seller would in the event of his death within the time, replace him with another horse of like kind.

The purchasers made no complaint whatever to the seller of dissatisfaction with the stallion until after September 1, 1912, the due date of the first note and when it was sent for collection and they did not return nor offer to return and deliver to the seller the horse at Springfield, Mo., in accordance with the contract.

The notes are ordinary joint and several promissory notes, agreeing to pay the specified amount to the order of the Holland Stock Farm at the bank of Charleston, in Charleston, Ark., with 6 per cent. interest, payable annually, from date until paid, signed by Wallace Haynes and twelve others.

The undisputed testimony shows that the appellant bank purchased the notes for a valuable consideration and before maturity and the seller and purchaser thereof both testified that neither had any notice of any defect or infirmity in the paper at the time of the sale nor of any defense thereto. There was some testimony however of certain facts and circumstances from which an inference of notice might have been chargeable to the purchaser. The undisputed testimony also shows that no complaint was ever made to the seller of the stallion nor any claim that he had failed in any respect to come up to the warranty until after the time specified therein for his return

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and exchange in case he did not prove satisfactory, had expired.

Appellees introduced certain testimony tending to show the horse was in fact of very little value as compared with the price agreed to be paid therefor.

The court instructed the jury, giving over appellant's objection certain instructions, telling it the burden was on the plaintiff to show by a preponderance of the testimony that it was a purchaser of the notes in good faith, for a valuable consideration, in the usual course of business before maturity, without any knowledge of existing defenses thereto and told the jury that if they found the amount already paid on the notes was the fair market value of the horse at the time he was purchased, they would find for the defendants unless they found plaintiff was an innocent purchaser of the notes. It also refused to instruct a verdict for plaintiff.

From the judgment on the verdict against it, the banking company prosecutes this appeal.

The appellant, *pro se*.

1. A verdict should have been instructed for appellant. The bank was an innocent purchaser, for value, before maturity. None of the defenses set up were proven. The horse was not returned, and no offer made to return. 101 S. W. 1179; 138 *Id.* 635; 97 *Id.* 18; 166 *Id.* 953.

2. Oral testimony to vary the terms of a written contract is not admissible. 95 Ark. 131; 107 Ark. 349; 158 *Id.* 500; 141 U. S. 510; 112 Ark. 165. The notes were negotiable. 61 Ark. 80; 153 U. S. 233. The only defense available is want of power in the makers and illegality of consideration. 41 Ark. 242. The testimony proves that the notes were assigned before maturity. 41 Ark. 242; 31 *Id.* 20; 48 *Id.* 454.

3. Appellant was an innocent purchaser. Instruction No. 1, to find for plaintiff should have been given. 94 Ark. 100; 61 *Id.* 81; 113 Ark. 28. Because the notes were taken "without recourse does not make the transaction out of due course." 80 Ark. 212; 14 Pa. St. 14; 11 Me. 253; 3 R. C. L. § 273-3. This was a negotiable note. 3 R. C. L. § 49.

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4. The instructions were erroneous. 13 Ind. 388; 108 Ark. 490.

*T. A. Pettigrew* and *Holland & Holland*, for appellees.

1. In all essential features this case is the same as 180 S. W. 978. The facts differentiate this case from 156 S. W. (Mo.) 953 and 121 Ark. 171.

2. Verbal testimony is always admissible to prove fraud. Jones on Ev. (2 ed.) 547; 2 Enc. of Ev. p. 498; 87 Ark. 614; 75 *Id.* 79.

3. The instructions in their entirety declare the law. If there was any error it was harmless. 92 Ark. 392; 8 Words and Phr. 6934.

KIRBY, J., (after stating the facts.) (1) The court erred in giving said instructions. When the holder of a negotiable instrument shows that he purchased it before maturity in the usual course of business for a valuable consideration, a *prima facie* case is made and the burden of proof shifts to the defendant who alleges it to prove that the purchaser had notice or knowledge of such facts as required him to take notice of the defense existing in favor of the makers. *White* v. *Moffett*, — Ark. —, 158 S. W. 505; *Keathley* v. *Holland Banking Co.*, 166 S.W. 953, — Ark. —.

(2) The purchasers of the horse could not have defended against the payment of the notes in the hands of the seller on the ground that the horse was of a less market value than the price agreed to be paid therefor in the notes or failed to come up in performance to the terms of the guaranty, since the contract of guaranty provided the exclusive method of settlement if the stallion should not prove as warranted. *Highsmith* v. *Hammonds*, 99 Ark. 403.

The undisputed testimony shows that no notice of dissatisfaction as to the condition or performance of the stallion was given to the seller until long after the time designated in the contract for his return in accordance with the terms of the contract, if he should prove unsatisfactory and not as warranted, nor was any attempt made to return him and receive another in his place in accordance with the terms of the contract. It was likewise undisputed

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that the purchasers did not insure the stallion in accordance with the agreement that they might do so in the contract of guaranty and had no claim against the seller on that account.

Since the testimony does not disclose that the makers on the note had any legal defense thereto, the court likewise erred in not directing a verdict for appellant.

The judgment is reversed and judgment will be entered here in appellant's favor, for the amount of the notes sued on. It is so ordered.

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## THOMAS v. TOWN OF DES ARC.

Opinion delivered July 3, 1916.

POOL TABLES—SUPPRESSION OF, BY MUNICIPAL CORPORATION—REGULATION.—A town has power to suppress billiard tables and pool tables when used for gaming, and to license, tax and regulate said instrumentalities when used only for the amusement and diversion of the players, and not for gaming.

Appeal from Prairie Circuit Court, Northern District; *J. G. Thweatt*, Special Judge; affirmed.

*W. A. Leach*, for appellant.

An incorporated town can not pass a valid ordinance licensing either billiard or pool tables. The only authority vested is to suppress when used for gaming. The agreement of facts shows that the tables were not used for gaming. The right to tax or license billiard tables is not delegated and does not arise by implication. Kirby's Digest § 5438 is the only delegation of power that Des Arc assumes. The ordinance is void for want of power to pass. 28 Cyc. 746; 116 Ark. 390; 45 *Id.* 454; 31 *Id.* 462; 27 *Id.* 467.

*Emmett Vaughan*, for appellee.

Section 5438 Kirby's Digest grants the power to license and tax billiard and pool tables and to suppress them when used for gaming. Pool halls and billiard parlors are proper subjects of police regulation. 116 Ark. 390.

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The ordinance was regularly passed. The tax is not unreasonable, nor in excess of the necessity under police regulation. It is not a revenue measure.

KIRBY, J. This appeal challenges the validity of an ordinance of the town of Des Arc, prescribing a tax or license on billiard and pool tables.

Appellant was convicted in the Mayor's court on a charge of violating the ordinance and on appeal in the circuit court. The agreed statement of facts shows that appellant kept a billiard and pool hall during the time for which license was required to be paid by the ordinance with billiard and pool tables therein, none of which were used as gambling devices.

The ordinance was duly passed and requires the payment of a license of $5.00 per annum for the privilege of operating or keeping each billiard and pool table.

The court refused to declare the law as requested by appellant that an incorporated town was without power to enact a valid ordinance, licensing either billiard or pool tables and had authority only to suppress the keeping of same when used for gambling and declared the law as requested by appellee that the town under the police power delegated to it could impose a license or tax or regulate either or both pool tables and billiard tables whether the same are used for gaming or not and suppress same if kept or used far gaming.

Appellant contends that the ordinance prescribing the payment of a license or tax is void, the town being without authority to enact same.

The law granting general powers to cities and incorporated towns, sec. 5438, Kirby's Digest, provides: "They shall have power * * * * to license, regulate, tax or suppress * * * * hawkers, peddlers, brokers * * * * fortune-tellers, corn doctors * * * * museums and menageries * * * * muscle developers, billiard tables or other instruments used for gaming."

It has been held that authority is expressly given to towns to suppress gambling devices. *State* v. *Lindsay*, 34 Ark. 372.

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In *Town of Dardanelle* v. *Gillespie*, 116 Ark. 390, it was held that the town was without authority to declare a pool hall a nuisance and suppress it unless the tables were used for gaming and the evidence there showing they were not kept for gaming but only for amusement and diversion of the players and that no gambling was allowed, the ordinance was held void. It was recognized, however, that pool halls and billiard parlors are uniformly held to be proper subjects for police regulation and places which may become nuisances and liable to suppression. It was not decided there that billiard and pool tables are not the proper subject of regulation unless used for gaming purposes. *Bryan* v. *City of Malvern*, 122 Ark. 379, 183 S. W. 957.

The statute expressly empowers towns to license, regulate, tax or suppress the various occupations and devices mentioned, among the number "billiard tables, or other instruments used for gaming" and since it has the power only to suppress such tables and appliances when used for gaming, a fair construction of the language used necessarily gives the town the power to license, tax or regulate said tables and instrumentalities that can be and are used for gaming or for pleasure and diversion of the players when used for the latter purpose only and not for gaming.

In other words, the town is given power to suppress billiard tables and pool tables which are only a particular kind of billiard table when used for gaming, and to license, tax and regulate said instrumentalities when used only for the amusement and diversion of the players and not for gaming.

Since the town had the power to pass the ordinance and no complaint is made against the tax or license prescribed, as unreasonable, the judgment will be affirmed. It is so ordered.

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## CITIZENS BANK & TRUST COMPANY *v.* RAINES.

Opinion delivered July 10, 1916.

1. INSOLVENT BANKS—DISPOSITION OF ASSETS.—Act 113, Acts of 1913, provides for the disposition of the assets of insolvent banks under the directions of the chancery court; Kirby's Digest, § 6236, providing the manner of foreclosing mortgages and other liens, and the sale of property thereunder, has no application to the sale of the assets of an insolvent bank, which are in process of liquidation under Act 113, Acts of 1913.

2. INSOLVENT BANKS—SALE OF ASSETS—PRIVATE SALE—APPROVAL—DISCRETION OF CHANCERY COURT.—The assets of a certain bank were in the hands of the State Bank Commissioner for liquidation under Act 113, Acts of 1913; the chancery court ordered a private sale of certain real estate, but the deputy commissioner offered the same for sale at auction. Appellee bid in the property; other persons thereafter offered a greater sum for the same. *Held*, in approving the sale to appellee, that the chancery court, abused its discretion, and that it should have refused to confirm the sale in view of its order that a private sale be had, and that a better price had been offered; it appearing also that appellee's bid was for an amount under the value of the land.

Appeal from Nevada Chancery Court; *Jas. D. Shaver*, Chancellor; reversed.

STATEMENT BY THE COURT.

The Citizens Bank & Trust Company, of Prescott, Arkansas, on the 27th day of July, 1915, went into liquidation under the Bank Commissioner, under the provisions of Act 113, approved March 3, 1913, Acts of 1913. Thomas C. McRae, Jr., was designated as special bank commissioner. He applied to the chancery court for an order as to the disposition of certain of the bank's assets. The court made an order directing McRae to sell all of the bank's real and personal property at private sale. The order provided "that all of such sales shall be submitted to the court for its approval before the sale is consummated."

McRae, after consulting with the stockholders and others interested in the assets of the bank, on the 12th day of October, 1915, gave notice by regular advertisement in a newspaper that he would, on the 26th day of

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November, 1915, offer the real estate, which was described in the notice of sale, at the north door of the courthouse in the city of Prescott, upon terms of one-half cash and the balance on credit of three months. The notice specified that the purchaser would be required to give bond with approved security, and that a lien would be retained on the property until the same was paid. He made the sale, and in his report stated that he attended and offered the property for sale at public outcry. He gives the names of the purchasers and a list of the lands sold, and among the purchasers was one E. E. Raines, the appellee. The land was struck off to him at $6,447.67. He purchased subject to a mortgage for $5,200, and paid the balance $1,247.67, in cash.

In the Commissioner's report he states that the attendance was good, and many of the stockholders of the bank were present; that on the 30th of November, 1915, at a meeting of the stockholders of the Citizens Bank & Trust Company, Geo. F. Kress and A. H. Smith agreed to increase the bid made by E. E. Raines for the lands purchased by him $752.33, thus giving to the bank a net sum above the incumbrance amounting to $2,000, instead of $1,247.67, the amount bid by Raines.

McRae recommended the approval of all the sales except the ones made to Raines, Jake Suckle and W. V. Tompkins, and recommended that the property sold to Raines and Tompkins be resold. Raines filed exceptions to the report of the receiver, setting up that he had purchased at the sale and had complied with the requirements of the receiver by putting up the amount of his bid. He stated that the directors of the bank and trust company were present at the sale, and had an opportunity to bid, but refused to do so, and that Kress and Smith were also present at the sale, and did not bid.

Kress and other stockholders of the bank and trust company replied to the exceptions of Raines, in which they set up that they were given to understand by the Bank Commissioner before the sale that any figures that were unsatisfactory would be reported adversely and the property again offered for sale; that immediately follow-

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ing the offering of the property for sale and the bid of Raines, Kress, for himself and other stockholders, proposed to raise the bid of Raines from $1,247.67 to $2,000 for the bank's equity, which offer they were ready to make good; that the offer of $1,247.67 made by Raines was only $3.10 per acre, and that the land was reasonably worth $7 per acre.

The court heard the testimony of the Commissioner on the exceptions of Raines and the reply thereto. McRae testified substantially to the effect that, after consulting with the stockholders of the bank, they doubted the wisdom of offering the body of land for sale at that time; that he told them that if the bids were unsatisfactory, the sale would not be approved and the property would be reoffered. He understood that if the offers of bids were not satisfactory, he could report against the approval, and the court would not approve the sale; that after the sale the stockholders held a meeting and the increased bid was made as set forth in his report; and therefore he recommended that the sale to Raines be not approved.

He exhibited a letter from the State Bank Commissioner, written before the sale took place, suggesting that he could go ahead and make it, but that unless the lands brought a good price that the department would not recommend that the court approve the sale.

The president of the bank testified, among other things, that he was present at the sale and permitted the bids of Raines and others to pass at the prices offered by the bidders, believing that the deputy commissioner would be permitted to re-offer the property if the bid was not satisfactory.

There was also testimony to the effect that $3 per acre was the assessed value of the land, which was about 50 per cent. of its actual value. The testimony showed that the auctioneer announced to the crowd present at the time the lands were sold that all bids would be submitted to the court for approval before the sale would be consummated.

The court, after hearing the evidence, found that the sale was fairly and legally conducted, and declined

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to disapprove the sale. The offer of Kress and others to guarantee the bank the sum of $2,000 for its equity, instead of the sum of $1,247.67, which it would have received under the bid of Raines, was rejected. The court entered judgment confirming the sale to Raines, and the appellants duly prosecute this appeal.

*Carmichael, Brooks, Powers & Rector*, for appellants.

1. There was no sale and that which has not occurred can not be approved. The order directed a *private sale*, but this was a public sale. The sale was not on a credit. Kirby's Digest, § 6236.

2. The sale was not on a credit. 27 Ark. 294; 34 *Id.* 55-63; 37 *Id.* 43; 31 Id. 229-236; 69 N. W. 388; 65 Atl. 367. The sale was void.

*Hamby & Hamby*, for appellee.

1. A sale, approved by the court, will not be set aside for inadequacy of price, unless grossly inadequate, 47 Ark. 93; 65 *Id.* 152; 77 *Id.* 216. But this plea is abandoned here. 122 Ark. 224; 51 Ark. 351; 64 *Id.* 305; 121 Ark. 64.

2. The sale was made under the banking act. Acts 1913, No. 113. This act authorizes a sale *on such terms as the court may direct. Ib.*, § 53. This section does not conflict with section 6236 of Kirby's Digest.

3. No objection was made to the sale. Objections can not be raised here for the first time. 64 Ark. 305; 121 Ark. 64; 51 Ark. 351.

4. Appellants are estopped. 38 Ark. 572.

WOOD, J., (after stating the facts). 1. When the State Bank Commissioner takes charge of an insolvent bank for liquidation under Act 113, *supra*, "upon the orders of the chancery court in the county in which it (the bank), is doing business, he may sell all its real and personal property on such terms as the court shall direct." Section 53. The act is special statutory proceedings for the disposition of the assets of insolvent banks under the directions of the chancery court. Section 6236 of Kirby's Digest, providing the manner of foreclosure of mortgages

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and other liens, and the sale of property under such foreclosure, has no application to sales of the assets of an insolvent bank that are in process of liquidation under the above act.

It is not shown that the real estate in controversy was sold under any mortgage or other lien. The purpose of Act 113, *supra*, was to enable the chancery court to make such disposition of the insolvent bank's assets as would best subserve the interests of all concerned, and the court is unfettered by any limitations as to the terms upon which it may order the disposition of such assets.

(2) Section 6236 of Kirby's Digest, and section 53 of Act 113, *supra*, relate to different subjects and there is no conflict between them. The sale of an insolvent bank's assets not under mortgage or other lien, when in process of liquidation under Act 113, must be governed alone by that act. It appears that the deputy commissioner, instead of acting under the orders of the court to make a private sale, proceeded to advertise the land and sold the same at public sale. The court, however, found that the sale, as made by the deputy commissioner was fairly and legally conducted and confirmed and approved the sale, thus treating the sale as having been made in compliance with the orders of the court. This finding of the chancellor was clearly against the undisputed testimony.

The undisputed testimony of the deputy commissioner who conducted the sale, was to the effect that he understood that he had the authority to offer the lands in the manner which he did, and if the bids made upon the lands were not satisfactory, that he would so report to the court, and that the court would not approve the sale; that he so advised members of the stock holder's committee with reference to the sale. The testimony of the president of the bank was to the effect that the deputy commissioner consulted with him about the sale, and that he was opposed to it, but withdrew his objections when given to understand by the deputy commissioner that any bids would be turned down if the same were unsatisfactory, and upon his representation that the property would be re-offered; that he attended the sale under this

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impression and permitted the bids of the parties who bought these lands to pass; believing that the lands would be re-offered for sale, as the bids were not satisfactory. The parties who purchased the lands, a few days before, had offered the sum of $1 per acre at private sale for the bank's equity, whereas, at the sale their bids were 40 cents per acre less.

The testimony showed that the bid of appellee was $3.10 per acre, or about the assessed value of the land, which was reasonably worth $6 or $7 per acre.

The court should have adopted the recommendation of the deputy commissioner in his report and disapproved the bid of Raines. The court's order directing the sale did not specify any terms further than that the commissioner should sell the real property at private sale. In the order the court provided that "all such sales shall be submitted to the court for its approval before the sale is consummated." Under the law and under the order of the court the sale was not consummated until the chancery court approved the same. The plain purpose of the law was to enable the chancery court to conserve the best interests of all concerned in the assets of the insolvent bank, and to make the most advantageous disposition of same possible. While the court is thus given large discretion in the manner in which it may dispose of these assets, yet it is not an unlimited judicial discretion, but one that can be controlled when abused.

It clearly appears that it was not to the best interest of those who were directly concerned in the manner of the disposition of the bank's assets to approve this sale. On the contrary, instead of husbanding the resources of the bank, so as to preserve and protect the interests of those who are directly concerned, the order of the court approving this sale would have precisely the opposite effect. The court therefore abused its discretion in confirming the report of the commissioner and treating the acts of the commissioner with reference to the sale of the lands as a completed sale to the appellee.

Appellee invokes the rule stated in previous decisions of this court that mere inadequacy of price in the absence

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of fraud does not afford grounds for withholding confirmation of a public judicial sale. *Colonial & United States Mortgage Co.* v. *Sweet*, 65 Ark. 152; *George* v. *Norwood*, 77 Ark. 216. That rule does not, however, apply in the present case for the reason that the court ordered a private sale (of which fact the pruchaser was fully advised), and in considering the question of confirmation, it should have been treated as a private sale.

The reason for the rule has been stated by this court in the following language: "Courts have adopted, as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale." *George* v. *Norwood*, *supra*. The reasons thus given do not apply to a private sale, for there is no such thing as competitive bidding in conducting that kind of sale which constitutes mere negotiations ending in the final approval or disapproval by the court.

It does not follow, however, that the court should have accepted the increased bid of Kress and others, and treated their bid as a final offer and a consummation of the sale. The undisputed testimony clearly shows that there was no intention upon the part of the commissioner by what he did to complete a sale to any one. The deputy commissioner recommended that the property which he had sold to Raines be resold. The court should have found that the commissioner had not proceeded to make the sale in the manner directed by its order, and should have adopted the recommendation of the deputy commissioner and ordered the land resold.

The decree of the court is therefore reversed and the cause is remanded for further proceedings according to law, and not inconsistent with this opinion.

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## MORELAND v. STATE.

Opinion delivered July 10, 1916.

1. CRIMINAL LAW—ASSAULT AND BATTERY—NECESSARY ACTS.—Proof that defendant took hold of the arm of the prosecutrix, and attempted to kiss her, will sustain a charge of assault and battery in the absence of proof that prosecutrix gave her consent.
2. CRIMINAL LAW—FORMER CONVICTION—ABUSIVE LANGUAGE—ASSAULT AND BATTERY.—The offense of a breach of the peace by using abusive language is not embraced in the act of assault and battery; they are not of the same generic class and one cannot be included in the other, although they may arise out of the same occurrence or transaction.

Appeal from Craighead Circuit Court, Jonesboro District; *J. F. Gautney*, Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal from a conviction against the appellant for an assault and battery on the person of one Mrs. Ida Turner. Mrs. Turner testified substantially as follows: That she lived in the country; that on January 20, 1916, at about 9 o'clock in the morning, she went to visit her sister, who lived about a half mile away by the path or field road over which she was traveling. No one was with her except her baby. She met Doctor Moreland, who was traveling south, and crossed Mrs. Turner's road. He was in his buggy, and after driving through the gate, he stopped and waited until Mrs. Turner came close to him. She walked up in about ten steps of him, and he wanted to know where she was going to travel that morning, and after a few words of conversation he walked up and took hold of her arm, squeezed it and said, "Are you well." She replied "No." He then said, "Kiss me this morning." She refused, and he pushed around some way, and his beard scraped her face. Her baby screamed, and he said, "Are you going through the field?" She said, "Yes," and he said, "Now I will open the gate for you." She refused to let him open the gate for her, and he said, "Ida, can't I come to see you," and she replied, "No." Then he went on, and she continued her journey to her sister's. Doctor Moreland tried to kiss her about

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six years before, and at that time she objected to it, but said nothing about it. This time she reported the matter to her husband. She never told the doctor to take his hand off her wrist, but stepped back for him to take it off. He just walked up and "kinda squeezed on her wrist," and she stepped aside and he walked up and took hold of her again. After he asked her to kiss him, she told him to quit, and he did quit.

Doctor Moreland testified as follows: "I have known Mrs. Ida Turner all her life, and have acted as her family physician during that period of time. The facts have been stated pretty well. I did take hold of her wrist with my right hand, but she didn't step over to one side. About that time I asked her to kiss me, and she said no, and the child cried about that time, and it passed off at that. She didn't object to my holding her wrist nor raise any outcry for help or cry. I didn't kiss her. When she said no, I stopped right there. I am 65 years old."

On cross-examination, appellant testified that he had kissed the prosecutrix about six years ago; that he kissed her with her consent; she offered no resistance whatever. The reason he had for believing that his approaches would be acceptable to her on this occasion was their former relations.

It was agreed by the prosecuting attorney and the attorney for the appellant that the appellant had been charged with a breach of the peace for the use of abusive language in connection with this same transaction; that he was fined $50 therefor, and that the fine had been paid. The conviction in that case was predicated upon the same testimony that had been introduced in this case.

The appellant asked the court to instruct the jury to return a verdict in his favor. He further asked that the court instruct the jury that he had already been convicted on a charge of a breach of the peace for abusive language, in which the same testimony was introduced as had been introduced in the present case, and that by reason of such conviction he could not be convicted on the present charge. The court refused these prayers for in-

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structions, and gave instructions on its own motion, to which appellant excepted.

The above are all of the facts that are necessary to be stated for a correct determination of the issues presented by this appeal.

*Basil Baker* and *Horace Sloan*, for appellant.

1. The undisputed evidence shows that no crime was committed and the court should have directed a verdict for defendant. 87 Ark. 227. The mere sqeezing a woman's wrist and the accidental brushing of her face with the ends of his whiskers utterly fails to establish assault and battery. 87 *Id.* 227; 49 *Id.* 179; 1 Md. 3; 1 S. W. 447; 79 *Id.* 577; 46 Tex. Cr. 1. No force was intended or proven.

2. It was error for Ed Turner and John Winn to testify about conversations concerning a proposed compromise. 52 Ala. 411.

3. The court erred in requiring defendant to testify with reference to former convictions for assault. Kirby's Digest, § 3138, as amended by Acts 1905, page 143; 70 Ark. 107, 110, 600.

4. The plea of former jeopardy should have been sustained. Kirby's Digest, § 5633; 89 Ark. 378; Ann. Cases, 1913-A, 1056; 109 Ark. 60; 99 Ark. 149. A conviction for a minor offense is a bar to prosecution for the same act charged as a higher crime. Ann. Cases, 1912-C, p. 66T; 11 Bush (Ky.) 603; 3 N. C. (2 Hayw.) 4; 57 Vt. 576.

5. Argue the instructions which are not passed upon by the court, citing Kirby's Digest, § 1687; 36 Ark. 222; 41 *Id.* 408; 100 *Id.* 330; 109 *Id.* 391; 172 S. W. (Tex.) 1025.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The court properly refused to direct a verdict. Defendant had the ability to commit the battery, and did so for he applied force sufficient to draw the prosecutrix toward him. His intention is clear. Kirby's Di-

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gest, § § 1583-4; 1 Am. & E. Enc. L. (1 ed.) 779; 2 Bishop Cr. Law, § 3; 83 Minn. 453; 1 Words & Phrases, 535.

2. Argue the admission of testimony as to compromise, citing 12 Cyc. 418; 34 Ark. 480; 102 *Id.* 525; 150 S. W. 119, and other cases, but the court does not pass on this.

3. Testimony was admissible to prove former conviction of *any crime*, for the purpose of going to the credibility of the witness. Clark's Cr. Law (2 ed.), 40; 5 Words & Phrases, 4533.

4. There was no error in the court's charge. Kirby's Digest, § § 1583-4. A battery is the use of any unlawful violence on the person, with intent to injure. 19 Ark. 205-213; 99 *Id.* 90; 44 Tex. 43; 20 So. 296; 94 Ky. 433; 95 Mass. 308-317.

5. The plea of former jeopardy was properly overruled. Kirby's Digest, §§ 5633, 1648; 42 Ark. 40; 61 *Id.* 88, 99; 66 Ind. 223; 61 Ark. 99. The two offenses are separate and distinct. 53 Miss. 439; 61 Ark. 88, 99; 66 Ind. 223.

WOOD, J., (after stating the facts). (1) The undisputed testimony shows that appellant was guilty of the crime charged.

An "assault and battery is the unlawful striking or beating the person of another." Kirby's Digest, § 1584.

Mr. Bishop says: "The kind of physical force necessary to constitute an assault is immaterial." See 2 Bishop's New Crim. Law, section 28. Among the examples, he gives to illustrate the text is, "The taking of indecent liberties with a woman; even laying hold of and kissing her against her will." Citing, *Reg.* v. *Dungey*, 4 Fost. & F. 99, 103. The author says (vol. 1, sec. 548): "Assault and battery are two offenses against the person and personal security, in the facts of most cases existing together, and practically regarded as one." "A battery," says he, "is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent."

In *Mailand* v. *Mailand*, 83 Minn. 453-455, it is said: "An intent to do violence is an essential ingredient of the

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offense, but the degree of violence is, of course, immaterial. The least or slightest wrongful and unlawful touching of the person of another is an assault." See, also, Clark's Criminal Law, p. 228.

The presumption is that Mrs. Turner was a chaste woman, and there is no evidence to the contrary. The testimony of the appellant to the effect that he believed his approaches would be acceptable to her because he had kissed her and she had kissed him six years ago, did not constitute an excuse or justification for his laying his hands upon her with the view of kissing her as he had done on the previous occasion. The undisputed proof shows that on the former occasion when he kissed her, she was a single woman. Since that time she had married, and at the time of the alleged offense, had her baby with her. The circumstances were entirely different.

Although the appellant had been the prosecutrix's family physician, as he says, all her life, that fact and the fact that he had kissed her before when she was a maiden did not justify him in laying his hands upon her before he knew whether or not she would consent to these advances. The presumption must be indulged that a virtuous woman would not have consented to be kissed under such circumstances. It was unlawful for appellant to kiss Mrs. Turner without her consent, and he had no right to presume from his past conduct and his professional relations with her that she would consent. The undisputed testimony shows that she did not consent. It is the sacred right of every woman to protect her virtue. Hence, she can, if she will, hold her person aloof from the contaminating touch of any man of lecherous inclination. No man, whether his purpose be lascivious or otherwise, has any right to lay his hands upon a chaste woman, indulging the presumption that she will consent to an act which it would be unlawful for him to commit without her consent, and in the absence of proof to warrant the inference that Mrs. Turner did consent to the act of appellant in laying his hands upon her for the purpose of kissing her, it must be held that the conduct of appellant in doing so

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was an assault and battery within the meaning of the above authorities.

The appellant relies upon *Clerget* v. *State*, 83 Ark. 227, as supporting his contention that the evidence was not sufficient to convict him. In that case the utmost that the evidence tended to prove was that Clerget told his companion Malone while they were making the rounds to warn road hands to work, that "somewhere on our rounds there are some girls we can go to and have a good time." When they reached a certain residence, Clerget went in and gave the sign to Malone that they had reached the place mentioned. Clerget went in and Malone followed him. Clerget was asking a young lady if any one was there subject to road duty, and she replied that her brother was. Clerget commenced writing a warning notice to him, and then Malone touched the young lady upon the chin, which she indignantly resented. We held upon these facts that Clerget was not guilty of an assault and battery. Clerget did not lay his hands upon the young lady, and the evidence was not sufficient to show a conspiracy between Clerget and Malone to do an unlawful act, and hence Clerget was not guilty. In that case Malone, of course was guilty of an assault and battery, because he took undue liberty with the person of the young woman without her consent, just as appellant did with Mrs. Turner. The court therefore, upon the undisputed evidence, might have so declared as a matter of law.

The judgment is right, and it is therefore unnecessary for us to consider the errors assigned in the rulings of the court in giving and refusing prayers for instructions, and in the admission of testimony.

(2) Under the agreed statement of facts, to the effect that appellant was convicted for the offense of abusive language growing out of the same transaction, appellant claims that this prosecution is barred under the authority of section 5633 of Kirby's Digest, which reads, in part, as follows: "Whenever any party shall have been convicted before any justice of the peace, * * * said conviction shall be a bar to further prosecution before any

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* * * justice of the peace or circuit court for such offense, or for any misdemeanor in the act committed."

But the offense of a breach of the peace by using abusive language is not embraced in the act of assault and battery. They are not of the same generic class and one can not be included in the other, although they may arise out of the same occurrence or transaction. This statute (section 5633) was not intended to prevent the State from carving out and prosecuting for separate and distinct offenses growing out of the same occurrence or transaction. The statute was only designed to prevent more than one prosecution for one and the same act constituting the same offense. The use of insulting words is one offense and assault and battery is an entirely separate and distinct offense, although the abusive and insulting words may have been used at the time of and in connection with the assault and battery. The use of the insulting words and the assault and battery were different acts. They were not "embraced in the act committed" within the sense of the statute.

There are no reversible errors in the record, and the judgment is therefore affirmed.

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## HOOD v. ROLESON.

Opinion delivered July 10, 1916.

1. DIVORCE—CONTRACT TO MAKE NO DEFENSE.—A contract between the parties to a divorce proceeding that the plaintiff would not file an answer to defendant's cross-complaint, and would make no defense to his action for divorce, is void as against public policy, notwithstanding the existence of legal grounds for divorce.
2. DIVORCE—AGREEMENT TO FACILITATE PROCEEDINGS.—An agreement intended to facilitate the procurement of a divorce, is against public policy, and any promise founded on such an agreement is void.

Appeal from Lee Circuit Court; *S. H. Mann*, Special Judge; reversed.

*D. S. Plummer*, for appellants.

1. A note executed for the purpose of facilitating a divorce is void. 9 Cyc. 519; 14 Ark. 276. The con-

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sideration is illegal, 53 Am. Dec. 208; 29 Ind. 139; 92 Am. Dec. 345; 80 *Id.* 407; 6 R. C. L. 772; 11 Am. Cas. 354.

2. A court may allow alimony where the wife is at fault, and there are mitigating circumstances, but she is not so entitled, as a matter of right, without a decree of court. Kirby's Digest, § 2694.

3. The court erred in refusing to admit the testimony of C. E. Daggett.

*Fink & Dinning*, for appellee.

1. The sole and only purpose of Mrs. Hood was to cause her husband to provide for her maintenance and support. It is manifest she had no intention to procure nor interest in either procuring or assisting her husband in procuring a divorce, nor in preventing him from doing so. The consideration of the note was not illegal.

2. No fraud was practiced upon the court—no collusion is shown. A contemplated divorce suit with an agreement or contract for alimony, violates no rule of public policy. 88 Ark. 309. *Bona fide* agreements as to alimony or adjustment of property rights between husband and wife, though in contemplation of divorce, are upheld. 54 S. W. 710; 12 L. R. A. (N. S.) 848, and note; 28 Oh. St. 596; 74 Mo. 26; 49 N. H. 69; 25 N. J. Eq. 548; 67 Ark. 15; 101 *Id.* 522-531.

The decree on the cross-complaint is not conclusive against the wife to assert her claim for support. 88 Ark. 307; 98 *Id.* 197. There was a good and valuable consideration for the note in controversy.

HART, J. Appellees sued appellants to recover $1,400 balance alleged to be due on a promissory note. The material facts are as follows:

J. B. Hood and Nannie L. Hood were married in the year 1912, and lived together as husband and wife until the year 1913, when they separated. Mrs. Hood first went to Michigan on an extended trip, and subsequently went to Memphis. While in Memphis she became very ill, and was carried to a hospital. During her stay in Memphis, she incurred numerous debts and charged them to Mr. Hood's account. Finally Hood published a notice

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in a Memphis paper to the effect that he would no longer be responsible for anything purchased by his wife. Since their separation he has remained in Arkansas.

After Mrs. Hood got well, she returned to Arkansas and instituted a suit against her husband for alimony. Mr. Hood filed an answer to her bill for alimony and also a cross-complaint, in which he sought a divorce from her. Finally a contract was entered into between the parties which resulted in the execution of the note sued on. The note was executed July 20, 1914, by J. B. Hood, as principal, and J. B. Daggett, C. E. Daggett and Morris Lesser as sureties, and was payable to the order of Roleson and McCulloch. It was for $2,250.

The agreement was that Mrs. Hood dismiss her action for alimony and make no defense to her husband's suit for divorce, and in consideration therefor, Mr. Hood was to pay her $2,000 and $250 for attorney's fee. Mrs. Hood made no defense to the action for divorce and Mr. Hood was granted a divorce on his cross-complaint. He made payments on the note which reduced it to $1,400.

The above facts were testified to by Mr. Hood, by one of his sureties and by his attorney in the suit for alimony and divorce.

According to the testimony of H. F. Roleson, one of the attorneys for Mrs. Hood in the alimony suit, the note in question was executed in settlement of her suit for alimony, and the fees of her attorneys, and the contract was independent of the divorce proceedings.

The court directed a verdict in favor of appellees, and the case is brought before us on appeal.

Counsel for appellees seek to uphold the judgment on the ground that the consideration sued on was the adjustment of the property rights merely between the parties. Such agreements standing alone are not invalid. *Pryor* v. *Pryor*, 88 Ark. 302; *McConnell* v. *McConnell*, 98 Ark. 193. Other cases from this court might be cited to sustain this proposition, but it is so well settled as to render further citation of authorities useless. The testimony of appellees was sufficient to uphold a verdict in their

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favor, but we are dealing with a directed verdict in favor of appellees.

(1) According to the testimony of appellants, the general purpose of the agreement was to facilitate the procuring of a divorce. A lump sum was agreed to be paid in settlement of the alimony suit and also to facilitate the procurement of a divorce. A part of the consideration for the execution of the note was that Mrs. Hood should not file an answer to the cross-complaint of Mr. Hood, and should make no defense to his action for divorce. Such contracts are against public policy and void, notwithstanding the existence of legal grounds for divorce. The reason given in many of the cases is that the marital relation, unlike ordinary contractual relations, is regarded by the law as the basis of the social organization. The preservation of that relation is deemed essential to the public welfare. *Rowe* v. *Young*, 123 Ark. 303, 185 S. W. 438; *Viser* v. *Bertrand*, 14 Ark. 267. In the latter case the plaintiff, an attorney, had bound himself at the request of the defendant to pay $300 to the defendant's husband as a consideration for the relinquishment of the latter's claim to certain negroes, and his promise to make no further opposition to her suit for divorce. It was held that the agreement was against public policy, and the plaintiff could not recover the $300.

(2) The rule is well established that an agreement intended to facilitate the procuring of a divorce is against public policy, and any promise founded on such an agreement is void. See case note to 11 A. & E. Ann. Cas. at page 377.

It follows that the court erred in directing a verdict in favor of appellees.

The record shows that the suit was brought by Roleson and McCulloch for themselves, and for the benefit of C. L. Lippincott as administrator of Allie L. Hood, deceased.

It is claimed that H. F. Roleson deposited the note as collateral security with the McClintock Banking Company for an indebtedness of $250 due by him to the bank and that the bank is an innocent purchaser for value be-

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fore maturity of the note to the extent of Roleson's indebtedness to it. The record, however, shows that the bank is not a party to this suit and its rights are in no wise affected thereby.

For the error in directing a verdict for appellese, the judgment must be reversed and the cause will be remanded for a new trial.

McCULLOCH, C. J., being disqualified, did not participate.

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## STRASNER v. CARROLL.

Opinion delivered July 10, 1916.

STATUTE OF FRAUDS—ORAL AGREEMENT TO PURCHASE LANDS FOR ANOTHER —RULE— EXCEPTION TO THE RULE.—The rule that a mere verbal agreement by which one party thereto promises to buy in at a judicial sale, lands of the other party, and to hold the same for his benefit, does not create a constructive trust, the agreement being within the statute of frauds, is subject to the exception that where the purchaser buys the lands of another, under such a state of facts as would make it a fraud to permit him to hold on to his bargain, a trust will be raised.

Appeal from Pike Chancery Court; *Jas. D. Shaver*, Chancellor; reversed.

*W. C. Rodgers*, for appellant.

The transaction is, in equity, at least, a mortgage. Certainly it was not intended as a *sale*. 13 Ark. 112-117; 96 U. S. 332; 13 Ark. 112-117, 118; 2 J. J. Marsh. 471; 1 Jones on Mortg., § 162, 167, 168. Once impressed with the character of a mortgage, it must so remain. 3 Pom. Eq. (3 ed.), § 1193.

A court of equity will always relieve the mortgagor from the consequences of his failure to perform the condition. 129 Ill. 72; 2 Jones on Mortg., § 1039. An equity of redemption is inseparably connected with a mortgage—the right can not be waived. 96 U. S. 332.

*Langley & Steel*, for appellee.

1. To constitute an equitable mortgage, there must be some kind of a conveyance by the grantor to the gran-

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tee for the purpose of securing an indebtedness. 5 Ark. 321; 3 *Id.* 364; 75 *Id.* 551; 37 *Id.* 308; 38 *Id.* 264. The deed here was absolute and the burden was on appellant to show that it was intended as a mortgage. 19 Ark. 278; 31 *Id.* 163; 40 *Id.* 146.

2. The findings of the chancellor will not be disturbed unless clearly against the preponderance of the testimony. 100 Ark. 166.

HART, J. M. L. Carroll instituted an action of ejectment in the circuit court against T. J. Strasner to recover 220 acres of land in Pike County, Arkansas. Strasner filed an answer and cross-complaint and set up substantially the following state of facts:

He owned 300 acres of land in Pike County upon which he resided and mortgaged the same to a bank in Pike County to secure the sum of $600 which he owed the bank. The debt of the bank fell due in 1914 and Strasner, failing to make payment, the bank proceeded to foreclose the mortgage. The land was worth much more than the mortgage debt, and in order to prevent a sacrifice of the land it was agreed that Carroll should purchase the land at the foreclosure sale for the amount of the indebtedness due the bank by Strasner and hold the title to the land in trust for the latter until he could repay Carroll the amount bid for the land. Two friends of Strasner were to sign the note for the purchase money given by Carroll as surety, and did so. Carroll became the purchaser at the sale, and the sale was confirmed and a deed executed to him by the commissioner who made the sale. Strasner tendered to Carroll the amount of the debt, principal and interest and requested Carroll to make a deed conveying back to him the land purchased by Carroll at the foreclosure sale. Carroll refused to do this.

The prayer of the answer and cross-complaint of Strasner are that he be permitted to redeem the land, and that the claim of Carroll be cancelled as a cloud upon his title.

Carroll filed an answer to the cross-complaint in which he denied that he purchased the land at the fore-

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closure sale for Strasner and agreed to hold the same in trust for him. He stated that he purchased the land for himself at the foreclosure sale, but agreed to resell it to Strasner within ninety days if the latter should pay him the amount which he had bid for the land; that Strasner failed to make the payment, and that the sale was confirmed in himself by the chancery court. On motion the case was transferred to the chancery court. The chancellor found the issues of fact in favor of Carroll, and held that he was the owner of the land and entitled to the possession thereof. A decree was entered accordingly and Strasner has appealed to this court. The material facts are as follows:

Strasner owned 300 acres of land in Pike County upon which he resided. He executed a mortgage to the bank to secure an indebtedness due it of $600. The bank instituted foreclosure proceedings and obtained a foreclosure decree in the chancery court.

According to the testimony of Strasner, M. L. Carroll, J. C. Couch and Isaac Webb, who were his friends and neighbors, agreed to purchase the land at the foreclosure sale for the amount of the debt due the bank and to hold same in trust for him until he could pay the amount of the indebtedness, principal and interest. Pursuant to this agreement, Carroll became the purchaser of 220 acres of the land at the foreclosure sale for the sum of $635, being the amount due on the mortgage debt. Carroll gave his note to the commissioner making the sale, for the purchase money and Couch and Webb signed it as his sureties.

Strasner resided on the lands and was getting out stave bolts and paying a part of the proceeds arising from the sale of them to Carroll to be credited on the mortgage indebtedness. This was pursuant to the agreement he had made with Carroll in the beginning; that ninety days after the land was bid in by Carroll, he had paid to him $140 from the proceeds of the sale of stave bolts. The value of the land bid in by Carroll was variously estimated by the witnesses from seven to ten dollars per acre. Most of the witnesses placed its value at ten dollars per acre.

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Couch and Webb corroborated the testimony of Strasner as above abstracted.

In addition, Strasner testified that if the agreement had not been made with Carroll, who purchased the land, that he had another friend who had the money to buy the land, and who would have loaned him the money for that purpose. He also testified that after he made the agreement with Carroll, he did not try to secure any further bidders, and that it was generally known that the lands were being bid to be held in trust for him.

J. C. Cornish stated that he came to Murfreesboro with the intention of bidding at the sale, but came a day too soon, by mistake, that he had a talk with Mr. Carroll about the sale, and asked him if it was going to be sold in bulk or by forties; that Carroll told him that he thought that he and Strasner had the matter fixed up. Cornish then left and did not stay to the sale.

Two other witnesses testified that Carroll gave Cornish to understand that the matter had been arranged.

M. L. Carroll testified in his own behalf. He denied that he entered into an agreement whereby he was to become the purchaser of the land at the foreclosure sale, and hold the same in trust for Strasner. He said that the court would convene about ninety days after the day of sale, and that the sale would then come up for confirmation; that he agreed with Strasner that he would resell the land to him if he would pay him the amount he had bid for the land within ninety days; that if Strasner repurchased the land, the amount derived from the sale of stave bolts was to be credited on the purchase price, but that if Strasner failed to repurchase the land within ninety days, that the amount derived from the sale of stave bolts should be retained by him because he owned the land.

We think the clear preponderance of the evidence shows that Carroll agreed with Strasner to purchase the land at the foreclosure sale and take the title in his own name upon a verbal agreement to hold it for the benefit of Strasner. Of course, the testimony of Carroll shows that the agreement was for a resale by him to Strasner

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upon certain conditions which were not complied with by Strasner. His testimony however, is contradicted by Strasner, and Strasner is corroborated by Couch and Webb. So we think a clear preponderance of the evidence shows a parol agreement on the part of Carroll to purchase the land at the foreclosure sale, hold it in trust for Strasner and to convey it back to Strasner on repayment of the purchase money, and that he afterward refused to do so. Even under this State of facts, it is contended by counsel for Carroll that the agreement being a verbal one, was within the statute of frauds, and not enforceable as a trust in equity. It is true the general rule is that a mere verbal agreement by which one of the parties thereto promises to buy in at a judicial sale, lands of the other and hold the same for his benefit, does not create a resulting or implied trust, the agreement itself being within the statute of frauds. There are, however, several well recognized exceptions to the rule, and one of them is that where the purchaser of lands in which the other is interested becomes such under such a state of facts as would make it a fraud to permit him to hold on to his bargain. *Trapnall* v. *Brown*, 19 Ark. 39; *McNeil* v. *Gates*, 41 Ark. 264; *LaCotts* v. *LaCotts*, 109 Ark. 335. In the first two mentioned cases the principle is announced that it would be a fraud in a purchaser, who obtained property at a price greatly below its value by means of a verbal agreement, to keep the property in violation of the agreement.

In the instant case, the evidence shows that the land was bid in for $635, and the proceeds arising from the sale of the stave bolts amounting to $40 was credited thereon. The evidence shows that the lands were worth much more than the amount bid for them by Carroll. It also shows that Strasner relied upon the promise of Carroll to bid in the property for his benefit and relaxed his efforts to borrow the money from some one else, and thus prevent a sacrifice of his land. Strasner stated that he had another friend from whom he could have borrowed the money. He also stated that he relaxed his efforts to secure other bidders because of the agreement made with

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Carroll. It is also shown by the evidence that another bidder who was able to purchase the land, came to Murfreesboro for the purpose of attending the sale and bidding thereat. He refrained from bidding because Carroll told him that an understanding or agreement had been reached between him and Strasner about the land.

In the case of *Slowey* v. *McMurray*, 27 Mo., at page 118, the court, in discussing this question, said: "There is another class of cases growing out of the conduct of debtors and purchasers at public sales. This is where the purchaser becomes such under a state of facts as would make it a fraud to permit him to hold on to his bargain. As if a purchaser, by means of a promise to reconvey to his debtor, should induce a relaxation of the efforts on his part to prevent a sacrifice of his property, and thereby obtain it at an under price, or, if the purchaser, taking advantage of that reluctance invariably manifested by those attending public sales to interfere with any arrangement a debtor makes to save his property, should create an impression that he was buying for the debtor, thereby preventing competition, or by any other improper means obtain the property of a debtor at a sacrifice, such conduct would convert the purchaser into a trustee for the benefit of those who were defrauded by his conduct. Such cases go upon the ground of fraud, and courts will give relief without regard to the circumstance whether the agreement was a written or a verbal one, or whether it was supported by a consideration or not. Such are the cases of *Rose* v. *Bates*, 12 Mo. 30; *Estill* v. *Miller & Estill*, 3 Bibb. 177." See, also, *Leahey* v. *Witte*, (Mo)., 27 S. W. 402. The same rule applies where the promisee relaxed his efforts to save the property from being sold at the judicial sale. *Arnold* v. *Cord*, 16 Ind. 177; *Lillard* v. *Casey*, 2 Bibb (Ky.) 459. As bearing on the subject as sustaining the rule where the facts warrant it, see *Patrick* v. *Kirkland*, 53 Fla. 768, 12 A. & E. Ann. Cas. 540, and note; *Carr* v. *Craig* (Iowa), 116 N. W. 720, and case note to 5 A. & E. Ann. Cas. at page 173; Perry on Trusts (4 ed.), vol. 1, sec. 215, and *Ryan* v. *Dox*, 34 N. Y. 307.

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From the views we have expressed, it follows that the decree should be reversed and the cause remanded with directions to permit Strasner to redeem the land, and have further proceedings in accordance with the views expressed in this opinion.

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

Opinion delivered July 10, 1916.

1. CRIMINAL LAW—PROTECTION OF RAILWAY EMPLOYEES—RAILROAD FROGS—PENALTY—HOW ENFORCED.—The penalty provided by §1, Act 261, Public Acts of 1911, for the failure of appellant railway company to maintain certain blocks in certain frogs at certain places on its line, may be enforced by criminal process.
2. CRIMINAL LAW—VIOLATION OF LAW BY RAILROADS—ENFORCEMENT OF PENALTY—PROTECTION OF FROGS AND GUARD RAILS.—Under Act 261, Public Acts of 1911, the failure of a railroad company to maintain blocks in any or all of its frogs and guard rails, in a certain county, constitutes but a single offense, for which but one criminal prosecution can be brought; but other prosecutions can be brought if the railroad company continues to neglect to comply with the statute.

Appeal from Pope Circuit Court; *A. B. Priddy*, Judge; reversed as to case No. 2081; affirmed as to case No. 2080.

*Thos. B. Pryor* and *W. P. Strait*, for appellant.

1. This prosecution is under Acts 1911, 263. Penal statutes, * * * strictly construed—nothing will be taken as intended, not clearly expressed. 79 Ark. 517; 107 *Id.* 450; 6 *Id.* 131; 43 *Id.* 415; 87 *Id.* 411; 64 *Id.* 271. A failure to properly block *all* the frogs, constitutes only *one* offense. All omissions are only *one* continuing offense, and a conviction in the first case is a bar to further convictions. 107 Ark. 450. See, also, 6 *Id.* 131; 43 *Id.* 415; 87 *Id.* 411; 68 *Id.* 34; 79 *Id.* 313; 64 *Id.* 271; 13 Am. & Enc. Law (2 ed.) 63; 86 Penn. St. 427; 61 S. W. 275; 7 Johns. (N. Y.) 134; Acts 1911, p. 11, as construed in 107 Ark. 450-454. The court erred in overruling the de-

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murrer and in holding that this act, No. 261, Acts 1911, created a criminal offense; but, if so, the conviction in the first case was a bar to any further prosecution.

*Hill, Fitzhugh & Brizzolara, amici curiae.*

1. The circuit court had no jurisdiction for the reason that the actions are civil in their nature, and having been instituted before a justice of the peace, such court had no jurisdiction, and the circuit court acquired none on appeal. The act does not create a crime, but a public duty to be enforced civilly. 48 Ark. 301; 107 *Id.* 450; 220 U. S. 589; 214 *Id.* 1013; 154 Fed. 95; 98 App. Div. N. Y. 450; 83 N. E. 459; 45 Ark. 387. This last case was relied on by the State, but it has no bearing on this case.

2. There was only one offense. 1 Bish. New Cr. Law, § 1061 and note; 8 Ct. Ct. Reporter, 604; 97 S. W. 720-4; 105 Ark. 60; 56 *Id.* 350; 59 Ala. 64; 46 N. Y. 644.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant.

1. The act creates a public offense. Kirby's Digest, § 1516. The appellant's citations, 107 Ark. 574; 63 *Id.* 136 and 56 *Id.* 166, shed no light upon the construction of the act. The others do not apply here.

2. The act speaks for itself and creates a crime. 111 Fed. 525; 55 Minn. 183, etc. See, Kirby's Digest, § § 1707, 1647, 1653-5-6. A fine is a penalty.

3. The plea of former conviction will not stand. Appellant was liable for each and every violation of the act—separate offenses. 107 Ark. 450.

HART, J. On the 10th day of August, 1915, the prosecuting attorney filed an information before a justice of the peace in Pope County, Arkansas, charging that the St. Louis, Iron Mountain & Southern Railway Company, on the 2d day of August, 1915, did unlawfully fail, neglect and refuse to place and maintain blocks of sufficient size to prevent employees from getting their feet caught in the fifth frog east of the icing station in the yards at Russellville, Ark., as required by section 1, Act 261, of the General Acts of 1911.

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On the 11th day of August, 1915, the prosecuting attorney filed another information before a justice of the peace in Pope County, charging that the same railroad company on the 3d day of August, 1915, failed, neglected and refused to place and maintain blocks of sufficient size to prevent employees from getting their feet caught in a certain frog; being the second frog east of the icing station in Russellville, Arkansas, as required by section 1, Act 261, of the Acts of 1911. The defendant was convicted in each case before the justice of the peace and took an appeal to the circuit court. The trial in the circuit court again resulted in the conviction of the defendant in each case, and from the judgments rendered, the defendant has appealed to this court.

The cases were consolidated here for the purpose of hearing.

The informations were filed by the prosecuting attorney under Act 261 of the Acts of 1911. The act reads as follows: "Section 1: That any company owning or operating any railroad in this State shall be required to place and maintain blocks of sufficient size in all its frogs and guard rails to prevent employees from getting their feet caught therein."

"Section 2. Any company owning and operating any railroad in this State violating the provisions of this act, shall be liable on conviction to a penalty of a fine of not less than $25 for each separate offense." General Acts of 1911, pages 257, 258.

(1) In construing the switch light statute which was passed at the same session of the Legislature, we said, "The act creates no public offense, and, according to its terms, subjects the railroad to a penalty to be recovered by civil action in the name of the State." *St. Louis, Iron Mountain & S. Ry. Co.* v. *State*, 107 Ark. 450. So, too, in the *Kansas City, Etc., Ry. Co.* v. *State*, 63 Ark. 136, in construing the statute requiring railroad companies to give a signal for public road crossings the court said that the act created no public offense, and that the proceedings to collect the penalty of the statute were in the nature of a civil action. Counsel for the de-

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fendant claimed that these decisions are decisive of the present cases and in effect hold that the recovery of the statutory penalty must be in an action of a civil instead of a criminal nature. We do not agree with counsel in this contention. In those cases the words, "creates no public offense" were used in their ordinary acceptation, and meant that the act did not create a criminal offense within the meaning of article 2, section 8, of our Constitution which provides that no person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in certain enumerated cases. This is shown by the reasoning of the court in the case of *Railway Company* v. *State*, 56 Ark. 166, where the court had under consideration the section of the statute which provides a penalty for failure of a railway company to signal at a highway crossing. Section 1546 of Kirby's Digest, which is a part of our criminal code provides that a public offense is any act or omission for which the law prescribes a punishment. Section 2082 of Kirby's Digest, which is also a part of our criminal code, reads as follows: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the State of Arkansas, or in the name of an individual or corporation, where the whole fine is given to such individual or corporation. The proceedings in penal actions are regulated by the practice in civil actions."

So it will be seen that under our code the recovery of statutory penalties may be by actions of a civil or criminal nature as the Legislature may direct. The act providing the penalty for the failure of a railroad company to light switches contains a clause which provides in express terms that the penalty shall be recovered in civil actions in the name of the State. *St. Louis, I. M. & S. Ry. Co.* v. *State*, 107 Ark. 450. This act was passed at the same session of the Legislature as the act now under consideration. The act now under consideration does not provide that the penalty shall be recovered in a civil action in the name of the State. The omission is significant in indicating that it was the intention of the

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Legislature that the penalty under the frog statute should be recovered by criminal proceedings.

As said by Mr. Justice Field, in *United States* v. *Chouteau*, 102 U. S. 611, "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * * To hold otherwise would be to sacrifice a great principle to the mere form of procedure." The penalty provided by the statute is a punishment that the State inflicts upon the carrier which has violated the protective measures provided by the statute. The statute in express terms provides that the company violating the provisions of the act shall be liable on conviction to a penalty of a fine." The words "fine, penalty and conviction" convey the idea of punishment, imposed and enforced by the State for a crime or offense against its laws. The penalty denounced by the statute was in the nature of a punishment for the nonperformance of the acts imposed by the statute. There is nothing in the language used which indicates that the Legislature intended that the proceedings should be regulated by the practice in civil actions. This the Legislature had the power to do, but it is sufficient to say that it has not done so. It is manifest that the Legislature intended criminal process for the enforcement of the penalty prescribed by the act. The prosecutions were begun by informations filed by the prosecuting attorney before justices of the peace and as the proceedings contemplated by the statute are criminal, the justice of the peace had jurisdiction of them and the circuit court properly so held.

(2) It is next contended by counsel for the defendant that but one penalty can be recovered for a violation of the provisions of the statute in each county. On the other hand, it is contended by counsel for the State that the statute contemplates that the corporation shall be liable for a penalty if it fails to comply with the act at each and every station and every frog at said station.

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We do not agree with the contention of counsel on either side in its entirety. Courts have always been opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason penal statutes are construed strictly. The declared purpose of the present statute is to require railroad companies to place and maintain blocks of a sufficient size in all its frogs and guard rails to protect employees from getting their feet caught therein. If the Legislature had meant to provide that the penalty should be imposed for a violation of each and every frog at each and every station, we think it would have so declared in express terms. Under our Constitution general jurisdiction for the trial of crimes is vested in the circuit courts and it is through the medium of county organizations that this jurisdiction is exercised. The duty of the railroad is to place and maintain blocks of a sufficient size in all its frogs and guard rails and the penalty accrues on its neglect to do so. It is not increased by the increased number of places in which it neglects to provide them in each county. The failure to block and maintain blocks at any and all of its frogs constitutes but one offense. A separate penalty does not accrue for the failure to place and maintain blocks at each of its frogs. *Clark* v. *Lisbon*, 19 N. H. 286. To illustrate, if the railroad company has twelve frogs in any one county and fails to block all of them, this still constitutes but one offense. If it fails to block one of them this still constitutes an offense. The railroad does not comply with the statute by blocking a part of its frogs, but it must block all of them, and a failure to block any or all of them constitutes but one offense. It would not do to say, however, that but one penalty could be recovered; for this would defeat the manifest purpose of the statute. The railroad could defeat the purposes of the statute by failing to comply with it and paying one penalty therefor in each county. We think the penalty is a continuing one in the sense that but one penalty can be recovered in each county under the statute for all acts committed prior to the commencement of the prosecution. If the railroad company failed

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to construct and maintain blocks in its frogs as required by the statute, such penalties may be recovered as often as there are failures to comply with the statute. If, after the commencement of the prosecution, the statute is again violated, another penalty may be recovered in another prosecution commenced thereafter, and so on as long as violations continue. To illustrate, if a prosecution should be instituted on the 10th day of a month, this would be a warning to the railroad company of an intention on the part of the State to enforce the statute, and the prosecuting attorney might institute prosecution each day thereafter until the railroad company would comply with the statute. This construction of the statute is just and reasonable and carries out the intent of the Legislature. Such construction will compel railroad companies to comply with the statute, and will also protect them from cumulative penalties by not allowing prosecuting attorneys to institute prosecutions for a ruinous amount of penalties at one time. This construction is in accordance with the rule laid down with regard to the failure to light switches in the case of the *St. L., I. M. & S. Ry. Co.* v. *State*, 107 Ark. 450. See, also, *K. C. M. & B. Rd. Co.* v. *J. J. Spencer et al.*, 72 Miss. 491.

In case No. 2080, the prosecution was commenced on August 10, 1915, and the judgment in that case will be affirmed.

The information in No. 2081 was not filed until the 11th day of August, 1915, but it charged a violation of the statute on the 3d day of August, 1915. This was prior to the commencement of the first prosecution, and could not be done under the rule we have laid down above.

It follows that the judgment in No. 2081 will be reversed and the charge contained in it against the defendant dismissed.

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## McNEIL *v.* STATE.

Opinion delivered July 10, 1916.

LIQUORS—ILLEGAL SALE—INDICTMENT—NAME OF PERSON TO WHOM SALE WAS MADE.—An indictment charging the sale of liquor without a license may be sufficient although it contains no allegation of the name of the person to whom the liquor was sold.

Appeal from Sebastian Circuit Court; *Paul J. Little*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant prosecuted this appeal from a judgment of conviction for the unlawful sale of intoxicating liquors. The indictment charges that he "unlawfully and feloniously did sell vinous, malt, fermented, alcoholic and intoxicating liquors, etc.," without naming any person to whom they were sold. A demurrer was interposed to the indictment and overruled and exception saved.

It appears from the testimony that appellant sold whiskey three or four different times to one Harrison Davis, in the back end of his place—a sort of restaurant, or eating house, in the city of Ft. Smith. Davis stated that he bought whiskey the first time from L. J. McNeil some time after Christmas, last year; that he bought three or four times, the last half-pint on Thursday, about two o'clock in the afternoon, before he was arrested that night for being drunk. He got the whiskey from appellant, who poured it out of a quart bottle, and paid him the money for it in his kitchen.

Three officers testified they had searched appellant's place and found a quart and two pints of whiskey in sealed bottles, up stairs in a trunk, which was claimed to have been put there for his wife, and a barrel of empty quart bottles in the back end of the house, on the first floor.

Appellant denied having sold any whiskey to Harrison Davis at any time and that he had or kept any whiskey on the premises and stated, also, that he was not about his place of business the afternoon of this particular

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Thursday on which Davis claims to have purchased whiskey the last time.

Several other witnesses also testified that he was not at the house at the time of the alleged sale and was at other different places in town during the afternoon.

*Edwin* and *John B. Hiner*, for appellant.

1. The court erred in overruling the demurrer. The indictment does not sufficiently allege the particular circumstances of the offense. It did not name the purchaser of the liquor, nor the place of sale, nor the circumstances thereof. 64 Ark. 194 is not against us. Kirby's Digest, § 2227.

2. The time of sale was not fixed by any witness. There is nothing to show that the sale was made after January 1, 1916, and the conviction was erroneous.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The demurrer was properly overruled. Kirby's Digest, § 2227. The offense was stated with such certainty that the accused knows the crime for which he is called upon to answer, etc., and so that an acquittal might be pleaded in a subsequent prosecution. 102 Ark. 454; 98 *Id.* 577; 94 *Id.* 65; 95 *Id.* 48; 84 *Id.* 487; 26 *Id.* 323; 11 Ohio 282; Bishop New Crim. Law, § 163; 98 Ark. 578; 95 *Id.* 61; 39 *Id.* 216; 71 *Id.* 80; 72 *Id.* 586. The indictment charged the offense substantially in the language of the statute. It need not state to whom the liquor is sold. 40 Ark. 453; 19 *Id.* 630; 43 *Id.* 150; 197 Fed. 283; 67 So. 714; 125 Ga. 778; 27 Kans. 499; 47 Pac. 174; 99 Mo. App. 34; 100 N. W. 396 and many others.

2. The date of the sale was sufficiently established, and his guilt was proven to the satisfaction of the jury.

KIRBY, J. (after stating the facts.) It is contended that the court erred in overruling the demurrer and that the proof is not sufficient to show the sale was made after the law became operative on January 1, 1916, making the sale of intoxicating liquors a felony.

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This court has held an indictment charging the sale of liquors without license, which did not allege the name of the person to whom the liquor was sold, sufficient. *Johnson* v. *State*, 40 Ark. 453; *McCuen* v. *State*, 19 Ark. 630; *State* v. *Bailey*, 43 Ark. 150.

It is true the offense has been raised to the grade of a felony by the new law, fixing the punishment, but it is still not an offense against the property or person of an individual and the gravamen of the offense consists in the selling of the liquor, and it was not necessary, as held heretofore, to allege the name of the person to whom the liquor was sold. The offense is charged substantially in the language of the statute and in such a manner as to enable a person of common understanding to know what is intended, and the accused to understand what he is called upon to answer, and with a sufficient degree of certainty to enable the court to pronounce judgment on conviction, according to the right of the case. *Howard* v. *State*, 72 Ark. 586; *Parker* v. *State*, 98 Ark. 578; *Quertermous* v. *State*, 95 Ark. 61.

The testimony does not show definitely the date of the sale to the witness Davis, but he testified he had bought whiskey from appellant upon four different occasions, the first time, some time after Christmas of last year, and the last on a particular Thursday in the afternoon, before he was arrested for getting drunk that night.

All the witnesses knew the date of said day and whether or not it was during the year of 1916. Appellant testified not that said day was of last year but only that he did not make the sale, and that he was not at his place of business at the time witness claimed to have bought whiskey, and many other witnesses stated that he was at different places in the city during the afternoon of that day.

The court instructed the jury that if they found appellant sold the whiskey after the first day of January, 1916, they would return a verdict of guilty, and the testimony is sufficient to support the finding.

The judgment is affirmed.

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## PEEPLES *v.* AYDELOTT.

Opinion delivered June 19, 1916.

1. PUBLIC ROADS—OBSTRUCTION—REMEDY.—The obstruction of a public road may be enjoined in equity.
2. PUBLIC ROADS—OBSTRUCTION—REMEDY.—Appellee constructed a gin partly upon land belonging to appellant, and partly belonging to a railroad company. *Held*, appellee could enjoin in equity, the action of appellant in attempting to close the only road affording ingress and egress to and from the gin.
3. LIMITATIONS—POSSESSION OF LAND—COVERTURE—LACHES.—Where appellee held land by permission from the owner, a married woman, and the period of her coverture extends back beyond the beginning of the tenant's occupancy, the latter is not barred from asserting her rights to the possession of the land by limitations; nor by laches since the tenant's occupancy was by permission.

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

*J. L. Ingram* and *W. A. Leach* for appellant.

1. The cross-complaint was not responsive to the complaint; did not plead matters germane thereto and presented no defense; nor did it ask any equitable relief. It was simply a complaint in ejectment. The demurrer was waived. 98 Ark. 553; 90 *Id.* 117; 95 *Id.* 405; 27 *Id.* 235. The question cannot be raised here for the first time. 79 Ark. 499; 74 *Id.* 102; 57 *Id.* 589; 52 *Id.* 411; 23 *Id.* 746.

2. The evidence shows appellant owned the land in 1906. There has been no adverse holding. But she is a *feme covert* and the statutes of limitation do not run against her.

*J. G., C. B.*, and *Cooper Thweatt* for appellee.

The demurrer was ruled on by the court in its final decree. 88 Ark. 6; 30 *Id.* 552; 16 *Id.* 141; 11 *Id.* 423. The cross-complaint was no defense to complaint nor did it ask any equitable relief, but the court heard the whole case upon the merits. There was no proof to sustain the cross-complaint. The burden was on appellant to prove her title and she failed. No evidence of title was submitted or even set forth. Kirby's Digest, §

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2742. It was admitted that the fence was a nuisance and appellant was properly enjoined.

McCULLOCH, C. J. Appellee, A. L. Aydelott, instituted this suit against appellant, alleging that appellant was the owner of a certain tract of land; that the C. R. I. & P. Railway runs diagonally across the southeast corner of the land, the right of way of the railroad being 100 feet wide on each side of the track; that the railroad had a freight depot, cotton platform and other buildings on its right of way north of the track; that appellee has erected and maintains on the north side of the railroad track a seed house and cotton gin; that the storehouse of appellee is situated in the town of Biscoe, east and adjacent to the track of the railroad; that running west from the town of Biscoe and on the north side of the railroad and parallel with it is a wagon road which is the only way the public has to travel from Biscoe to appellee's gin and seed house, and the freight depot and other buildings on the north side of the railroad; that appellee had secured from the railroad company a lease of the lands on which he erected his cotton gin; that on the second day of February, 1914, appellant constructed a fence across said dirt road, preventing its use by appellee and the general public; that the fence constituted a public nuisance and worked an irreparable injury to appellee, rendering his gin worthless.

The appellant answered and made her answer a cross-complaint, in which she admitted that she was the owner of the land described in the complaint; alleged that appellee had erected a gin house on a portion of said land and was in possession of same.

Appellee answered the cross-complaint; denied that appellant was the owner of that part of the land upon which appellee's gin house was situated, and set up that he had been in the peaceable and uninterrupted possession of same for more than seven years, and had thereby acquired title to the same. He also embodied in his answer a demurrer to the cross-complaint, which set up

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that same did not state facts sufficient to constitute a cause of action, and the court had no jurisdiction to grant the relief sought, and that if she had a remedy it was adequate and complete at law. Wherefore, appellee asked that the cross-complaint be dismissed.

The decree recites, among other things, that "this cause is submitted to the court upon the duly verified complaint of the plaintiff and the exhibits thereto, the answer and cross-bill of Bettie H. Peeples, the reply and demurrer of the plaintiff thereto and depositions of witnesses; * * * and after due consideration of said cause upon the pleadings and depositions of witnesses * * * the court doth find for the plaintiff, and holds that the restraining order heretofore issued in this cause should be made perpetual." Then follows the decree enjoining appellant from interfering with the use of or obstructing the public highway, describing the same, and dismissing the cross-complaint of appellant for want of equity. Appellee died since the appeal was perfected and the cause has been revived in the name of his administrator and heirs.

(1) Appellant's attempt to obstruct the public road was wrongful, and the evidence adduced by appellee establishes the fact that he was rightfully in possession of the gin property, and was therefore entitled to seek the aid of the court of equity to restrain appellant from obstructing the road. The ground covered by the gin was a part of a tract of land originally owned by appellant's ancestor, William R. Harris, who died in the year 1856. She inherited an interest in the land and purchased the interests of the other heirs. The railroad company obtained a right of way 100 feet in width from W. R. Harris in the year 1854—that is to say, the predecessor of the present company obtained the right of way and it has been continuously occupied as a railroad right of way.

(2) The gin house is situated partly on the right of way and partly on the land of appellant, and it was built there by express permission of appellant and the railroad company. The gin house was destroyed by fire in the

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year 1906, and was rebuilt by appellee with express permission of appellant and the railroad company. Thus it was that appellee acquired possession of the land covered by the gin house and has rightfully continued to occupy it, and this entitles him to prevent an obstruction of the road which affords the only approach to it. The special injury resulting to appellee, aside from that suffered by the public generally, is what gives him the right to sue. It follows, therefore, that the chancery court was correct in enjoining appellant from obstructing the road.

(3) The decree dismissing the cross-complaint being in appellee's favor, he had no cause to complain as to the action of the court in proceeding to trial without transferring it to a court of law. The court did not dismiss the cross-complaint because it was a cause of action cognizable at law, but on the contrary heard the cause upon its merits and dismissed the complaint for want of equity. We are of the opinion that the decree was correct, not because appellant failed to establish ownership of the land but because the testimony which she adduced showed affirmatively that she is not entitled to oust appellee from the possession at this time. Her own proof shows that she consented to the rebuilding of the gin house, and she has not proved any facts which entitled her to revoke that consent and deprive appellee of the enjoyment of his gin plant which he was thus induced to erect.

Appellant is a married woman, and the period of coverture extends back beyond the beginning of appellee's occupancy of the land. Therefore she is not barred by the statute of limitations. Nor is she barred by laches, for the reason that appellee's occupancy has been with her permission. The decree should not therefore be treated as adjudicating the title to the land against her, but leaves it open for her to assert her title whenever she proves that appellee has forfeited his right to further occupy the land. Having expressly consented for appellee to erect the gin plant on the land, she must first show that some-

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thing has occurred to bring to an end the right of occupancy under that permission.

The decree is therefore affirmed.

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## RANDLEMAN v. JOHNSON.

Opinion delivered June 26, 1916.

1. MALICIOUS PROSECUTION—ADVICE OF COUNSEL—WHEN NO DEFENSE.—It is no defense to an action for malicious prosecution, that the appellant acted upon the advice of counsel, when he had not in good faith given to the attorney a fair and full statement of the facts as he understood them to be.
2. MALICIOUS PROSECUTION—COMPENSATORY AND PUNITIVE DAMAGES.—In an action for damages for malicious prosecution, plaintiff held entitled to recover both compensatory and punitive damages.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney*, Judge; affirmed.

*L. Hunter*, for appellant.

1. The verdict is contrary to the law and the evidence. To support a verdict the evidence must show clearly and conclusively that malice existed, and that there was no probable cause to justify the prosecution. It is not sufficient that malice alone be shown, but want of probable cause must also appear affirmatively. 11 Ind. 45; 56 Mo. 89; 50 W. Va. 581; 42 Ill. App. 254; 103 Mich. 131; 26 L. R. A. 627; 122 Ark. 382. The failure of the grand jury to indict, is no evidence of a lack of probable cause. 94 Ark. 433, 12 L. R. A. (N. S.) 717. The defense was absolute and complete. *Redman* v. *Hudson*, 124 Ark. 26.

2. The damages are exorbitant. 122 Ark. 382, and cases cited.

*Spence Dudley*, for appellee.

1. Every element of the tort complained of is overwhelmingly shown by the evidence; probable cause, honest belief in guilt and advice of counsel were not shown to the satisfaction of the jury. The malice is

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apparent. 29 Cyc. 30; 63 Ark. 391; 26 Cyc. 48; 71 Ark. 357; 26 Cyc. 27, 28.

2. The judgment is not excessive. 58 Ark. 139; 13 Cyc. 121; 139 Ala. 217; 66 Ill. App. 173; 131 Ind. 221; 56 Kans. 794; 35 La. Ann. 594.

SMITH, J. Appellee recovered judgment against appellant for the sum of $2,000 as damages in an action for malicious prosecution, and the judgment is questioned upon two grounds; first, that it is contrary to the law and the evidence, and, second, that it is excessive.

The charge preferred upon which the prosecution was had was that of buggery, alleged to have been committed with a mule, and upon the evidence of appellant and other witnesses appellee was ordered held by a justice of the peace, sitting as an examining court, to await the action of the grand jury. The charge was investigated by the grand jury and dismissed, whereupon this suit was brought.

Appellant defended upon the grounds that he did not institute the proceeding, but had merely furnished the deputy prosecuting attorney the names of witnesses who were familiar with the facts in the case, and these names were furnished that officer to enable him to take such action as he deemed proper upon the investigation to be made by him. The second defense was that the charge was true.

The evidence is in irreconcilable conflict. Appellant testified that he had twice seen appellee commit the crime charged, and he was corroborated by his father-in-law and his brother-in-law and by another witness. But other matters were testified to by these witnesses, in which there were such conflicts in their own evidence and such contradictions of the other evidence that the jury no doubt entirely disregarded this evidence; and we cannot say they were not warranted in so doing.

Appellee was a witness against appellant in a trial for malicious mischief wherein appellant was charged with shooting a dog. Appellant admitted that he went to Piggott to have appellee arrested for carrying a pistol,

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and there he met the deputy prosecuting attorney and, instead of preferring that charge, he told that officer about the circumstances of the alleged crime of buggery. The deputy prosecuting attorney testified that appellant was the only man he talked with before filing the information and that it was filed at appellant's request. That he met appellant on the street, when appellant called him aside and said he had some business with him, and this was the business he had. That appellant was present and testified in the justice trial and, among other other things, stated that appellee had kissed appellant's wife.

A witness named Hays, who was also a witness at the trial of appellant upon the charge of killing the dog, stated that appellant had said to him that the Johnsons, of whom appellee was one, were bad people, and that appellant proposed that a scheme be gotten up to run the Johnsons out of the neighborhood.

Appellee indignantly denied the charge and made a statement which evidently carried conviction to the minds of the jury, and it would serve no useful purpose here to set out the evidence tending to corroborate him and to contradict the evidence offered against him.

(1) Appellant insists that because the proof shows that he consulted with the prosecuting officer of that county, and that this officer put the machinery of the law in motion, he should not, therefore, be held liable for the prosecution. He cited the recent case of *Redmon* v. *Hudson*, 124 Ark. 26, as sustaining that view. The writer did not concur in the majority opinion in that case, but the chief ground of difference there was that the majority treated as undisputed the allegation that the appellant there, who was the defendant below, had in good faith made a full and fair statement of the facts to the attorney with whom he advised. The minority took the view that this was a question of fact which should have been passed upon by the jury. We are all agreed, however, that no one can defend as having acted upon the advice of counsel when he does not in good faith give to the attorney a fair and full statement of the facts as he

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understands them to be. Certainly he cannot make a false statement and defend upon the ground that he acted upon advice which was predicated upon this false statement.

Here the jury might well have found that, although appellant did advise with the deputy prosecuting attorney, he made a false statement to that officer, and if he did so he can claim no protection from any action of that officer which was prompted by the false statement.

We cannot say the verdict was excessive. Appellant was shown to be a man of considerable wealth by his own admissions, and the jury might have found that he gave a very low estimate of the value of his property.

No complaint is made against any of the instructions.

(2) The charge was disgustingly infamous, and, in addition to the compensatory damages, the evidence on the part of appellee tends to show that it was made under circumstances which would justify the award of punitive damages, and this question was submitted to the jury, although there was no request made to find the compensatory and punitive damages separately.

Finding no error the judgment of the court below is affirmed.

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## WHITE v. LOUGHBOROUGH.

Opinion delivered July 3, 1916.

1. LOCAL IMPROVEMENT—ANNEXATION OF ADDITIONAL TERRITORY—CONSENT OF ORIGINAL PROPERTY OWNERS.—Additional burdens cannot be placed upon the owners of property in a local improvement district by the annexation of other property thereto, without their actual consent.

2. LOCAL IMPROVEMENT—ANNEXATION OF ADDITIONAL PROPERTY.—Where territory is added to a local improvement district, under Act No. 246 of 1909, p. 744, the assessors are without authority to change the assessments in the old district merely because other territory is added to the district; the statute only authorizes a readjustment of assessments in case of changes in the value of improvements on particular pieces of property, and the readjusted assessments are merely intended to conform to such changes.

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8. LOCAL IMPROVEMENT—ADDITION OF NEW TERRITORY—CONSENT OF OWNERS IN ORIGINAL DISTRICT.—Where additional territory is annexed to a local improvement district under Act of 1909, p. 744, the assent of the property owners in the original district is not necessary, where no additional burden is placed upon them.

4. LOCAL IMPROVEMENT—AMOUNT OF ASSESSMENTS—ADDED TERRITORY. —Where territory is added to a local improvement district, the formation of the district will be upheld, where the assessed benefits do not exceed 20 per cent. of the total value of the property in the entire district.

5. LOCAL IMPROVEMENT—ANNEXATION OF TERRITORY—PRAYER.—Under Act No. 246 of 1909, p. 744, a prayer asking the annexation of certain territory to a local improvement district is valid, although it does not contain in express language a prayer that the costs of the improvement be assessed and charged upon the property within the annexed territory.

6. LOCAL IMPROVEMENT—ANNEXATION OF TERRITORY.—Act 246, p. 744, Acts of 1909, providing for extending territory in improvement districts in cities and towns, *held* to authorize the extension of the improvement *and the construction thereof* by the commissioners of the enlarged district, pursuant to the terms of the general statute.

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

*J. B. Webster*, for appellant.

1. To allow the assessment on the property in the annexed territory to stand, would be taxing property beyond the limit permitted by law. 109 Ark. 90; 86 *Id.* 21; 97 *Id.* 341; Kirby's Dig., § 5683.

2. The annexation is invalid; the petition did not pray that the cost be assessed and charged upon the annexed territory or the original district. Kirby's Dig., § 5667; Acts 1909, § 2; 115 Ark. 163.

3. The Act is in direct conflict with the constitution, in this, that there is no provision for receiving the assent of the property owners in the original district. Kirby's Dig., § 5665; Ant. 19, § 27; Const. 1874; 84 Ark. 390; 50 *Id.* 116; 115 Ark. 163; *Hamilton* v. *Board Imp.*, 123 Ark. 327.

*Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellee.

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1. Act 246, Acts 1909, has been strictly complied with. The statute is not void. 86 Ark. 1; 81 *Id.* 286.

2. The consent of a majority was primarily obtained. 115 Ark. 88; 55 *Id.* 614; 64 *Id.* 83; Kirby's Dig., § 4684; 46 Ark. 96.

MCCULLOCH, C. J.. Pursuant to the statute regulating the organization of improvement districts in cities and towns and proceedings thereunder, an improvement district was, on April 14, 1914, organized for the purpose of paving Spring Street between Markham and Tenth, in the city of Little Rock, and parts of certain intersecting streets, said district being known as "Paving District No. 222." The regularity and validity of that organization is unchallenged, either as to the original petition and ordinance creating the district, or the subsequent petition for the construction of the improvements and the assessment of benefits. However, after the district was completely organized and the assessments levied to pay for the improvement, a majority of property owners in certain contiguous territory filed a petition pursuant to the terms of the Act of 1909 (page 744), praying that the territory mentioned in the petition be annexed to the original district for the purpose of extending the improvements so as to embrace the paving of Spring Street from Tenth Street to Fourteenth, and parts of certain intersecting streets. The petition was granted and the ordinance was passed by the City Council annexing the territory described in the petition, and the property was duly assessed in accordance with the terms of the statute.

Appellant is a property owner in the annexed territory, and instituted this action in the chancery court of Pulaski County against appellants, who are the Commissioners of the District as originally formed, praying that the latter be restrained from attempting to enforce the collection of assessments against the property of appellant and others in the annexed territory.

The statute under which the annexation proceedings were inaugurated states in substance, that the council of a city or town may, upon a petition signed by a majority

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in value of the owners of property in any territory adjoining any improvement district, pass an ordinance annexing the described territory to the district, and that wher that is done the property in the annexed territory may be assessed in proportion to all the other real estate in said district. Section 4 of the statute, which relates to the assessment of benefits, reads as follows: "Sec. 4. Immediately upon the passage of such ordinance, it shall be the duty of the council to appoint three assessors, who shall immediately proceed to assess the value of the real estate included in such territory without such improvements; the value of same with such improvements and to extend the betterment to such property by reason of said improvements, and to assess the same, according to its betterment, in proportion to all the other real estate in said district." Section 5 of the Act provides for the filing of the assessment lists with the commissioners of the district and the publication of notice thereof so as to give the property owners an opportunity to be heard upon their objections to the assessments. Section 6 reads as follows: "Sec. 6. Whenever any territory shall have been annexed to any improvement district in the manner provided in this Act, it shall become a part of the said district and be subject to the same laws—special and general—as are provided for improvement districts in this State."

One of the grounds for the assault upon the validity of the annexation statute and the proceedings thereunder in this particular instance, is that the statute provides no means for obtaining the consent of the property owners of the old district. Appellees answer by the assertion that the original petition signed by a majority in value of the property owners in the district constituted an assent on their part to any subsequent addition or extension which is authorized by existing laws. The argument is, that the signing of the original petition was an assent in advance to any annexation that might thereafter be made upon the petition of a majority in value of the owners of property in the annexed territory.

(1) We do not agree with the contention of either side. If the effect of the annexation is to place an addi-

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tional burden upon the owners of property in the old district, it cannot be done without their express consent, for the constitution makes the right to levy assessments for local improvements depend upon "the consent of a majority in value of the property holders owning property adjoining the locality to be affected." Art. XIX, Sec. 27.

(2) The argument of counsel for appellees is that, consent to the original improvement is an implied consent to the additional improvement and that is sufficient, but the provisions above quoted, as interpreted by this court, means actual or express consent of the property owners, and not an implied consent. *Craig* v. *Russellville Waterworks Imp. Dist.*, 84 Ark. 390; *Hamilton* v. *Board of Imp. Dist.*, (185 S. W. 440), 123 Ark. 327.

Answering the argument of appellant: We do not find that the annexation imposes any additional burden on the property owners in the district as originally organized and assented to by them, for when the statute is carefully analyzed, it will be found to relate only to burdens to be imposed upon the territory annexed. It says not a word about taxing or retaxing the property in the old district. It appears from the record in this case that the Board of Assessors assumed the power of readjusting the assessments on the property in the original district, but that they made no changes in those assessments, and therefore no infraction of the law was committed. But it is perfectly plain that the assessors had no authority to change the assessments in the old district merely because additional territory was added, as the statute only authorizes a readjustment of assessments in case of changes in the value of improvements on particular pieces of property, and the readjusted assessments are merely intended to conform to such changes.

(3) Section 4 of the annexation statute, which has been herein quoted, plainly authorizes only an assessment of the annexed property, and it is provided that it must be assessed "in proportion to all the other real estate in said district." So we are of the opinion that the statute is not open to the objection made by appellants, for as before stated, there is no additional burden placed upon

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he owners of property in the old district, and their assent to the annexation is not required in order to conform to the provisions of the constitution which prohibits the levying of assessments without the consent of the property owners.

(4) Another objection urged against the annexation in this particular instance is, that the costs of the extension of the improvement will exceed 20 per cent. of the value of the real property in the annexed territory, as shown by the last county assessment. It appears from the agreed statement of facts that this is true, but that the cost as a whole, including the extension, does not exceed 20 per cent. of the value of the real property in the whole district as enlarged. The statute provides that "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." Kirby's Digest, § 5683. It is urged that the extension of the improvement must be treated as a "single improvement," within the meaning of the statute, and that it cannot be undertaken if it exceeds 20 per cent. of the assessed value of the real property in the annexed territory. It will be observed that the annexation statute makes no reference whatever to the percentage of the assessed value of the property in the district, and places no limitation on the cost of the improvement. The statute does declare, however, that when the territory shall have been annexed, "it shall become a part of said district and be subject to the same laws—special and general—as are provided for improvement districts in this State." If the 20 per centum limitation prescribed in the original statute has application to annexed territory, as seems to be conceded by learned counsel for appellant, it must apply to the district as a whole, and not merely to the annexed portion, for the simple reason that according to the plain letter of the statute, the annexed property becomes a part of the said district, and as such, is subject to the same law. So if we are to apply the 20 per centum limitation at all, it means that the whole improvement as extended over the annexed territory, shall not

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exceed 20 per centum of the value of the property in the whole district, including the annexation.

It is argued that if we treat the improvement in the annexed territory as separate, to the extent that it must be paid for by assessments on the property in that territory, the 20 per cent. limitation must necessarily apply separately to the property that is to be annexed. The argument is not without force, but in considering the statute, as a whole, we are convinced that that is not the proper construction of it. The limitation upon the cost of the improvement is purely statutory, the constitution contains no limitation so far as the cost is concerned, except that we must read into the constitution, a limit of the cost to special benefits derived from the improvement. *Shibley* v. *Fort Smith & Van Buren District*, 96 Ark. 410. But the legislative authority is supreme within those limitations, and if it is seen fit by the lawmakers to permit an extension of the improvement in excess of a certain percentage of the assessed valuation of the property in the district, there is no constitutional objection to it being done.

Learned counsel for appellant erroneously assumes that the 20 per cent. limit applies to each separate piece of property, but such is not the construction we have given to the statute in that regard. *Kirst* v. *Street Imp. District*, 86 Ark. 1. This does not affect in the slightest degree the question of uniformity of assessments on property in the original district and in the annexed territory. If there be constitutional objection to the Legislature authorizing the assessment of property in annexed territory on a different basis from the property in the old territory, no such objection can be made to the statute now under consideration, for it expressly provides that assessments on the property in the annexed territory shall be "according to its betterment, in proportion to all the other real estate in said district." This preserves harmony in the assessment of the property in the new district with that in the old. The obvious intention was to make the assessments uniform, and the record does not

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show that that rule of uniformity was departed from in the present instance.

(5) The only other charge against the validity of the proceedings is that the petition for the annexation does not contain in express language a prayer that the costs of the improvement be assessed and charged upon the property within the annexed territory. The statute does not prescribe any exact form for the petition, nor does it say the prayer shall be for the assessment of the costs on the property of the district. It merely reads that the council may pass the annexation ordinance when there is presented "a petition asking that it be so annexed." The prayer for the annexation of the territory is sufficient to invoke the aid of the council to the extent the law authorizes. Of course there must be a specification of the extension of the improvement, for that is necessarily implied inasmuch as the old statute authorizing the construction of the improvement provides that the nature of the improvement shall be specified, and the annexation statute makes the territory when annexed, subject to all the laws governing improvement districts. It is an instance of the Legislature declaring a right and referring to other existing laws for the remedy, which method of legislation does not offend against that provision of the constitution which declares that, "no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only." *Watkins* v. *Eureka Springs*, 49 Ark. 131; *Common School District* v. *Oak Grove Special School District*, 102 Ark. 411.

(6) There is another point which suggests itself in consideration of the effect of the annexation statute, but which is not presented in the briefs of counsel, and that is, the statute does not in express terms authorize the extension of the improvement, it merely provides for the annexation of territory and the assessment of property in that territory. We are bound to construe the statute so as to give authority to extend the improvement if it is to have any effect at all, for it is not to be presumed that the Legislature meant to authorize owners of property in contiguous territory to become annexed to an improve-

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ment district merely for the purpose of being taxed. It is very doubtful whether the statute would be valid unless it be construed to authorize the extension of the improvement so as to afford benefits to the annexed property. We must attach that much importance to the language of Section 6, for it obviously was intended to bring the annexed territory within the operation of the law so as to authorize the making of a new contract for the extension of the improvement and the assessment of the property to pay for it. The application of other statutes which are invoked in Section 6 give that power. We reach the conclusion, therefore, in interpreting the statute, that it was intended to authorize the extension of the improvement and the construction thereof by the Commissioners of the enlarged district pursuant to the terms of the general statute. The statute omits specifications of any means of keeping separate the costs of the extension, and the funds received from assessments levied on annexed territory, to pay for that extension; but we are not concerned with that in the present litigation, for the record contains no charge that the rights of any one are being violated in that respect. The separate identity of the parts of the enlarged district must be preserved to the extent, at least, that the annexed part may bear the burden of the additional expense.

Our conclusion upon the whole case is that the statute is valid and that the proceedings thereunder as reflected by the record in this case have been in conformity with it. The decree is therefore affirmed.

HART and KIRBY, JJ., dissent.

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## G. W. JONES LUMBER CO. v. WISARKANA LUMBER COMPANY.

Opinion delivered July 3, 1916.

1. CORPORATIONS—TWO CORPORATIONS WITH SAME OFFICERS—RIGHTS INTER SE.—The fact that two corporations have directors or other officers in common does not of itself prevent one from maintaining an action at law against the other; and a judgment rendered in such an action is valid, if free from fraudulent conduct on the part of the officers who procured the judgment.

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2. CORPORATIONS—TWO CORPORATIONS WITH SAME PRESIDENT—VALIDITY OF JUDGMENT AGAINST ONE IN FAVOR OF THE OTHER.—Under the facts, *held*, that a judgment procured by one corporation against another corporation, they both having the same president, was not procured by fraud, and was a valid judgment.

3. CORPORATIONS—RIGHTS INTER SE OF MAJORITY AND MINORITY STOCKHOLDERS.—The relative rights of majority and minority stockholders is measured by the charter and by-laws of the corporation; and the majority may impose upon the minority additional by-laws not inconsistent with the charter, but they have no right to impose by-laws providing gratuities to one of their number.

4. CORPORATIONS—RIGHTS OF MINORITY STOCKHOLDERS—ACTS OF MAJORITY—ABSENCE OF BY-LAW.—An attempt by the majority stockholders to vote the payment of back salary to the president of the corporation, in the absence of a by-law providing for the same, in opposition to the will of the minority stockholders is invalid.

5. CORPORATIONS—PAYMENT OF ILLEGAL SALARY—RIGHTS OF MINORITY STOCKHOLDERS.—The president of a corporation received an unauthorized payment of money as salary. *Held*, the president received the funds as a trustee, and he may be called to account by the minority stockholders.

6. COSTS—UNNECESSARY AUDIT OF CORPORATE BOOKS—LIABILITY OF INTERVENOR.—Where one N. intervened in an action between two corporations, causing an unnecessary audit of the books of one of them, the cost of the audit will be assessed against him.

Appeal from Craighead Chancery Court, Western District; *C. D. Frierson*, Chancellor; reversed.

*Mann, Bussey & Mann*, for appellants.

1. The judgment of the Circuit Court is conclusive as to the amount due. It was a valid judgment and constituted an adjudication of all matters in controversy. None of the provisions of Sec. 4431, Kirby's Digest, are alleged as cause for setting aside the judgment. Our statute does not require service of summons on all the stockholders of a corporation. Kirby's Digest, §§ 6045-6048.

2. The judgment was not voidable because G. W. Jones was president of both corporations, or because of interlocking directors or officers. 68 Ark. 492; 73 *Id.* 440; 75 *Id.* 415; 83 *Id.* 508; 9 *Id.* 261. Such judgment is not open to collateral attack by reason of alleged fraud in prior transactions. Cases *supra*. No fraud was practiced on the court in procuring the judgment.

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3. Jones was properly allowed his salary as president by the directors, all of whom had notice of the meeting.

4. It was error to disallow the items of $4,054.75, $2,000 and $710.

5. It was error to charge the lumber companies or Jones with any portion of the cost. The intervener, Nash, should be taxed with all the costs. He caused the expensive audit unnecessarily. 1 Cyc. 364; 21 Ark. 255; 10 Cyc. 954.

*Lamb, Turney and Sloan*, for appellee, L. J. Nash.

1. The $3,000 salary of G. W. Jones was properly charged back to him. 96 Ark. 281; 70 Ill. App. 556; 78 Fed. 62; 36 Pac. 36; 47 *Id.* 810.

2. Exceptions to interest charges, commissions, loan of credit, double charges, were all properly sustained. The judgment in the law court did not conclude appellees as to these items. Jones was president of both companies and the contracts were voidable. 96 Ark. 281; 38 *Id.* 17; 47 *Id.* 269; 87 *Id.* 521; 70 *Id.* 232. He and his directors were trustees for all the stockholders. 96 Ark. 281; 35 *Id.* 304.

3. The judgment was not only voidable, but void. 32 Cyc. 554; 111 N. W. 747; 70 Pac. 679.

4. The entire burden of cost should have been imposed upon G. W. Jones, including the master's fee. The books should have been audited annually. Nash had nothing to do with the books. Jones' conduct rendered the audit necessary.

MCCULLOCH, C. J. The Wisarkana Lumber Company is a corporation organized under the laws of the State of Wisconsin, but its assets have always been situated in Craighead County, Arkansas, where it constructed and operated a large lumber manufacturing plant and where a large body of timber lands owned by it is situated. It was organized with a capital stock of $100,000, divided into a thousand shares of the par value of $100 per share, of which the G. W. Jones Lumber Company, another

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Wisconsin corporation, owned 657 shares, G. V. Nash 200 shares, C. L. Storrs 100 shares, B. C. Wettlaufer 40 shares, and the other shares were held by three individuals merely for the purpose of qualifying them as officers of the corporation, one of whom was G. W. Jones, who was made president of this corporation, and who was also the president and principal stockholder of the G. W. Jones Lumber Company.

The promoters of the corporation were G. W. Jones and G. V. Nash, who conceived the idea of purchasing a large body of timber lands somewhere in the South and establishing a mill and lumber business. Nash came South in search of timber land, and finally located a large tract in Craighead County, and upon his recommendation the lands were purchased by the G. W. Jones Lumber Company, and upon the organization of the Wisarkana Lumber Company the lands were conveyed to the latter. That occurred early in the year 1905, and a mill was built at Nettleton, Craighead County, Arkansas, and the manufacturing business was begun. G. V. Nash was elected treasurer and general manager of the corporation and was put actively in charge of its business at Nettleton. He continued to act in that capacity until the year 1909, when some difference arose between him and G. W. Jones, when he resigned as manager and another was put in his place. He continued to be treasurer of the company for about a year thereafter, but ceased to have any actual control over the affairs of the corporation. He sold 170 shares of his stock to the F. Kiech Manufacturing Company, a corporation controlled by his brother-in-law and doing business in Craighead County, and he sold the remaining 30 shares to his brother, L. J. Nash, who is one of the appellees.

On October 10, 1911, a suit was instituted in the chancery court of Craighead County by the Bank of Nettleton (a banking corporation controlled by the stockholders of the F. Kiech Manufacturing Company), the F. Kiech Manufacturing Company, and the administrator of F. Kiech, deceased, and G. V. and L. J. Nash, against the Wisarkana Lumber Company and the stockholders

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and directors, alleging that the Wisarkana Lumber Company was insolvent, and asking that its affairs be wound up and that a debt to the Bank of Nettleton be paid out of the assets. Pursuant to the prayer of the complaint, a receiver was appointed and placed in charge of the assets of the Wisarkana Lumber Company, but subsequently an agreement was reached between all of the interested parties whereby the suit was withdrawn and the receiver discharged.

It appears from the testimony in the present case that from the time G. V. Nash severed his connection with the Wisarkana Lumber Company, the parties in interest, that is to say the Kiechs and the Nashs on one side and Jones on the other, dealt with each other at arms length and to some extent in antagonism to each other's interest, though their relations were not altogether unfriendly. The business of the G. W. Jones Lumber Company had been continued at the place of its domicile, Appleton, Wisconsin, and it acted as sales agent for the Wisarkana Lumber Company and made sales of the lumber produced at the Nettleton mill. It also advanced money from time to time for the Wisarkana Lumber Company and guaranteed its credit; and in August, 1912, an action at law was commenced by the G. W. Jones Lumber Company against the Wisarkana Lumber Company in the circuit court of Craighead County for the recovery of an amount of an account alleged to be due in the sum of $43,560.79. The suit was instituted at the instance of G. W. Jones, as president of the G. W. Jones Lumber Company. Said account, which was the subject-matter of that suit, covered all the transactions between the two corporations and showed a balance in the sum above named due to the G. W. Jones Lumber Company. Judgment by default was rendered in the circuit court in favor of the G. W. Jones Lumber Company for the full amount of the account on September 11, 1912, and on January 8, 1913, the G. W. Jones Lumber Company and G. W. Jones commenced the present suit in the chancery court of Craighead County against the Wisarkana Lumber Company for the purpose of winding up the affairs of the corporation and obtaining

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satisfaction of the judgment debt due to the G. W. Jones Lumber Company.

The stock of the F. Kiech Manufacturing Company was then assigned to L. J. Nash and he intervened in the case to protect his rights as holder of that stock as well as the 30 shares which he had purchased from his brother, G. V. Nash. In the intervention plea of L. J. Nash, he attacked the validity of the judgment rendered in favor of the G. W. Jones Lumber Company, and also of a number of the items embraced in the account of that company against the Wisarkana Lumber Company. At the instance of the intervener, L. J. Nash, the court appointed an expert accountant as special master to examine the books and check up the accounts of the Wisarkana Lumber Company and make report. The master made an elaborate report, with findings favorable to the G. W. Jones Lumber Company, and exceptions thereto were filed by the intervener, some of which were sustained and others overruled. The exceptions covered items aggregating the sum of $11,627.02, and the court sustained the exceptions concerning four of the items aggregating $9,764.75 and struck those items from the account.

The court also decreed payment of the costs of the litigation as follows: "That the plaintiff, G. W. Jones Lumber Company, pay one-half of the costs, and that the Wisarkana Lumber Company pay one-quarter of the costs and that the intervener, L. J. Nash, pay one-quarter of the costs, * * * and that the said costs include the charge of the special master, Homer K. Jones, $3,137.45." Plaintiffs G. W. Jones and G. W. Jones Lumber Company appealed from so much of the decree as was against them, and the intervener, L. J. Nash, cross-appealed.

The first question presented concerns the validity of the judgment rendered in favor of G. W. Jones Lumber Company against the Wisarkana Lumber Company, for if that judgment was valid it constituted an adjudication of all the matters in controversy therein between the two parties to that suit, and this embraced all of the items covered by the exceptions, except one involving the

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sum of $3,000 which will be discussed later. All of the other items were charges of the G. W. Jones Lumber Company against the Wisarkana Lumber Company, and, of course, if the judgment had any validity at all it constituted a final adjudication between the parties.

(1) It is not contended that the proceedings were not conducted in accordance with the statutes with respect to the issuance and service of process and the rendition of the judgment, but it is argued that the fact that G. W. Jones was president of both corporations, and instigated the litigation, makes the judgment voidable at the instance of the minority stockholders of the Wisarkana Lumber Company. This contention presents the question whether or not one of two corporations having what is termed interlocking directors or officers can maintain an action at law against the other. The authorities on that point hold squarely that the fact that the two corporations have directors or other officers in common does not of itself prevent one from maintaining an action at law against the other, and that a judgment rendered in such an action is valid if free from fraudulent conduct on the part of the officers who procured the judgment.

In Joyce on Actions By and Against Corporations (Section 226) the rule is stated as follows: "Although there is a commingling of officers of two corporations, as when some of the directors of one corporation are directors of another, still it does not prevent them from being distinct corporations, with a right to contract with each other in their corporate capacities, and to sue and be sued by each other in regard to such contracts, where the relations of the parties have not been abused. The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. It is an elementary and fundamental principle that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected."

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Substantially the same rule is stated in another text book on the subject. Spelling's Corporate Management, Section 300. The text finds support in the decision of the Supreme Court of the United States in the case of *Leavenworth* v. *C. R. I. & P. Ry. Co.*, 134 U. S. 688, where it was held that the trust relation between two corporations did not prevent one from suing the other when there was no collusion or fraud in fact.

This brings us to the question whether or not there was any actual fraud in the procurement of the judgment. When the action at law was instituted, F. Kiech Manufacturing Company and L. J. Nash were the only two holders of stock which were antagonistic to the Jones interest. F. Kiech Manufacturing Company was located in Craighead County and was represented by attorneys who were members of the bar at the City of Jonesboro, where the action was pending. They were apprised of the pendency of the litigation and applied to the attorneys for the plaintiff for a statement of the account, which was furnished them, and every opportunity was given to them to consider whether or not a defense should be offered for the F. Kiech Manufacturing Company. After consideration, those attorneys reached the conclusion that no defense should be made by their client, and so notified the attorneys for the plaintiff, who then asked the court for a judgment by default, which was rendered. L. J. Nash is a lawyer and resided in Wisconsin. He had been practicing law there for a great many years, and had been on terms of intimacy with G. W. Jones and for many years had been the attorney for Jones and the G. W. Jones Lumber Company.

Nash and Jones had had considerable correspondence about disposing of the assets of the Wisarkana Lumber Company, but there was no evidence that Nash received any information concerning the pendency of the suit at Jonesboro until September 7, 1912, when he addressed a letter to G. W. Jones at the office of the G. W. Jones Lumber Company in Appleton, making inquiry about the suit pending at Jonesboro, and also about the affairs of the corporation, whether it was insolvent or not, etc.

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Jones was absent at the time, but some one in his office answered the letter, stating that Mr. Jones was absent, and that his attention would be called to the matter on his return. It appears that Jones was then in Arkansas, and the judgment was rendered before his return, and when Nash heard a day or two later that judgment had been rendered, he protested against it but took no steps then towards having the judgment set aside. The antagonism between the parties grew more and more acute until it culminated in the present litigation.

(2) We do not think that the testimony supports a charge of fraud in the procurement of the judgment. All of the items of the account sued on were disclosed by statements that were furnished by the G. W. Jones Lumber Company to the Wisarkana Lumber Company from time to time, and any stockholder had the opportunity to know what was embraced therein. Those accounts became accounts stated, within the meaning of the law, and it is doubtful whether a defense against any of the items could have been successfully made. There is no evidence whatever that G. W. Jones intended to conceal the institution and pendency of the suit in the circuit court of Craighead County. On the contrary, the indications are that he instituted the suit openly, and that the pendency of the suit came to the knowledge of the stockholders most interested on the other side, namely the F. Kiech Manufacturing Company. That concern was operated by men there in the same county, and having attorneys practicing at the bar who would likely take notice of any litigation which affected the rights of their clients. The correspondence between the attorneys, which is set out, showed that the attorneys for the respective parties dealt with each other in the most courteous way, without any effort to cut off any right to present a defense, and that not until the attorneys for the F. Kiech Manufacturing Company had declined to make defense for their client was there any effort to secure a judgment by default. The attorneys for the plaintiff in that action doubtless assumed, as they had the right to do, that if one of the antagonistic stockholders was

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informed as to the pendency of the suit the information would be conveyed also to the other one. It is significant that both of those stockholders were purchasers from G. V. Nash, a brother of the intervener, and that when the intervener was preparing to appear in this action he secured a transfer of the stock of the F. Kiech Manufacturing Company to him solely for the purpose of giving him additional status in this litigation as a large stockholder. The proof shows that it was transferred to him merely for the purpose of bringing it into this litigation and for no other purpose. Under those circumstances we are unwilling to say that there was any fraudulent conduct on the part of G. W. Jones which rendered the judgment voidable.

Now, this settles the controversy concerning all the items except the item of $3,000 referred to above, which was the salary of G. W. Jones, as president of the Wisarkana Lumber Company. In the year 1911, after G. V. Nash severed his connection with the corporation, the board of directors met and allowed G. W. Jones a salary of $3,000 for the period of six years prior to that time. So far as is disclosed by the evidence in this case, there was no by-law authorizing the payment of salary to the president, nor had there been any contract with respect to such a charge. The evidence shows that Jones acted as president during all the time, and that he made frequent trips to Arkansas, and in other ways gave attention to the business of the corporation. The evidence is sufficient, in other words, to warrant a finding that G. W. Jones earned that sum of money by services rendered to the corporation, but that is not the true test, we think, of the right to collect the salary under the circumstances shown in this case.

(3-4) The relative rights of majority and minority stockholders must be measured by the charter and by-laws of a corporation, and minority stockholders had a right to look to the courts for protection from a violation of their rights. The majority have the right to impose upon the minority additional by-laws not inconsistent with the charter, but they have no right to pay gratuities

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to one of their number. If the by-laws had been amended so as to authorize the payment of a salary to the president, then it would have been competent to pay Mr. Jones the salary thereafter earned under the by-laws; but it does not appear that this payment was made pursuant to any by-law. It was merely voted to him as a back salary for services already rendered. The minority stockholders had the right to assume, in the absence of a by-law or contract, that no salary would be paid, and the attempt of the majority to vote a salary to the president for past services was a distinct violation of the rights of the minority.

(5) This item was credited to G. W. Jones on the books of the G. W. Jones Lumber Company, and a corresponding charge was made against the Wisarkana Lumber Company. In this way the G. W. Jones Lumber Company advanced the money for the Wisarkana Lumber Company and paid it over to Jones. So far as concerns the account of the G. W. Jones Lumber Company, it will be conceded that the judgment at law was a bar to any further inquiry as to the item, but it does not follow that in this proceeding Jones, as president of the Wisarkana Lumber Company, cannot be called to account for a sum of money which he had wrongfully accepted from the funds of the corporation. The matter stands the same as if he had caused a check to be drawn by the Wisarkana Lumber Company on its bank to pay this sum. Having received the funds without being entitled to it, he is a trustee to that extent, and the minority stockholders have a right to call him to account for it, and that right is not barred by judgment recovered by the G. W. Jones Lumber Company against the Wisarkana Lumber Company. We are of the opinion, therefore, that the court was correct in rendering a judgment against G. W. Jones for that amount.

(6) The only other point which we deem it necessary to discuss is that which relates to the award of costs, it being the contention of counsel for plaintiffs that the court erred in assessing the fee of the accountant as a part of the costs to be paid by them. There seems to

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be much force in the contention that the intervener, Nash, caused a fruitless audit of the books of the company, and that he alone should bear the expense. It is true that nothing was accomplished by the audit of the books. The items in dispute were known to the parties, or were easily ascertainable, and it does not appear that there was any real necessity for having the books audited. There were negotiations between the parties about the examination of the books, and Jones offered to permit Mr. Nash to have the books audited, and the latter selected an accountant, who failed to do the work because Jones objected to the books being taken away from the office of the company. It was not unreasonable to insist that the books be not removed from the office, and if an examination of the books was desired it ought to have been made at the place where the books were ordinarily kept. The report of the master was favorable to the plaintiffs, and the only errors that were found in the books were very slight ones and were against the interests of the G. W. Jones Lumber Company. The audit resulted in nothing favorable to the intervener, and it shows that the charges of improper bookkeeping were unfounded.

There is no reason, therefore, why either the Wisarkana Lumber Company or G. W. Jones Lumber Company, or G. W. Jones himself, should be required to pay any of that unnecessary expense, and we are of the opinion that the court ought not to have included it in the general costs, but should have adjudged that item against the intervener. The matter of costs was within the sound discretion of the chancellor, but we think it amounted to an abuse of that discretion to tax this large unnecessary expense against those who gave no cause for it.

The decree is therefore reversed, and the cause remaned with directions to enter a decree in accordance with this opinion.

WOOD, J., dissents as to decree for costs.

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## BREINING v. LIPPINCOTT.

Opinion delivered July 3, 1916.

SEDUCTION—ACTION FOR DAMAGES—LIMITATIONS.—An action by a parent for damages for the debauchery and seduction of his daughter, is one sounding in tort for personal injuries, to which the one year statute of limitations does not apply.

Appeal from Pulaski Circuit Court; Third Division; *G. W. Hendricks*, Judge; reversed.

STATEMENT BY THE COURT.

Appellant instituted this suit January 25, 1915, against the apellee to recover damages for the alleged debauchery by him of appellant's daughter. Among other things, appellant alleged that she was a widow; that she had a daughter who was of the age of seventeen, who was employed by the appellee to work for him in connection with his business in operating picture shows; that appellee took advantage of his position as her employer and of her youth and inexperience, and "seduced her by threats, force, flattery and promises of money to have sexual intercourse with him," and that he did have sexual intercourse with her on or about the first day of April, 1913, and as a result of such intercourse there was the birth of a child; that such acts of the appellee caused great and untold humiliation to the appellant and deprived her of the services, companionship and society of her daughter, and caused her to expend the sum of $200.00 for medical services, drug bills and nurse hire in connection with the birth of the child. Other elements of damages are also set forth in the complaint. She alleged that the acts of appellee were wantonly, wilfully and maliciously done. She prayed for compensatory damages in the sum of $50,000, and punitive damages in the sum of $25,000.

Appellee answered denying the allegations of the complaint, and setting up, as part of his answer, the one year statute of limitations.

The court treated the plea of the statute of limitations as a special demurrer to the complaint and sustained it, finding that the complaint on its face shows "that

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this action was not brought within one year after the cause of action accrued." The court thereupon entered judgment in favor of the appellee dismissing appellant's complaint, and this appeal followed.

*Bradshaw, Rhoton & Helm*, for appellant. *Gardner K. Oliphint*, on the brief.

1. The one year statute, Kirby's Digest, § 5065, does not apply to this case. This is not an action for "Criminal Conversation" and 24 Ark. 55 does not control. 54 Ark. 404; 71 Ark. 71; 160 Fed. 260; 83 Ark. 71; 6 Bacon's Abridgements, p. 551, 374; 52 L. R. A. (N. S.) 85, 91; 4 Suth. on Dam. (3 ed.) § 1283; 1 Sedgw. on Dam. (9 ed.) § 376; 56 Pac. 529; 60 Kans. 341; 44 L. R. A. 757; 72 Am. St. Rep. 360; 31 S. E. 268; 98 S. W. 986, 83 Ark. 6; 128 N. W. 1084; 164 Mich. 26; Annot. Cases; 1912, B. 65.

2. But if it does apply, the statute cannot be taken advantage of by demurrer. 54 Ark. 468; 58 *Id.* 136; 99 *Id.* 377; 74 *Id.* 101; 70 *Id.* 161; 91 *Id.* 400; 96 *Id.* 163; 92 *Id.* 465; 31 *Id.* 684; 34 *Id.* 165; 49 *Id.* 252; 46 *Id.* 438; 45 *Id.* 333, etc. The defense of the statute of limitations is not a meritorious one. 10 Ark. 428. The statute did not begin to run until loss of services occurred and the action is not barred. 54 Ark. 404, 406. There must be a complete and present cause of action. 10 Ark. 228; 25 *Id.* 462; 32 *Id.* 131; 1 Duval (Ky.) 313; 5 Bush, 568; 16 S. W. 473; 39 *Id.* 341; 27 N. C. 16; 22 W. Va. 275; 153 Ind. 591. The cause should be reversed.

3. All forms of action were abolished by the Code. This action is founded on tort; it is not for criminal conversation but for "personal injuries" and the one year statute does not apply. 52 L. R. A. (N. S.) 85, 91; Am. & Eng. Ann. Cases, 1912, B. 65 and note; 113 Ga. 987; 23 Hun. 71; 120 Ga. 651; 102 Am. St. 118. This court should abolish the fiction of law requiring a parent to sue as a matter for loss of services. The Code was adopted after the case of Patterson *v.* Temple, 24 Ark. 55 was decided and the rule no longer applies. 98 Fed. 702; 71 Ark. 76.

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*Jno. D. Shackelford* and *Gus Fulk*, for appellee.

1. The action was barred by the one year statute of limitations. Gould's Dig., § 11. Ch. 106. This was a special action in the case and the law is not changed by § 1 Code Civil Proc. 24 Ark. 55; 71 *Id.* 71; 83 *Id.* 9; 103 *Id.* 366. This is simply an action for criminal conversation. Anderson's Law Dict., p. 252; 2 Bosarx. & Pull. 476; 71 Ark. 71.

2. The statute can be raised by demurrer where the complaint shows a bar. 31 Ark. 684; 34 *Id.* 165; 39 *Id.* 158; 45 *Id.* 333; 46 *Id.* 438; 49 *Id.* 253.

3. The statute began to run from the date of the seduction. 54 Ark. 406; 3 Sharswood's Blackstone, p. 143, note 26; 35 Cyc. 1305; *Ib.* 1308; 18 U. C. Q. B. 251; 16 S. W. 473.

WOOD, J. (after stating the facts). In 1862 this court, in *Patterson* v. *Thompson*, 24 Ark. 55, held that the right of a father to maintain an action for the seduction of his daughter was barred in one year from the time the cause of action accrued. The statute of limitations under which that case arose and was decided was as follows:

"The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery, and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken whereby special damages are sustained." Gould's Digest, chap. 106, § 11.

The effect of the holding in *Patterson* v. *Thompson*, *supra*, is that an action for seduction was a special action on the case, under the one year statute, and in the same class with actions for criminal conversation, assault and battery, false imprisonment, and the other actions named in the section. The court did not hold, and it was not necessary to the conclusion there reached to hold that seduction and criminal conversation were the same and that an action for seduction would be the same as an action for criminal conversation. The court construed the

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words "all special actions on the case" to include other special actions on the case besides those specifically enumerated and decided that seduction and criminal conversation were in the same class so far as the one year statute of limitations was concerned.

But in 1868 the code of civil procedure was adopted, which abolished the forms of all actions, and provided that there should be but one form of action, which shall be called a civil action. After this the digesters, acting under the authority of the statute "to omit redundant and tautological words and to condense the law into as concise and comprehensive a form as might be consistent with a full and clear expression of the will of the legislature," omitted the words "all special actions on the case." So that the statute now reads as set forth in section 5065 of Kirby's Digest, as follows:

"The following actions shall be commenced within one year after the cause of action shall accrue: First, all actions for criminal conversation, assault and battery and false imprisonment. Second, all actions for words spoken, slandering the character of another. Third, all words spoken whereby special damages are sustained."

This court in *Emrich* v. *Little Rock Traction & Elec. Co.* 71 Ark. 71, shows that the construction of the digestors, in omitting these words from the statute, had been approved inferentially at least by several decisions of this court citing them. But even if these words had been retained, as held in *Emrich* v. *Little Rock Trac. & Elec. Co. supra*, "the meaning of the clause would then be the same as if it had provided, that the following actions shall be barred in one year after they accrue: First, all special actions on the case for criminal conversation; all actions for assault and battery, and for false imprisonment." The court in *Emrich* v. *Little Rock Trac. & Elec. Co. supra*, thus expressly overruled the holding in *Patterson* v. *Thompson*, *supra*, that the one year statute of limitations applies to other special actions on the case than those for criminal conversation, etc., expressly named therein. This court has approved the construction given the statute in *Emrich* v. *Little Rock Trac. & Elec. Co. supra*, in *St. L.*,

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*I. M. & S. Ry. Co.* v. *Mynott*, 83 Ark. 9; *St. L. I. M. & S.* Ry. Co. v. *Robertson*, 103 Ark. 366. It follows that the one year statute, as it has been construed by this court, is applicable only to those actions that are specifically enumerated therein. Actions for criminal conversation therefore are barred within one year. Is the present action one for criminal conversation?

Since the legislature has specifically designated that an action for criminal conversation, assault and battery, etc., shall be brought within one year and has also expressly provided that all actions not included in the foregoing provisions shall be commenced within five years (Kirby's Digest, § 5074), it is not within the province of the court to include within the term "criminal conversation" actions "of a like nature." The statute is plain and the intent of the legislature must be gathered from the words used, and where the words used are unambiguous courts cannot add to or take from them their obvious meaning. The legislature used the specific term "criminal conversation," which had a well defined meaning.

In *Gill* v. *L. & N. Railroad Co.*, 160 Fed. 260, 263, it is said: "One of the well recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute; and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was first necessary to give it place and operation."

Mr. Sutherland says: "The best construction of a statute is to construe it as near to the rule and reason of the common law as may be and by the course which that observes in other cases." Sutherland on Stat. Const. § 454.

Says Blackstone: "Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater) the law gives a satisfaction to the husband for it by action of trespass *vi et armis*, against the adulterer,

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wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation, by settlement or otherwise, to provide for those children, which he cannot but suspect to be spurious." 2 Lewis' Blackstone's Com. 139-140.

Now the relation of husband and wife is entirely different from that of master and servant or parent and child. In *Woodward* v. *Walton*, 2 Bosanquet & Puller, 476, Lord Mansfield stated that he could not distinguish between an action by a father for the debauchery of his daughter and an action by a husband for criminal conversation. This language was used in determining whether the form of action by a father for the debauchery of his daughter should have been one upon the case instead of trespass *vi et armis*, and the opinion of Chief Justice Mansfield that the *form* of action by a father for the debauchery of his daughter was the same as that of a husband for criminal conversation with his wife is far from a holding to the effect that the causes of action were the same. On the contrary, the opinion shows that the causes of action were different. Our code as already stated has abolished the different forms of action. Under our statute of civil procedure there is but one form of action. But a form of action and a cause of action are entirely different things. The legislature has not undertaken to and could not make all causes of civil action the same. In prescribing the limitation of one year for the designated actions the legislature had reference to causes of action and not to the forms of action.

A cause of action by a parent for a debauchery of a daughter by adultery or fornication is altogether different from a cause of action by a husband for criminal conversation with his wife. The causes of action grow out of entirely different relations and are not in any sense the same.

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In *Prettyman* v. *Williamson*, 39 Atl. Rep. 731-732, it is said: "Criminal conversation, as above stated, is an action for damages caused by adultery with the wife, and the husband's injury by the wrong consists in mental suffering from the dishonor of the marriage bed, and the loss of the affection of his wife, and the comfort of her society, as well as the pecuniary loss of her services. * * * According to the modern doctrine and the later decisions, the action is based merely on what is termed the loss of the consortium, that is, the loss of the conjugal association, affection and assistance of the wife, and it is not essential to the maintenance of the action that there should be any pecuniary loss whatever."

In *Simpson* v. *Grayson*, 54 Ark. 406, Cockrill, Ch. J., speaking for the court, said: "The common law regarded the father's action for the seduction of his daughter as an action of trespass for assaulting a servant, whereby he lost her services. It was based upon the relation of master and servant, and not upon that of parent and child, and the measure of damages was such only as a master would recover for a disabling physical injury to his servant. * * * The theory of an injury to the master is pertinaciously retained as the essential basis of the father's action, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family.

"It is a logical sequence from that state of the law that proof of the mere nominal relation of master and servant should be sufficient to give the parent a footing in court to recover damages commensurate with his injury. It is accordingly established, in this country at least, that the father may maintain his action for the seduction of his minor daughter, although she is not a member of his household, but is in the actual employment of another, enjoying the fruits of her own labor, with her father's consent, if he has not relinquished past the power of recall his right to control her services."

The cause of action for criminal conversation is based upon the relation of husband and wife, and not that of master and servant or of parent and child, and the measure

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of damages for the two causes of action would be entirely different. Inasmuch as the legislature prescribed in specific terms that the one year statute of limitations should apply to actions for criminal conversation, and did not deem it wise or expedient to apply the same bar to an action by a parent for the debauchery of a child, the court should not place such limitation upon the latter cause of action by construction. *Bennett* v. *Worthington*, 24 Ark. 487-94. This was purely a legislative function. The legislature has used terms having well defined meanings, and it must be presumed that they understood the distinction between the causes of action enumerated and others not mentioned.

Furthermore, the rule of law which only permits a parent to recover damages for the debauchery of a minor daughter because of his relation as master, and not as that of parent, is, as stated by Chief Justice Cockrill in *Simpson* v. *Grayson*, *supra*, "but little more than a fiction," and, being such, it should be and is no longer recognized by the best of modern judicial thought as the essential basis of a parent's action for the debauchery of a minor child. The real and substantial basis for the recovery should be the personal injury which the parent sustains in his capacity as parent and not as master. The fiction really grew up out of the emphasis and importance placed upon forms of action at the common law and the necessary technicalities indulged in by the courts in an effort to square the forms of action to the principles of natural right and justice. But under the reformed procedure there is no longer any reason for preserving by judicial construction this fiction, for under the liberal rules of such procedure all fictions growing out of the mere forms of pleadings have been abolished. It was held in *Anthony* v. *Norton*, 44 L. R. A. 757:

"The common law rule in actions by a parent for damages for the seduction of his daughter, which requires him to sue in the capacity of a master, for the loss of her services as a servant, although in fact permitting a recovery by him in his parental relation, was the rule of a legal

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fiction which no longer obtains, under the reformed procedure, because of the abolition by the code of fictions in pleadings, and its requirement to state the actual facts in controversy." The opinion is an able and exhaustive discussion of the reasons why the legal fiction should no longer obtain under the reformed procedure, and we are in full accord with all that is therein expressed.

We approve the language of the chief justice rendering the opinion in that case, in which he said; "The rule which requires a parent suing for the seduction of a daughter to plead loss of her services as his servant, but which obligates him to only nominal proof of the cause of action stated, is an empty and senseless legal fiction, a pretence and sham which does discredit to the law, and with which it were highly desirable to dispense." We now hold that the adoption of the code of civil practice did dispense with it. The digesters correctly omitted the words "special" and "on the case." The action is one sounding in tort for personal injuries to which the one year statute of limitations does not apply.

For other cases holding that the right of action for debauchery and seduction is one in tort for personal injuries, see *Holliday* v. *Parker*, 23 Hun. 71; *Hutcherson* v. *Durden*, 113 Ga. 987, 54 L. R. A. 811; *May* v. *Wilson*, 23 Am. & Eng. Ann. Cas. 1912 B. 654, and case note.

The judgment is therefore reversed and the cause remanded with directions to overrule appellee's demurrer, and for further proceedings according to law and not inconsistent with this opinion.

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## THE MURRAY COMPANY v. SATTERFIELD.

Opinion delivered July 3, 1916.

1. MORTGAGES—TWO MORTGAGES—RECORD—PRIORITY.—Where two mortgages are given covering the same property, in the absence of countervailing equities, the one first filed for record is a superior lien to the other, regardless of which mortgage was first executed.

2. MORTGAGES—MORTGAGE BY VENDOR—TIME FOR FILING.—The above rule is qualified as to allow a vendor who executes a deed and simultaneously takes a mortgage, a reasonable time in which to file his

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mortgage for record, but where the said vendor delays an unreasonable time in filing his mortgage, he will lose his priority in favor of a mortgagee who files a mortgage upon the same property in the meantime.

3. MORTGAGES—AFTER ACQUIRED—CHATTELS.—A mortgage specified that it should cover "also all machinery that may hereafter be added to said premises." *Held*, the mortgage lien was valid in favor of the mortgagee as against the vendor of the machinery who took a mortgage upon the same when he sold it to the mortgagor, but who delayed an unreasonable time in filing his mortgage.

Appeal from Yell Chancery Court, Danville District, *Jordan Sellers*, Chancellor, affirmed.

STATEMENT BY THE COURT.

This suit was instituted by Satterfield against one V. E. Dacus, Claud Fulton and Lillie Fulton to recover judgment and to foreclose a mortgage which the latter had executed to Satterfield to secure a promissory note for borrowed money in the sum of $1,800. The note and mortgage were executed February 11, 1913. The mortgage embraced certain lands in Yell County and certain machinery, and also "4-70 saw all steel Murray gin stand, lint flue condensers and one double box Munger Press"; also, "all machinery that may hereafter be added to said premises." The mortgage was duly recorded on the 20th of February, 1913.

The appellant intervened and set up that Dacus and Fulton were indebted to it in the sum of $1,461, evidenced by their promissory notes, secured by mortgages, made Exhibits B1, B2-B3. The mortgage Exhibit B2 was dated March 6, 1913, and was made to secure a note of that date for $474.55. Embraced in the mortgage was certain machinery described as follows: "4-70 saw Murray plain single steel gin; 4-70 saw steel feeder; 1 Murray 4-70 saw steel lint flue complete; 4-70 saw steel elevator," etc., "said machinery located at Danville, Arkansas, and to be located in Yell County, State of Arkansas." And the mortgage contained a clause which specified that the machinery "is clear of liens, conveyances and encumbrances, and is to remain personalty, however, and wheresoever located." The mortgage was duly recorded on

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May 9, 1913. Mortgage Exhibit B1 was executed August 11, 1914, recorded September 12, 1914. Mortgage Exhibit B3 was executed 30th October, recorded 3d December, 1914.

Satterfield answered the intervention, setting up that his mortgage was prior to that of the Murray Company; and alleging that he had furnished the money to Dacus & Fulton to purchase the gin stands claimed by the intervener and on which Dacus & Fulton had given him a mortgage which was to be a first lien on the mill plant, including the gin stands claimed by the Murray Company, and that he had no knowledge that the Murray Company claimed the gin stands at the time he advanced the money to Dacus & Fulton and they executed their mortgage to him on same; that the Murray Company was notified by Dacus & Fulton that the purchase money for the gins was borrowed of him and that he was to have a first lien on same. He also set up that the Murray Company was a foreign corporation and that it had failed to comply with the laws of Arkansas regarding such corporations.

Dacus testified on behalf of the appellees that at the time he executed the mortgage to Satterfield he had a contract with the Murray Company for the purchase of gin stands; that at the time he made the first contract in January he told the Murray Company that he was borrowing the money from a farmer in Arkansas to pay for the gin stands and that he was to give him a mortgage on all the stuff that he was buying, as well as what was already on the land; that at that time he contracted for three gin stands, and later changed the contract by buying another gin stand, and a new contract was drawn up at the time they got the four gin stands. When witness got the money from Satterfield witness told him that he wanted enough money to pay for everything so that he would owe it all to one man.

On cross-examination he testified that the contract he referred to as the first contract, made in January at Dallas, Texas, was abandoned and never carried out; that the contract under which the shipments were made and the machinery delivered was afterwards made at Darda-

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nelle, Arkansas. Witness made the mortgage to Satterfield a few days after they had contracted for the stuff. On arrival of the machinery they made a mortgage to the Murray Company before it would deliver the same. Witness made the purchase under a contract that the title to the machinery was to remain in the Murray Company until the purchase money was paid and secured by a mortgage. This they had to do before they could get the machinery.

Satterfield testified that he loaned the money to Dacus & Fulton which the mortgage in suit was given to secure; that at the time the note and mortgage were executed he had no knowledge of anyone else having a claim or lien against the gin stands. He understood he was paying for them from the factory. Dacus & Fulton represented to witness that the machinery would be free of liens, otherwise he would not have loaned them the money. Witness did not know that the Murray Company had a lien or claim on the property until they filed their intervention. Dacus & Fulton told witness that the money they were borrowing from him would pay for all the machinery and give them a clear title. Witness then testifies that the gin stands and all the machinery incident thereto and connected therewith and necessary for their operation were intended to be permanent when put upon the plant; that the machinery of the plant was attached to the plant by concrete foundation and its removal would damage the remaining property.

The testimony on behalf of the appellant, which is not disputed, tended to prove that the machinery in controversy embraced in the mortgages was sold to Dacus & Fulton under a regular contract which provided that the title to the property was to remain in the vendor until paid for in full or until notes and mortgages for the purchase money were executed and a cash payment made. The contract also provided that until this was done the property was to remain personal property and was not to become a part of the realty.

The court found that Satterfield had a valid first lien on the property described in Exhibit B2; and also found

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that the appellant had a valid first lien on the property described in Exhibits B1 and B3, and entered a decree accordingly for the respective parties. Appellant duly prosecuted this appeal, and the appellee has taken a cross-appeal in this court.

*Harry H. Myers*, for appellant.

1. When Dacus & Fulton executed the mortgage to Satterfield they had no title to the machinery, as the title was reserved in appellant. The machinery was so sold that it could not become a part of the realty until paid for and the prior mortgagee never obtained any lien prior to its reserved title and mortgage lien; the prior mortgage parted with nothing of value as regards the chattels and the lien of the interpleader was prior and paramount. The prior mortgagee had notice. 19 Cyc. 1950-1; 66 Ark. 87; 56 *Id.* 55. The machinery never became a *fixture* and never passed to Satterfield. Ewal on Fixtures, p. 22; 43 Vt. 546; 61 *Id.* 213; 73 Ark. 227; 95 *Id.* 275; 65 *Id.* 23; 63 *Id.* 628; 13 A. & E. Enc. Law (2 ed.) 642; 19 Cyc. 1065; 16 Wash. 95; 44 N. J. Eq. 244; 6 Am. St. 889; 36 S. W. 1010; 45 W. Va. 584; 57 Neb. 323; 57 Cal. 3; 121 Ala. 335; 53 N. Y. 377; 16 Ark. 511; 195 Am. St. 640 and many others. See also 42 Ark. 473; 101 Ark. 473.

2. As between conflicting mortgages the one first recorded will have priority. But the mortgagors had no title to the machinery. 52 Ark. 439. Nor did they ever acquire any title to same. 32 Ark. 260; 97 *Id.* 432; 113 *Id.* 575; 50 *Id.* 108.

3. Where one of two innocent persons must suffer he through whose agency the loss occurred must sustain the loss. 19 Cyc. 583; 108 Ind. 419; 58 Am. Rep. 49; 9 N. E. 329.

*John M. Parker*, for appellee.

1. A mortgage of future acquired property is valid. 27 Cyc. 1040; 108 Ark. 442; 107 *Id.* 337. Upon the execution of the mortgage the title vested in Dacus & Fulton, and by recording the mortgage Satterfield obtained a prior

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lien. Kirby's Digest, § 5396; 71 Ark. 517; 97 *Id.* 432; 37 *Id.* 94; 27 Cyc. 1162; 57 Iowa 115; Kirby's Dig., § 734; 47 Ark. 111; 27 Cyc. 1194.

2. The appellant did not file its mortgage within a reasonable time. 97 Ark. 437.

3. The machinery became a fixture. 93 Ark. 77; 56 *Id.* 5; 66 *Id.* 87.

WOOD, J. (after stating the facts). At the time Dacus & Fulton executed the mortgage to Satterfield on the machinery in controversy they had no title to such machinery, for the undisputed evidence shows that they purchased under a written contract in which the title to the machinery was to remain in the Murray Company until notes for the purchase money and a mortgage to secure the same were executed and a cash payment made. The mortgage to Satterfield was dated February 11, 1913, and the mortgage (Exhibit B2) to the Murray Company and part payment of the purchase money was of date March 6, 1913. Dacus & Fulton acquired no absolute title to the property until the latter date. At that date however, by complying with the condition of the contract of sale in executing the notes and mortgages and paying part of the purchase money, they did acquire title to the machinery. *Andrews* v. *Cox*, 42 Ark. 473; *Butler* v. *Adler-Goldman Com. Co.*, 62 Ark. 450; *Starnes* v. *Boyd*, 101 Ark. 469.

In the mortgage to appellee the property in controversy on which the court granted appellee a first lien was definitely described, and was also included under the words "all machinery that may hereafter be added to said premises." It is a well settled rule that "a mortgage may be made to cover future acquired property of a mortgagor when an intention to that effect clearly appears from the the face of the instrument and it will be enforced against the mortgagor and all others except purchasers for value without notice." 27 Cyc. 1040. *Kline* v. *Ragland*, 47 Ark. 111; *Williams* v. *Cunningham*, 52 Ark. 439; *Morton* v. *Williamson*, 72 Ark. 390.

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Therefore, when Dacus & Fulton acquired title to the property in controversy that title inured to the benefit of Satterfield under his mortgage. But the mortgage to the Murray Company was simultaneous with the vesting of the title to the machinery in Dacus & Fulton.

In *Western Tie & Timber Co.* v. *Campbell*, 113 Ark. 570, we held (quoting syllabus): "A purchase money mortgage must be given simultaneously with the execution of the deed of conveyance in order to take precedence over prior liens, for if there is any intervening space of time during which the title rests in the purchaser the prior liens attach to it in preference to the mortgage."

There was no intervening space of time here in which the title to the property rested in Dacus & Fulton before they conveyed the same, under their mortgage, to the Murray Company, but the latter company allowed the title to rest in Dacus & Fulton for over two months before recording its mortgage. The case we have, therefore, under the facts, is that of two independent mortgages on the same property, given to different mortgagees. While both the mortgages were good as between the parties, neither of the mortgagees acquired a lien as against third parties until the mortgages were filed for record. Kirby's Digest, § 5396.

(1–2.) In the absence of countervailing equities, the rule as to priority as between two independent mortgages on the same property, given to different mortgagees, is that the one first filed for record is a superior lien to the other, whether it was executed before or after such other. See 27 Cyc. 1192-94. But this rule is so qualified as to allow a vendor who executes a deed and simultaneously takes a mortgage, a reasonable time in which to file his mortgage for record. See *Beers* v. *Hawley*, 2 Conn. 467.

Under the peculiar facts of this record the issue as to the priority of these mortgages should be determined by the diligence displayed by appellant to comply with the statute in order to give third parties notice of the existence of its mortgages. Satterfield filed his mortgage for record nine days after it was executed, whereas the Murray Company waited from one to two months before

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recording its mortgages. Therefore, if the mortgages were treated as having been made to the respective mortgagees on the same day, it is undoubtedly true that Satterfield appears to have exercised the greater diligence in complying with the statute in perfecting his lien and giving notice to others of the existence thereof, and his mortgage should be treated as prior in time to the mortgages of appellant.

No special circumstances are shown on the part of the appellant to excuse or justify it in waiting for so long a time to have its mortgages recorded. It allowed the title to remain in the mortgagor for an unreasonable length of time before perfecting its lien by having its mortgages recorded. In the meantime Satterfield had placed his mortgage upon record and should be entitled to priority of lien. In *Thornton* v. *Findley*, 97 Ark. 432-437, we used this language: "For, if the title rests even for a short time in the vendee, with no valid lien thereon in favor of the vendor, then the prior lien secured by another on such property will have precedence over a mortgage subsequently secured by the vendor." That is the principle that controls here and determines the issue in favor of the appellee Satterfield, for as we have already observed the Murray Company allowed the title to rest in the vendee Dacus & Fulton an unreasonable time before recording its mortgage.

(3.) While the property on which the court decreed a first lien in favor of the appellant was not in existence at the time the mortgage to the appellee was executed, yet this property was added to the premises of the mortgagors, and a lien was thereby created in equity in favor of the appellee under that clause of his mortgage which specifies "also all machinery that may hereafter be added to said premises." The lien was good and enforcible as between the parties to the mortgage. *Apperson* v. *Moore*, 30 Ark. 56; *Jarratt* v. *McDaniel*, 32 Ark. 598; *Delta Cotton Co.* v. *Ark. Cotton Oil Co.*, 80 Ark. 431; *Howell* v. *Walker*, 111 Ark. 362, 372.

When appellee's mortgage was placed on record this gave notice to the world of all of his rights, legal and equit-

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able, under the mortgage. His mortgage created an equitable lien on the property when it was attached to the premises and as it was placed on record before appellant gave notice or had its mortgage recorded, it follows from what we have already said that appellee acquired a superior lien to appellant in the property described in the decree as lot 3, to wit: One Murray Cleaner complete, with transient and pulley; four seventy-saw huller gin breasts complete; one hydraulic ram complete; one Brunham hydraulic pump; one set hydraulic pump fittings.

The decree therefore in favor of the appellee on the appeal of the Murray Company is affirmed, while the decree in favor of the Murray Company against the appellee is reversed on appellee's cross appeal, and the cause is remanded with directions to enter a decree in favor of the appellee giving him a superior lien to the appellant on the property mentioned in the decree as property known as lot 3, as above described, and for further proceedings not inconsistent with this opinion.

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## FIREMEN'S INSURANCE COMPANY *v.* LAREY.

Opinion delivered July 3, 1916.

FIRE INSURANCE—OWNERSHIP BY TENANTS IN COMMON—SALE OF INTEREST BY ONE TENANT.—A and B, tenants in common of certain property insured the same with appellant, the policy providing for an avoidance of the same in case of a change of ownership. A sold his interest to D, and thereafter the premises were destroyed by fire. *Held*, the policy was avoided as to D, but that B could collect his share of the insurance from the appellant company, his interest not being affected by the sale of A to D. *Semble*. The rule would be otherwise in the case of a partnership.

Appeal from Miller Circuit Court; *G. R. Haynie*, Judge; affirmed.

*Webber & Webber*, for appellant.

1. The policy here is indivisible, the contract being entire. 52 Ark. 257; 63 *Id.* 187. Any breach which renders the policy void as to part of the property renders

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it void as to all. Ostrander on Insurance, § 23 *et seq.*, p. 80; *Ib.* pp. 55, 59, 60 and 62 for illustrations.

2. The introduction of a new person without permission voids the policy. Richards on Insurance, p. 351, and No. 1. Taking in a new partner is a change of title. Ostrander on Ins., p. 313. Sale of partnership interest avoids the policy. 26 L. R. A. 591. Partition avoids it also. Ostrander Ins. § 76, p. 238. A conveyance of one half interest violates the condition. Elliott on Ins., § 266, 267, 267. Also change of ownership. Ostrander Ins., p. 23, § 7. Even between joint owners, one selling to others. *Ib.* § 75, p. 237, *et seq.*; or sale by a partner. *Ib.* 303. Any change in the title, the policy dies. 19 Cyc. 742, F., *et seq.* Where a stranger is introduced in the title the policy is void. 19 Cyc. 753.—*q.*

3. It was error to direct a verdict. Elliott on Ins. § 298; 81 N. W. 568; 122 Mich. 626.

*J. M. Carter*, for appellee.

1. Blocker's sale of his undivided one-half interest in the property did not avoid the policy as to Larey. The acts and transactions of Duke and Blocker and the agent could not affect Larey's rights. No stranger was introduced into the policy. The burden was on appellant to show cancellation. 19 Cyc., p. 936. Notice was necessary. 108 Ark. 131.

2. Title of one joint owner or tenant in common failing does not vitiate the policy as to the other. May on Ins., § 74; 11 Fed. 478, Ostrander on Ins., p. 310, 314; May on Ins., §§ 273-5; Vance on Ins., §§ 161, 279, 280; Angel on Ins., §§ 197, 381; 14 L. R. A. 431; 27 Ohio St. 1; 40 Ia. 551; 46 Ala. 11; 8 Ohio Dec. 404; 1 Sans. (N. Y.) 20; 55 Cal. 418; 100 N. Y. 417; 121 Mo. 75; Ostrander on Ins., pp. 310, 314. The cases in 52 Ark. 257 and 63 *Id.* 187 do not apply. See also 120 Pac. 344; 19 Cyc. 710-11; 38 S. W. 361, and many others.

3. Appellant had notice of Blocker's sale, and if it ever had any right to declare a forfeiture as to Larey, it failed to assert it until *after the fire*. This constituted a

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waiver. 15 S. W. 34; 19 Cyc., p. 789-790 and 819. It is estopped. 63 Ark. 210.

HART, J. R. L. Larey sued The Firemen's Insurance Company to recover upon a policy of fire insurance. The facts material to a determination of the issues raised by the appeal are as follows:

C. M. Blocker and R. L. Larey were tenants in common of certain lots in the town of Fouke, Miller County, Arkansas, each owning an undivided one-half interest therein. There were two store buildings located on the lots. On the 1st day of April, 1915, C. M. Blocker applied to the Firemen's Insurance Company for a policy on said buildings in the sum of $600 for the period of one year. The policy was issued to C. M. Blocker and R. L. Larey and among other conditions provided that the policy should be void "If any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise, etc." Blocker had no authority from Larey to insure his interest in the property but as soon as Larey found that the insurance had been taken on the property, he ratified the act of Blocker and agreed to pay his part of the premium. The policy was issued on a credit but the agent who issued it had authority to issue policies on a credit and both Blocker and Larey were well known to him. Blocker sold his interest in the property to Mrs. F. L. Duke and on the 15th day of May, 1915, the agent cancelled the policy. The property was destroyed by fire on June 12, 1915. Larey did not know that Blocker had sold his interest in the property until after the fire occurrred and had not authorized him to make a sale thereof.

The court directed the jury to return a verdict for Larey in the sum of $300 being one-half of the policy and from the judgment rendered the insurance company has appealed.

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It is contended by counsel for the defendant that the contract for insurance was an indivisible one and that the policy became void when Blocker sold his interest to Mrs. Duke. They claim that this act violated the provision of the policy quoted in the statement of facts against a sale or change of title of the subject of the insurance. In the the first place they contend that this necessarily results from the principles laid down in *McQueeny* v. *Phoenix Ins. Co.* 52 Ark. 257, and *Phoenix Ins. Co.* v. *The Public Parks Amusement Co.* 63 Ark. 187. In the first mentioned case the policy was issued upon a residence and frame house which was used for rental property. A gross sum was named in the policy as the premium and the amount of the policy was apportioned as follows: $600 upon the residence and $400 upon the frame house held to let. The same person owned both houses. The court held that the contract was entire and that the effect of the apportionment of the amount of insurance on the different subjects insured was to limit the extent of the insurers' risk, upon each item, to the amount named. In the last case the policy stipulated for a single premium and covered the contents of a livery stable. The insurance was separately apportioned to three classes, the horses, the vehicles, and the harness, etc. It was held that the contract was entire, the contract and risk being indivisible, and that if the policy was rendered void as to part of the carriages by reason of the insured's misrepresentation of his title, the entire policy was avoided. We do not think the rule laid down in those cases is controlling here. In giving effect to language, regard must be had to its purposes. The generality of the language employed must be restricted to the reason and object of its use by the parties. In the cases referred to the same person owned all the property insured. The premium was gross and there was not only no apportionment between the different items of property insured but the title to the insured property was in the same person. The two houses in the McQueeny case were situated at a distance from each other and a separate valuation of the houses was placed in the policy to appor-

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tion the loss in case one of the houses burned and the other did not during the life of the policy.

The title to tenants in common in lands is separate. There is no unity in title but only unity of possession. In the instant case it is conceded that the agent who wrote the policy had the authority to issue policies and to issue them on a credit. He lived in the same county with Blocker and Larey and knew them both personally. The policy was not issued to Blocker and Larey as partners but as tenants in common. Hence the agent must have known that they did not occupy the premises themselves but were renting them out. The contract was one in its nature and purpose susceptible of apportionment and when the intention of the parties as gathered from the language of the contract and the subject matter of the insurance is considered, we think there is nothing in the nature or the terms of the contract which makes it indivisible. There is considerable conflict of authority as to the question whether the change in the personnel of a partnership, or the assignment of one partner's interest, is within the meaning of fire insurance policies which provide that the policy shall be void in case of any sale or transfer of the property, or change of title or possession. A much greater number of the decisions hold that the transfer by one partner of his interest in the property insured to another member of the firm, is not such a change in the title thereto as would violate conditions in a policy against transfer, change, or alienation of the property or interests therein. See case note to 21 L. R. A. (N. S.) 422; *Pierce* v. *The Nashua Fire Ins. Co.* 50 N. H. 297; *Lockwood* v. *Middlesex Mutual Assurance Co.*, 47 Conn. 553; *Hoffman* v. *Aetna Fire Insurance Co.*, 32 N. Y. 405. The reason given is that such a condition is inserted in the policy for the benefit and protection of the company against the risks of having careless or improvident persons substituted in the place of the original parties with whom they contracted. An assignment by one partner to another is obviously not within the principle or motive on which the condition is founded. Such a change does not affect the risk because no new party is brought in contrac-

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tual relations with the insurers. The rule is different where a sale is made by one partner to a third person. In such cases a new person is brought into contractual relation with the insurance company. This is so because every partner owns the whole partnership property subject to the equal ownership of every other partner. When one partner sells his interest to a third person such purchaser does not become a tenant in common with the other partners in any specific goods but acquires only the interest his vendor had, which is his share of the residue after the affairs of the firm are settled and the debts paid, including debts due from the firm to a partner. 30 Cyc. 605. Again the same author says that the interest of a partner in the firm's assets is not that of a tenant in common, or of a joint tenant at common law. It is the share to which he is entitled under the partnership contract, after the firm's debts and the partners equities are adjudged. 30 Cyc. 444. See also Parsons on Partnership, 4th Ed. p. 137. Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty and therefore they all occupy promiscuously. Cooley's Blackstone, 4th Ed., Vol. 1, Book 2, * p. 191. On the other hand as Lord Hardwicke said, each member of a partnership is seized *per my et per tout* of the common stock and effects.

It follows that when one partner sells his interest to a third person, a new party with whom the insurance company did not contract is introduced. Such a change affects the risk because a new party is brought into contractual relations with the insurance company. In the case of a sale by a tenant in common of his interest to a stranger, the contract of insurance as to him or his vendee is at an end. Under a contract of insurance containing a provision like the one in question as to change of title, the contract as to the remaining tenant in common however, is not affected by the sale. This is so because under the sale no stranger is brought into contractual relation with the company. There is no unity of title whatever between tenants in common and a contract made by an insurance company with them is necessarily subject to

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apportionment and is therefore a divisible contract. We think this rule is in accordance with reason and justice. To illustrate: in the present case, Blocker sold his interest in the property insured to Mrs. Duke. Under the clause of the policy under consideration there was a change in his title to the property and the contract was ended as to him. Mrs. Duke could not be brought into contractual relationship with the company without its consent and under the clause in question there was not only no consent but the insurance was avoided as to her. All this, however, had nothing to do with the contract in regard to the interest of Larey. His interest was not in any way affected by the sale of Blocker's interest to Mrs. Duke. In case of a loss by fire, neither he nor Mrs. Duke could share with Larey in the insurance collected by him. There would be no temptation to Mrs. Duke to destroy the property, not only because she could not share in any recovery had by Larey but she also lost her undivided one-half interest in the property insured.

The judgment will be affirmed.

MCCULLOUGH C. J. (dissenting). The ownership of the insured property was separate, Blocker and appellee, Larey, being equal tenants in common, but the contract of insurance was joint and indivisible. The stipulation in the policy was that "if any change other than by the death of the insured takes place in the interest, title or possession of the subject of insurance, or if the policy be assigned before a loss, unless otherwise provided by agreement indorsed hereon or added hereto, *the entire* policy shall be void." It is undisputed that Blocker sold his individual interest in the property to Mrs. Duke without obtaining the consent of the insurance company.

There is a sharp conflict in the authorities on the question of the divisibility of a policy of insurance which provides for the payment of a gross sum as premium but insures different items of property. This court has held that such a contract is indivisible and that a breach of a portion of the contract avoids the entire policy. *Mc-*

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*Queeny* v. *Phoenix Insurance Co.*, 52 Ark. 257; *Phoenix Ins. Co.* v. *Public Parks Amusement Co.*, 63 Ark. 187.

In the opinion in the McQueeny case, the conflict in the authorities on the subject was distinctly recognized, and after a full discussion of the question and a review of the authorities, the court deliberately took the position that the contract was indivisible, and many cases were cited in support of that rule. In concluding the discussion the learned judge who wrote the opinion said: "We can see no good reason why a contract which, if made between individuals, would be entire, should be divisible if made between an individual and an insurance company."

The same rule was announced in the latter case of *Phoenix Insurance Co.* v. *Public Parks Amusement Co.*, *supra*, where the policy was on different items of personal property but reciting an entire consideration, and Judge Battle, speaking for the court, said: "The contract of insurance was entire and indivisible. Being void as to a part of the property insured, it is void as to all. It was all exposed to one risk, and the consideration for the policy was a specified sum. The fact that separate amounts of insurance were apportioned to separate items or classes of property did not make the policy divisible. The contract and risk being indivisible, the contract is entire, and any breach which renders it void as to a part of the property affects it in the same manner as to the remainder."

The authorities on this question are still irreconcilably in conflict, but as our court has deliberately taken a position on the question it ought not to be changed except by the lawmakers. If the policies in the two cases just referred to were entire, it would seem for a stronger reason, that the policy involved in the present controversy is entire and indivisible. There was a single premium and the contract was to pay a gross sum to both of the beneficiaries jointly in the event of the destruction of the property. It makes really a stronger case of indivisibility of the contract than where the policy apportions a separate sum on each item of the property insured. There is not a single feature of this policy which separates it into parts, for it mentions the two beneficiaries jointly, pro-

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vides for a gross premium and for a gross sum to be paid in case of loss. There is nothing upon which the idea of divisibility can rest. The fact that the two beneficiaries owned separate interests does not, it seems to me, at all affect the entirety of the contract.

It will be observed also that the language of this contract, which is a standard form of policy, is unusually emphatic in providing that the *entire* contract should be void. Many of the authorities lay down the rule that that particular language renders every portion of the contract void even though it be treated as a divisible contract, and in those states where the contrary view is taken from that this court has decided upon the question of the divisibility of the contract, hold that where the stipulation is that the entire policy shall be void, it renders the contract indivisible so as to make it void in the case of a breach of the terms with respect to any part of the contract. 2 Cooley's Briefs, on the Law of Insurance, p. 1913; *Germania Fire Insurance Co.* v. *Schild*, 69 O. St. 136; *Insurance Co.* v. *Connelly*, 104 Tenn. 93; *Germier* v. *Springfield Fire & Marine Ins. Co.* 109 La. 341; *McWilliams* v. *Cascade Fire & Marine Ins. Co.*, 7 Wash. 48; *Martin* v. *Insurance Company of North America*, 57 N. J. L. 623.

It seems to me, however, that this case is entirely controlled by the two decisions of this court referred to, and that we are making a radical departure from the doctrine announced in those cases in holding that this contract was devisible and that one of the beneficiaries could recover for his separate interest.

Mr. Justice Wood concurs in the views here expressed.

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## DICKINSON, AUDITOR *v.* CLIBOURN.

Opinion delivered July 3, 1916.

1. GAME AND FISH COMMISSION—APPROPRIATION TO PAY SALARIES.—Act No. 124, Acts of 1915, creating the State Game and Fish Commission, *held*, not to provide any appropriation of funds for the expenses of the commission.

2. PUBLIC FUNDS—APPROPRIATION THEREOF—CONSTITUTIONAL LIMITATIONS.—All funds required by statute to be paid into the State

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treasury are money within the meaning of the constitutional requirements relating to appropriations thereof and no money coming into such treasury by operation of such laws, can be legally drawn therefrom or paid out of the treasury, except in pursuance of specific appropriations made in accordance with said constitutional requirements.

8. PUBLIC FUNDS—"APPROPRIATION" DEFINED.—"Appropriation denotes the setting apart or assigning to a particular use a certain sum of money for a specified purpose in such a manner that the public officials are authorized to draw and use the sum so set apart and no more, for the purpose specified and for no other."

Appeal from Pulaski Circuit Court, Third Division, *G. W. Hendricks*, Judge; reversed.

*Wallace Davis*, Attorney General and *Hamilton Moses*, Assistant Attorney General, for appellants. *Walter J. Terry* of Counsel.

1. Mandamus will lie against the auditor to compel him to issue a warrant only when there is a law making it his duty to do so. 104 Ark. 583; 45 Cal. 149. There is no duty incumbent upon the auditor to issue the warrant here. He can only issue warrants where there has been money appropriated by law for that purpose. Const. 1874, Art. 16, § 12; Kirby's Digest, § 3415; 42 Ark. 233.

2. There has been no appropriation made by Act 124, Acts 1915, p. 464. The Legislature alone has power to make appropriations. Const. Art. 16, § 2. Definite limits on the exercise of this power are placed by the Constitution. Art. 5, §§ 28, 29. Sections 6, 8, 11, 12 and 20 do not constitute an appropriation. 27 Ark. 129, 131; 45 Cal. 149; 12 Neb. 407; 15 *Id.* 609; 23 *Id.* 25; 50 *Id.* 89. The amount must be stated in dollars and cents and be specific, certain and definite. 45 Cal. 149; 50 Neb. 88; 23 *Id.* 25. The requirements and even formalities of the constitution must be observed. 93 Ark. 336, 24 *Id.* 161; 1 *Id.* 513, 538; 27 *Id.* 266, 280; 101 *Id.* 473. The provision of § 28, Art. 5, is mandatory. 26 Ark. 281; 27 *Id.* 129; *Ib.* 266; 28 *Id.* 348; 48 *Id.* 82; 93 *Id* 34; 101 *Id.* 473; 103 *Id.* 48, 109; 176 U. S. 559; 64 Mo. 526; 64 *Id.* 294; 69 Cal. 479.

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3. The provision applies to all moneys paid into the State Treasury for fees, licenses, etc. 13 Kans. 220; 91 Pac. 819; also to special taxes. 85 Ark. 171; also to salaries and expenses of officers and employes of a Fish and Game Commission. 107 Pac. 159; 13 Kans. 220.

4. The Legislature cannot delegate to another body its power to appropriate money. 27 Ark. 129, 131, 266, 273.

*D. G. Beauchamp*, *Moore*, *Smith*, *Moore & Trieber* and *Miles & Wade*, for appellee.

1. No specific appropriation of the Legislature is necessary, but, if so the Fish & Game Act so appropriates the funds raised under the Act. The various provisions of the Constitution, Art. 16, §§ 5 to 11, Art. 6, § 12, etc., refer only to general taxes and revenues collected from assessments. 120 Ark. 80; 178 S. W. 930. § 3598 Kirby's Digest makes game and fish the property of the State and catching same a privilege. The Game and Fish Act is under the police power of the State and fees and licenses are not taxes and by no means subject to the constitutional provisions requiring specific appropriations. 103 Ill. 130; 38 Mich. 306; 46 *Id.* 183; 39 Oh. St. 340; 37 Cyc. 711.

2. The language of the Act makes a specific appropriation, §§ 6, 11, 12, and 20. This Act was passed within the two years. A fund is created and can be used for no other purpose; *all* this fund is appropriated. This meets all the requirements of the constitution. 32 Neb. 32; 20 Ind. 328; 22 Am. St. 624; 43 Ala. 427; 80 Cal. 220; 22 Pac. 143; 29 Nev. 469; 91 Pac. 819.

KIRBY, J. Appellee brought this suit against the State Auditor and Treasurer for a mandamus to compel the Auditor to issue a warrant on the Treasurer on a voucher drawn by the Game and Fish Commission in his favor as a game warden and the Treasurer to pay same out of the game and fish protection fund.

It was alleged that the voucher was duly issued for services rendered and that the Auditor and Treasurer

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refused to issue a warrant thereon and cash same, claiming no appropriation had been made of said fund for such purpose.

The court having overruled a general demurrer to the complaint and appellants declining to plead further, entered a judgment granting the relief prayed, from which this appeal is prosecuted.

Appellants contend that no appropriation was made by the Legislature of the moneys raised under the Act creating the Fish and Game Commission out of which the claim could not be paid and that the court erred in not so holding.

The State Game and Fish Commission was created by Act No. 124 of the Acts of the General Assembly of 1915, which requires the payment of certain license fees for the privilege of hunting and fishing and that all moneys received from such license fees and fines for violation of the game laws, shall be paid into the State Treasury.

It is contended by appellee that a sufficient appropriation of all the moneys paid into the Treasury under the provisions of the Act within the meaning of the Constitution, is made by section 11, 12 and 20 thereof as follows:

"Sec. 11. All licenses, fines and forfeitures provided for in this Act shall be paid in lawful money of the United States to the State Treasurer, and shall constitute, be and remain a separate fund to be known as the Game Protection Fund. Such fund shall be used for no other purpose than paying the necessary expense of enforcing the game and fish laws of the State."

"Sec. 12. The expenses of the Commission and the pay of its employees shall be paid out of the Game Protection Fund, and out of no other Fund. * * *

"Sec. 20. That all moneys arising from fines, forfeitures, or licenses under any law for the protection of game and fish, now existing or hereinafter enacted, shall be collected in lawful money of the United States and be paid immediately by the collecting officer to the State Treasurer, and said moneys shall be set aside, to be known as the Game and Fish Protective Fund, and shall be available for the protection of the game, the birds and the fish."

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The provisions of the Constitution and other laws necessary to be considered are:

"No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill; and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriation shall be for a longer period than two years." Sec. 29, Art. 5, Const.

"No money shall be paid out of the treasury until the same shall have been appropriated by law; and then only in accordance with said appropriation." Sec. 12, Art. 16, Constitution.

"No warrants shall be drawn by the Auditor or paid by the Treasurer unless the money has been previously appropriated by law, nor shall the amount drawn for or paid under one head ever exceed the amount appropriated by law for that purpose." Sec. 3415, Kirby's Digest.

"The Treasurer is prohibited from paying any money out of the treasury on any account whatever, except upon the lawful warrants of the Auditor." Sec. 3441, Kirby's Digest.

"In all cases where the law recognizes a claim for money against the State, and no appropriation shall be made by law to pay same, the Auditor shall audit and settle such claim, and give the claimant a certificate of the amount thereof, under his official seal, if demanded, and report the same to the Governor, who shall lay the same before the General Assembly." Sec. 3409, Kirby's Digest.

The primary object of these provisions of the Constitution and statutes in aid thereof, is to prevent the expenditure of the people's money, without their consent expressed in the organic law or constitutional acts of the Legislature.

A specific appropriation is an absolute pre-requisite to the drawing from or payment out of the State Treasury of any money therein required to be appropriated. No money for general, ordinary, special, contingent or other expense, no money at all, can be legally drawn therefrom,

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except under the forms of law in accordance with an appropriation properly made.

In *Moore* v. *Alexander*, 85 Ark. 171, the court held that the capitol fund collected pursuant to a special tax levied for the purpose of building a State Capitol, could not be paid out unless there had been a biennial appropriation specifying the money to be used, notwithstanding it was beyond the power of the General Assembly to divert the fund collected therefor to use for any other purpose under Sec. 11, Art. 16 of the Constitution.

In *Dickinson, Auditor* v. *Edmondson*, 120 Ark. 80, the court held that the common school fund was appropriated by article 14 of the Constitution which is self executing, providing for its creation and collection, and that no appropriation thereof was required by the General Assembly and in discussing said provision of the Constitution, Art. 5, Section 29, after stating that it refused to hold in *Moore* v. *Alexander*, *supra*, that it had no application to the fund raised from a special tax and applied at least to all revenues raised for State purposes, said:

"We are unwilling to recede from the position taken in that case, for it is plain that the framers of the Constitution intended to place an unmistakable limitation upon the authority of public officials in paying out public funds, and to declare that all the State funds which are within the purview of the provision must be held in the treasury, until a specific appropriation thereof has been made by the Legislature. The power of the General Assembly with respect to the public funds raised by general taxation, is supreme, and no State official, from the highest to the lowest, has any power to create an obligation of the State, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. The Constitution provides, too, that no appropriation shall be for a longer period than two years, and thus a period is fixed over which the lawmakers hold complete control over the purse-strings of the State."

An unmistakable purpose is shown in said provisions of the Constitution and statutes quoted, to prevent the payment out of, or drawing from the State Treasury, any

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money raised under the operation of any statute, until the same is appropriated by law, which appropriation is required to be specific, and the purpose distinctly stated in the bill and the maximum amount which can be drawn, specified in dollars and cents. No appropriation shall be for a longer period than two years and all appropriations not expended during the period are required covered into the treasury at the end thereof, the manifest intention being to give each succeeding legislature a comprehensive and exact view of the State's financial condition from the appropriations made and expended and to require it to make such appropriations for the next two years in accordance with the Constitutional limitations as will meet the needs of the State Government and pay the expenses of its administration.

Appellee insists that said sections of the Act under consideration, make a sufficient appropriation of the fund within the constitutional requirements, but we do not think so. It is true that all the moneys arising from the operation and execution of the law paid into the State Treasury are required set apart into a particular separate fund to be used only "for paying the necessary expense of enforcing the Game and Fish laws of the State" which it is said "shall be available for expenses in enforcing the various provisions of the law for the protection of the game, the birds and the fish," but no maximum amount is specified in dollars and cents and it cannot be said that the appropriation is specific when the amount that would probably be raised from the operation of the law was entirely contingent and altogether unknown, nor does the said language sufficiently manifest an intention to authorize the drawing of the money out of the treasury until after an appropriation properly made.

The framers of the Constitution intended that each Legislature shall fix a maximum amount specified in dollars and cents in every appropriation made beyond which the fund cannot be used during the period, in language so clear as to manifest an intention that it is set aside and authorized to be drawn and used for the purpose distinctly stated.

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Appropriation denotes the setting apart or assigning to a particular use a certain sum of money for a specified purpose in such a manner that the public officials are authorized to draw and use the sum so set apart and no more, for the purpose specified and no other. *Clayton* v. *Berry*, 27 Ark. 129; *State* v. *Moore*, 50 Neb. 88; *Stratton* v. *Green*, 45 Calif. 149.

The said provisions of the Act do not constitute an appropriation of the funds, paid into the State Treasury, through the operation thereof, in accordance with the constitutional requirements and the court erred in holding otherwise. All funds required by statute to be paid into the State Treasury are money within the meaning of the Constitutional requirements relating to appropriations thereof and no money coming into such treasury by operation of our laws, can be legally drawn therefrom or paid out of the treasury, except in pursuance of specific appropriations made in accordance with said constitutional requirements.

The judgment is reversed and the cause remanded with directions to sustain the demurrer to the complaint.

HART and SMITH, JJ., dissent.

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## SELLS *v.* BREWER.

Opinion delivered July 3, 1916.

LEASES—FORFEITURE—NON-PAYMENT OF RENT—STIPULATION.—Where expressly stipulated in the contract of lease, non-payment of rent will work a forfeiture of the lease.

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; reversed.

*H. F. Roleson*, for appellant.

The trial court misconstrued the case of *Geary* v. *Parker*, 65 Ark. 521. There was no condition of forfeiture in that case and it was based on a construction of a statute. Here the rent was not paid when due and the lease declared forfeited and notice to quit served before the tender of rent. The contract is unam-

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biguous and the contract was forfeited. 41 Ark. 532; 57 *Id.* 301; 24 Cyc. 1352, 1339. The court erred in its instructions. *Supra.*

SMITH, J. Appellant instituted an action of unlawful detainer against appellee to recover the possession of a certain tract of land which she had leased him for the period beginning June 1, 1908, and ending May 31, 1918. The rent was $30 per year, payable quarterly, and rent for one quarter was due on September 1st, but was not paid at that time. The lease contained the following clause:

"It is further agreed that the rent herein above provided for is to be paid quarterly, and if any quarter's rent shall remain due and unpaid, after due date thereof, then and in that event party of the first part may declare this lease at an end, and take immediate possession of this property, together with the appurtenances."

On September 5, 1913, the rent remaining unpaid, the appellant served on appellee the following notice:

"You are notified that I have in default of your payment of rent cancelled your lease dated June 2, 1908, and demand possession of the premises."

This action followed this notice.

Appellee denied the allegations of the complaint that appellant was entitled to the possession of the land, or that the same was unlawfully detained. A tender of the rent was made on September 13th.

There was conflicting evidence in regard to appellant's custom in the collection of the rent. and there was evidence on appellee's behalf which tended to show that appellant would not insist on the forfeiture clause because of a failure to pay rent on the day it was due. This evidence was in conflict with that of appellant on the subject. However, the question of waiver was not submitted to the jury, and we must, therefore, treat that question as not having been passed upon by the jury. Upon the contrary, the court gave, over appellant's objection, the following instruction:

"You are instructed that if you find from the evidence that the rent due for the property in question was

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tendered within three days after demand for possession was made by the plaintiff, then it is your duty to find your verdict for the defendant."

It is said this instruction is based upon the opinion of this court in the case of *Geary* v. *Parker*, 65 Ark. 521. It will be observed, however, that the opinion in that case mentions the fact that "there was no condition of forfeiture in the lease for non-payment." But in this case we have this express condition, and the authorities recognize the right of parties to contract for a forfeiture. 2 Taylor, Landlord & Tenant, Sec. 489.

In 24 Cyc., page 1352, it is said:

"While a provision in a lease for a forfeiture or re-entry is necessary to authorize the lessor to terminate the tenancy, on the failure to pay rent, except where the statute otherwise provides, yet when the lease contains such a provision, the lessor may proceed to end the lease on the breach of such covenant, notwithstanding the failure to pay was not wilful. Of course the landlord cannot terminate the lease until the expiration of the whole of the day on which the rent is payable; and if the lease provides that the rent shall not be payable until a certain time after it accrues, he has no right to re-enter until the expiration of that time."

While the cases on the subject hold that the landlord who desires to enforce the forfeiture of the lease for the non-payment of the rent must bring himself strictly within the provisions of the contract which gives him this right, still the validity of the stipulation and the right to enforce it is recognized when he has done so.

In the recent case of *Williams* v. *Shaver*, 100 Ark. 565, it was said: "Ordinarily, where a forfeiture is desired in a contract, it is by the express terms thereof provided that a forfeiture may be declared in event of some breach thereof. This is especially true of leases. The forfeiture of the term of a lease is usually provided for in the contract by express words, and generally occurs upon or in consequence of a breach of some agreement therein stipulated."

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The opinion in that case quoted from both the majority and the dissenting opinions in the case of *Buckner* v. *Warren*, 41 Ark. 532, in both of which opinions, as shown by the quotations there made, non-payment of rent was recognized as a ground for forfeiture of a lease when it was so expressly provided.

The court should, therefore, have given effect to the language of the contract and under the evidence in the case should have submitted the cause to the jury upon the question of waiver.

For the error indicated the judgment will be reversed and the cause remanded.

KIRBY, J. dissents.

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## GORDON v. STATE.

Opinion delivered July 3, 1916.

1. CRIMINAL LAW—PHRASE "MALICE AFORETHOUGHT" DEFINED.—"Malice aforethought" defined as the voluntary and intentional doing of an unlawful act, with the purpose, means and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken.
2. CRIMINAL LAW—ASSAULT WITH INTENT TO ROB.—When defendant manifests a present purpose to take from the person of another, the latter's property, not clandestinely but openly, and by means of the exercise of such force as may be necessary to overcome any resistance offered, the crime of assault to rob is committed.

Appeal from Prairie Circuit Court, Southern District; *Thos. C. Trimble*, Judge; affirmed.

*J. F. Wills*, for appellant.

A verdict should have been instructed that the State failed to prove the charge and to find for defendant. Kirby's Digest, § 2028. There is not a syllable of testimony as to the manner of the alleged "felonious, wilful and of malice aforethought," assault, nor of an assault at all. There must be force or intimidation. *Ib.*, § 2026. There was no evidence of assault, or ill feeling or malice. 99 Mich. 336.

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*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

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The testimony is amply sufficient and defendant's peremptory instruction was properly refused. 152 Mo. 124. The words "felonious," "wilfully" and "malice aforethought" have a well defined meaning. The defendant's theory of defense was properly submitted to the jury—it believed the testimony of the prosecuting witness.

SMITH, J. Appellant was indicted and convicted upon a charge of assault with intent to rob, alleged to have been committed upon and against the person of one T. H. Reed. By this appeal he questions the sufficiency of the evidence to support the verdict and the failure of the court to give instructions which, in effect, told the jury that the crime could not be committed without the use of force or intimidation, and that unless force or intimidation was used in the attempt to commit the crime, a conviction could not be had. The court, however, read the statute defining the crimes of assault with intent to rob and of robbery, and, in addition, told the jury that while appellant was not indicted for the crime of robbery, yet force was an essential ingredient of the crime with which he was charged, and that a conviction could not be had unless the proof showed that appellant had committed an assault on Reed with "the felonious intent then and there, him, the said T. H. Reed, to forcibly and feloniously rob," and that "there must be a felonious intent to rob, and it must be done by force before you can convict the party as charged in the indictment."

On the question of the sufficiency of the evidence, it may be said that Reed testified that he had lived two miles northeast of Hazen for forty-four years, that he had known the appellant ever since he was a little boy, and had seen him often, and knew him well. That, in November, 1915, he went to Hazen to sell some cotton. That he sold the cotton about sundown for $10.50. That he remained in town until about 10 o'clock that night, when he stopped in a restaurant where he heard some

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music, and stayed about fifteen or twenty minutes. That appellant and another negro named Daniels were there, and that he gave Daniels some money and asked him to get him some whiskey, but that Daniels later returned the money, saying that he had been unable to procure any. That he started home about 10:30 at night, and as he was driving along the road, his team became frightened and as he checked it and looked back, he saw some one climbing in the wagon. That appellant came up behind him and ran his right hand in his right pocket, and appellant then drew him back, when the seat turned over, and that appellant then went in his other pocket and snatched out a pocketbook containing about $8, and that he lost his cap in the scuffle. That the moon was shining, and as appellant turned the seat over, he looked squarely in his face and recognized him. He testified that he tried to keep appellant from getting his pocketbook, and that "he jerked his hand out of my pocket and jerked me backward," but that appellant never succeeded in getting his pocketbook until he fell, at which time he placed his hand in his pocket and pulled out the pocketbook.

The evidence on the part of appellant was to the effect that Reed was drinking and was under the influence of liquor. That he stopped in a colored restaurant, where he heard some musicians playing some waltz music, and that he proceeded to dance with appellant, who is a colored man, and that he gave another colored man money with which to buy whiskey, but he was unable to procure it. Appellant argues that Reed's condition was such and the circumstances under which the robbery was committed were such that Reed could not have identified appellant. Reed testified, however, that he did identify appellant, and the jury has resolved the conflicts in the evidence against appellant.

(1) It is further contended that the statute under which appellant was indicted contemplates a malicious striking or beating of the person with the intent to rob him, and it is argued that as "there is not one scintilla of evidence in this record to indicate, either expressly

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or impliedly, that the party had the slightest ill feeling, or was in any manner angry toward Reed at any time," the jury was not warranted in finding that the act was committed with "malice aforethought." The phrase "malice aforethought" has been many times defined, and a number of these definitions are found under that title in Words & Phrases. Among the definitions there found is the following one:

"The phrase 'malice aforethought' was properly defined as 'the voluntary and intentional doing of an unlawful act, with the purpose, means and ability to accomplish the reasonable and probable consequence of it, done in a manner showing a heart regardless of social duty and fatally bent on mischief, by one of sound mind and discretion, the evidence of which is inferred from acts committed or words spoken.' *Barr* v. *State*, 120 S. W. 422, 56 Tex. Cr. R. 372."

We think this phrase as employed in our statute has the meaning given it by the Texas court.

This is not a case like that of *Routt* v. *State*, 61 Ark. 594, in which case the crime charged was committed by snatching money from another's hand, and where it was held that that action did not constitute the crime of robbery. In the case cited, however, it was said:

"Robbery, as defined by the text books and the previous decisions of this court, is a felonious and forcible taking of the property of another from his person or in his presence, against his will, by violence, or putting him in fear. And this violence must precede or accompany the taking of the property. *Clary* v. *State*, 33 Ark. 561; 1 Wharton's Crim. Law, § 846.

"The taking must be done through force or fear. 'If force is relied on in proof of the charge, it must be the force by which another is deprived of, and the offender gains, possession. If putting in fear is relied on, it must be the fear under duress of which the possession of the property is parted with. The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else, the offense is not robbery.' "

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(2) We think the proof shows the exercise of sufficient force, not only to support the charge of assault to rob, but thatit is sufficient to support the charge of robbery.

The law does not require that one be beaten up before he submits to the robbery to constitute the offense. It is sufficient if he yields because of this fear. Nor is one required to resist to the uttermost. The crime is committed if one exerts sufficient force to overcome the resistance encountered where the property is not taken surreptitiously. When there is manifested a present purpose to take from the person of another his property, not clandestinely, but openly, and by means of the exercise of such force as may be necessary to overcome any resistance offered, the crime of assault to rob is committed. This is not a case where the property was snatched from one's hand or obtained by artifice or trick; but one where there was the actual exercise of sufficient physical violence to overcome the resistance offered, and we must hold the evidence sufficient to sustain the conviction, and the judgment of the court below will, therefore, be affirmed.

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## CLINTON *v.* MODERN WOODMEN OF AMERICA.

Opinion delivered July 3, 1916.

FRATERNAL INSURANCE—CONDITIONS IN CERTIFICATE—FAILURE TO PERFORM.—There can be no recovery on a benefit certificate, where it provided that it became binding only when delivered to the insured in a certain manner, and where the insured died before delivery to him in the manner prescribed.

Appeal from Yell Circuit Court, Dardanelle District; *M. L. Davis*, Judge; affirmed.

*John B. Crownover*, for appellant.

1. It was error to direct a verdict. When there is *any evidence* tending to establish an issue in favor of the party against whom the verdict is directed, a trial court should not take the case from the jury. 89 Ark. 3; 84 *Id.* 57; 77 *Id.* 556; 63 *Id.* 94. On appeal this court will take that view of the evidence most favorable to the party against

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whom the verdict is directed. 89 *Id.* 372; 73 *Id.* 561; 76 *Id.* 520. Delivery or non-delivery of a policy is a question for a jury. 97 *Id.* 232. The trial court was influenced solely by the decision in 104 Ark. 541. But that case was decided solely on the ground of false answers to a question in the application.

2. Deceased was adopted according to the ritual; nothing more was necessary to be done to put deceased's name on the docket. The burden was on the society to prove all facts peculiarly within its knowledge. 65 Ark. 269; 12 Fed. 465.

3. The certificate was delivered. *Manual* delivery before death not necessary. 2 L. R. A. 207; 83 Ark. 17; 94 *Id.* 389. *Parol* contracts of insurance have frequently been held valid. 83 Ark. 22; 72 Mich. 316; 1 Joyce on Ins., § 34; 1 Bacon Ben. Soc., 305-6. The insurance was consummated when the acceptance was posted. 21 Am. Dec. 305; 94 Ark. 253; 72 Am. Dec. 379; 42 L. R. A. 88; 103 S. W. 317. Where nothing remains to be done by the insurer, the mailing is delivery. 97 Ark. 229; 65 *Id.* 581. It is binding if never delivered. 66 Ark. 621; 26 Maine, 18-29. Acceptance and mailing the policy put the contract in force. 94 Tex. 25; 57 S. W. 635; 86 Am. St. 813; 89 Ark. 471; 97 *Id.* 229; 65 *Id.* 581. The policy itself is the contract. 105 Ark. 105. This was an ordinary insurance policy. 52 Ark. 205; 105 Mass. 160; Niblock Ben. Soc., 163.

4. It was not necessary to sign the certificate. 22 L. R. A. 772; 89 Ark. 378; 11 Atl. 84; 64 Ark. 506.

5. Proof of death was made, but it may be waived. 72 Ark. 365; 87 *Id* 171; 79 *Id.* 475; 91 *Id.* 49. It was the custom to leave the policies with the local clerk. 69 Ark. 313; 85 *Id.* 568; 81 *Id.* 549; 99 *Id.* 204.

6. Forfeitures are not favored by the courts. 67 Ark. 511; *Ib.* 558; 20 *Id.* 214; 21 Minn. 85; 101 Mass. 558. 5 Ind. 103. Stipulations are construed most strongly against the insurer. 94 Ark. 417; 58 *Id.* 528; 89 *Id.* 471.

*Truman Plantz* and *Geo. G. Perrin*, of Rock Island, Ill., and *James A. Gray*, for appellee.

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A verdict was properly directed for defendant. The contract consisted of the application, the certificate and the by-laws. A member must be adopted; there must be *manual* delivery of the certificate to the applicant while he is in sound health and signed by the applicant. Proof of death must also be made. These are all essentials to the validity of the contract; none of them were complied with and there was no waiver of them. The Arkansas cases are conclusive. 104 Ark. 538; 111 *Id.* 435. See, also, 142 S. W. 641; 130 *Id.* 861; 87 *Id.* 535; 119 N. W. 426; 64 S. W. 36; 52 L. R. A. 444; 109 N. W. 159; 88 Ark. 120; 142 S. W. 641; 130 *Id.* 858; 144 N. W. 843; 149 *Id.* 33; 224 Fed. 74; 104 N. E. 653; 175 S. W. 170 and 75, other citations from various States.

SMITH, J. Appellant brought suit to recover upon a certificate of insurance issued in her favor upon the life of Walter W. Clinton, her husband. The company against which judgment was prayed is a fraternal beneficiary society, and defended the suit upon numerous grounds. Among other defenses interposed was that Clinton, in his written application to become a member of the defendant society, had given his assent that his application should be governed by the by-laws of the society, and that no claim of benefit should be made by himself, or his beneficiary, until his application for membership had been approved, and he had been regularly adopted into the society in accordance with the ritual thereof, and his certificate of membership manually delivered to him by the camp clerk while he was in sound health. These by-laws were offered in evidence and contained the provisions that the liability of the society for the payment of benefits upon the death of a member should not begin until the applicant had received and signed his certificate, while in good health, and that the certificate should not be of any force or effect until the adoption ceremony provided in the ritual of the order had been performed, and that upon the adoption of such member, he should pay the dues for the current month, which included the per capita tax and the sanatorium

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tax, and that the payment of these dues should be made before the policy should be effective. Section 39 of the by-laws provides that no officer of the society nor any local camp officer or member thereof is authorized or permitted to waive any of the provisions of the by-laws of the society which relate to the contract between the member and the society.

The proof shows that Clinton's application to become a member was made on March 20, 1915, and that the application was accepted and that the benefit or membership certificate was issued thereon March 31, 1915, and was mailed on that day to L. C. Adams, clerk of the local camp at Dardanelle, and was received by that officer on Friday night after supper. Clinton became ill Thursday night or Friday morning, and called a physician to see him about noon Friday, April 2, when it was discovered that he was suffering from an attack of appendicitis, and he was carried to Little Rock the following day for an operation, and died on the following Monday. The clerk of the local camp never saw Clinton after the receipt of the certificate, and the certificate was never delivered to nor signed by Clinton. Clinton never paid the first assessment, nor the camp dues, nor was he adopted into the order in accordance with its ritual, nor was any attempt made to deliver the policy by the camp clerk. There was proof, however, that the camp clerk had the certificates of several members in his possession, and that the certificate of at least one of these members had never been delivered to that member. but had always been retained in the possession of the camp clerk.

At the conclusion of the evidence, the court directed a verdict in favor of the defendant insurance company, and this appeal has been prosecuted from the judgment pronounced thereon.

There appear to be a great many cases which discuss the legal principles which control the decision of this case, and we have been cited to a number of them in the briefs. We find no occasion, however, to go beyond the decisions of our own court for cases which announce these principles. Two cases, which are apparently exactly in point,

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are *Woodmen of the World* v. *Hall*, 104 Ark. 538, and *Peebles* v. *Eminent Household of Columbian Woodmen*, 111 Ark. 435. In the first cited case there is set out the provisions of the application and of the by-laws, which are almost identical with those involved in this litigation. It was there held that compliance with these rules and by-laws was a condition precedent and that there was no valid contract of insurance until they had been complied with.

The question of waiver was raised there, as it is here, but the court there said:

"But it is well settled by the weight of authority that the officers and subordinate lodges of a mutual benefit association have no authority to waive the provisions of its by-laws and constitution which relate to the substance of the contract between the applicant and the association."

In the case of *Peebles* v. *Eminent Household of Columbian Woodmen*, *supra*, the by-laws contained the provision that the certificate should not be effective until its delivery to the insured while in good health. We discussed there the meaning and object of this provision, and we there said that this condition was placed in the policy for the benefit of the insurance association, and that it was intended thereby that the representative of the order should ascertain for the order whether the proposed member was, in fact, in good health, and while it was there held that subordinate officers and lodges might become the agent of the governing body in the discharge of administrative duties, and might in the discharge of these duties estop the company to deny that they had been performed, it was there recognized that the provision for the performance of these duties was valid, and compliance with the terms thereof a condition precedent. But it was there held that the conduct of the officer of the local lodge, whose duty it was to ascertain whether the member was in good health at the time of the delivery of the certificate to him, was such as to make a question for the decision of the jury as to whether the company was estopped from denying that the local officer had dis-

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charged that duty. But it was there held, in effect, that the certificate was not in force until that duty had been performed. The duty there to be performed by the officer of the subordinate lodge was to ascertain that the member was in good health at the time of the delivery of the certificate, and the evidence in that case presented a question of fact for the decision of the jury as to whether the duty had been discharged. Here there was no delivery of the policy, nor attempt to ascertain the health of the applicant. Indeed, such effort would have disclosed that the applicant was not in good health, and it would, therefore, have been the duty of the local officer to refrain from making the delivery.

It appears, therefore, that the verdict was properly directed, and the judgment of the court below will be affirmed.

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## RANKIN v. ALLNUTT.

Opinion delivered July 3, 1916.

HUMANE OFFICER—APPOINTMENT AS DEPUTY CONSTABLE.—Act 87, p. 340, Acts of 1915, § 26, which provides that the constable in townships subject to the act "may have five deputies, one of which shall be the Arkansas Human Officer," *held*, to give the constable the right to appoint as many as five deputies, subject to the approval of the county court, and if this number was appointed one of them should be charged specially with enforcing the duties of humane officer. The right to appoint this deputy, as well as the other deputies, abides in the constable only, and is to be exercised by him subject to the approval of the county court.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant seeks by mandamus to compel appellee Allnutt, as constable of Big Rock Township of Pulaski County, Arkansas, to appoint him a deputy constable for said township. He also makes the county judge of Pulaski County a party defendant that he may be required to confirm the appointment so prayed to be made

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by said constable. He alleges that he is the humane officer, and has his office in the city of Little Rock, in said township, and that he was appointed as the agent of the humane society by the president thereof. That said society was reorganized in 1909 under Act No. 170, of the Acts of the General Assembly of 1909, page 518, when he was duly reappointed agent of said society. Appellant predicates his cause of action upon the provisions of section 26 of Act No. 87 (Acts 1915, page 340), entitled, "An Act for the establishment of municipal courts in certain cities of the first class, prescribing their jurisdiction and the jurisdiction of justices of the peace in certain townships, fixing the compensation of certain officers in such cities and townships, and for other purposes." The relevant portion of that section reads as follows: "Sec. 26. Constables in townships subject to this act shall perform the same services in the municipal court as are required of them before justices of the peace by the general laws. * * * In a township within which is situated any larger city subject to this act, the constable may have five deputies, one of which shall be the Arkansas Humane Officer. * * *"

Appellant, in his complaint, recites the fact to be that after its introduction, the bill for this act was amended by inserting after the words "may have five deputies," the phrase "one of which shall be the Arkansas Humane Officer."

Both the constable and the county judge demurred to the petition, and their demurrers were sustained, and the petition dismissed, and this appeal has been duly prosecuted from that order.

*Hal L. Norwood*, for appellant.

1. The question is: What do the words "one of which shall be the Arkansas Humane Officer" mean in Act 87, Acts 1915? It is evident that the Legislature *intended* that the constable *should* appoint said "humane officer" one of his five deputies. The *intent* of the Legislature should prevail to be gathered from the text and body of the act, the condition of affairs, the evil sought to be remedied, etc. 27 Ark. 419: 24 *Id.* 155; 25 *Id.* 101.

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2. It is plain the words meant the officer appointed by the Arkansas Humane Society, and in the act of 1909, he is called the "Arkansas Humane Officer." Appellant was that officer. The act is mandatory, and it was error to sustain the demurrer.

*Mehaffy, Reid & Mehaffy*, for appellee.

1. The Arkansas Humane Society is a private corporation. Kirby's Dig., ch. 31, subd. 9. By § § 1630-1645, *Ib.*, the *agent* * * * may make arrests, etc., for violating the statutes against cruelty to animals and children. Nowhere is such *agent* designated as "the Arkansas Humane Officer." The provision is void for ambiguity and uncertainty. 98 Ark. 505.

2. The statute is not mandatory. It confers a power, but does not create a duty. The exercise of the power is discretionary. 143 Pac. 881-5; 98 Ark. 505.

3. Mandamus will not lie. 27 Ark. 382; 26 *Id.* 482; 1 Thompson on Copr., § 145.

4. A deputy constable must be a resident of the same county and township of his principal. 35 Cyc. 1519. He holds office during the pleasure of his principal, and may be removed at any time. *Ib.* 1521. The constable is responsible for the acts of his deputy. Kirby's Dig., § 688. If the contention of appellant is sustained, strange anamolies might arise which the Legislature never could have intended as (1) The constable is denied the right to appoint his own deputy, but becomes responsible for the acts of one who owes his position to another. (2) When the act becomes applicable to other cities, the deputy might be a resident of another county and entitled to a salary from two counties and dispenses with the approval by the county court, etc. No such intention can be spelled out of the act consistent with its object and purpose. 98 Ark. 505.

SMITH, J., (after stating the facts). It is insisted that the amendment set out above embraced in the phrase "one of which shall be the Arkansas Humane Officer," is void for uncertainty.

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It is certainly a very ambiguous phrase and to ascertain its meaning resort must be had to a study of the legislation which defines the duty of the officer there designated as the Arkansas Humane Officer. In doing this, we, of course, have in mind those cardinal rules of statutory construction that the interpreter of a statute is not called upon to improve it, but to expound it, and that while he is to seek the intention of the Legislature, that intention is not to be ascertained at the expense of the clear meaning of the words employed. The question for him is not what the Legislature meant, but "What does the language mean which it had employed?" Endlich on Interpretation of Statutes, section 7.

The antecedent legislation on the subject of humane officers is found in sections 1638-1645, inclusive, Kirby's Digest, and in Act No. 170 of the Acts of 1909, p. 518. The purpose of the sections of Kirby's Digest above mentioned was to prevent and to punish cruelty to animals. These sections provide that societies may be incorporated for this purpose, and that the president of such society in any county in this State may appoint agents and officers of such society who shall have authority to arrest persons found violating the provisions of the act which became sections 1638-1645 of Kirby's Digest. Section 1642 provides that all fines, forfeitures and penalties imposed and collected in any county in this State under the provisions of any act passed or which may be passed relating to or in any wise affecting animals shall inure to such society in aid of the purpose for which it was incorporated. It was evidently contemplated that a society might be organized in each of the counties of the State, and the same powers were conferred upon the officers, agents and members of each of these societies.

The act of 1909 referred to above is entitled, "An Act to prevent and punish cruelty to children," and a study of its provisions leads to the conclusion that the Legislature there intended to extend the beneficient provisions of the prior act for the protection of animals to children. Section 7 of this last act is identical with section 1639 of Kirby's Digest, except that the word "child"

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is used for the word "animal." And section 8 of this last act is substantially the same as section 1644 of Kirby's Digest, the word "children" being substituted for the word "animals." This last act contemplates the organization of societies in each of the counties of the State to enforce its provisions, and designates the societies so to be formed as the Arkansas Humane Society. This last act confers certain enlarged powers upon this society, and its officers have the custody and care of abandoned children. In both acts the society is given the right to appoint agents with certain powers incident to the enforcement of the respective acts, and all of these agents would have the same authority under the law.

The act of 1915 above mentioned applies to all cities having a population exceeding 45,000 according to the latest preceding Federal census, and all smaller cities of the first class situated in the same or another county and lying contiguous to any of the said larger cities and of the smaller cities separated from any of such larger cities only by a river being contiguous thereto, and all townships, counties and judicial districts within which are situated any of such larger or smaller cities. In its practical operation the act may apply only to Pulaski County, but there is nothing in the act which so limits it. The manifest purpose of this act was to reduce the expense of the administration of the criminal law in the enforcement of those laws of which the courts there created were given jurisdiction. The act does not require the constable to appoint five or a smaller number of deputies. It only authorizes him to appoint that number. It, therefore, confers a power, and does not impose a duty . This right of appointment, however, is not an absolute one, but is subject to the approval of the county court, and this approval is, of course, a condition precedent to the validity of the appointment.

Appellant says this act designates him as one of the constables by virtue of his appointment as an agent of the Arkansas Humane Society for Pulaski County. If this is true he would also be a deputy constable for Hill Township of Pulaski County, this being the township in

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which the city of Argenta is located. But more than one agent might be appointed by the humane society and in that event there would be no certainty as to the one to appoint, and there is nothing in the act which gives the appointing officers of the society the right to confer authority upon one agent which is denied another.

This amendment does not appear to be a well-considered piece of legislation; but we must assume the Legislature did not intend any absurd results. If appellant's contention is correct, we would have the possibility of several persons being eligible and all entitled to an appointment which only one could receive. Even though there was only one person eligible, his appointment would be subject to the approval of the county court, and we would have the useless formality of a person being appointed and confirmed when neither the appointing nor the confirming officer had any discretion about the appointment. A person might be appointed who would not be a resident of the township in which his principal was elected, and such would be the case here if appellant was appointed for both Big Rock and Hill Townships. The humane officer's appointment is without any reference whatever to the term of office of the constable, and the constable would be responsible for the acts of a deputy over whose appointment he had no control whatever, and this deputyship would be wholly uncertain both as to the incumbent and the tenure of office, as the society could change its agents at any time.

We think the more reasonable construction of the act is that it gave the constable the right to appoint as many as five deputies, subject to the approval of the county court, and if this number was appointed, one of them should be charged specially with enforcing the duties of humane officer. But the right to appoint this deputy as well as the others abides in the constable only, and is to be exercised by him subject to the approval of the county court.

It follows, therefore, that appellant's prayer for a mandamus was properly denied, and the judgment of the court so ordering will be affirmed.

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## COTTEN v. HUGHES.

Opinion delivered July 3, 1916.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT DISTRICT—DE FACTO COUNCIL.—By Legislative enactment it was attempted to raise the town of Benton, Saline County, to a city of the second class (Act 113, p. 277, Private Acts of 1911). The act was held invalid by this court in *Cotter* v. *Benton*, 117 Ark. 190. By Act 212, p. 831, Acts of 1915, the Legislature attempted to ratify and validate all municipal acts done under statutes raising their grades. *Held*, the acts of the municipal officers in creating a local improvement district and levying assessments, performed subsequent to the passage of Act 212, Acts of 1915, and before an election was held to elect new officers, were valid, that the district was legally formed, and the assessments levied were valid.

Appeal from Saline Chancery Court; *J. P. Henderson*, Chancellor; affirmed.

*Hal L. Norwood*, for appellant.

1. Special Act 113, Acts 1911, was unconstitutional and void. 117 Ark. 190. Special Act No. 212, Acts 1915, was also void. 185 S. W. 440. The City of Benton was never even a *de facto* city of the second class. 55 Pac. 103; 106 Okla. 61; 92 N. E. 778; 175 Ind. 332; 136 Ill. App. 606; 88 N. E. 349; 43 Ind. App. 634; 73 N. E. 727; 35 Ind. App. 65.

2. There can be no *de facto* officer where there is no office to fill. 118 U. S. 425; 28 Atl. 82; 18 N. W. 285; 31 Minn. 472; 29 S. E. 931; 103 Ga. 319; 61 S. E. 30; 4 Ga. App. 197. To constitute a *de facto* officer there must be a rightful government. 26 Ark. 545, 580. See also 24 Pac. 370.

3. Plaintiff is not estopped. 15 Pac. 825; 43 Ind. 566; 37 N. E. 739; 22 Mich. 104. There can be no innocent purchasers of bonds issued without authority of law. 10 R. C. L. 41; 123 N. C. 380; 51 Am. St. Rep. 824; 94 U. S. 260.

*Rose, Hemingway, Cantrell, Loughborough & Miles*, for appellees.

1. It is immaterial whether the City of Benton is treated as a *de jure* incorporated town or a *de facto* city

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of the second class. All have the same power to organize improvement districts. Its acts were valid. I Dillon Mun. Corp. (5th ed.), § 67, p. 122; 2 *Id.* § 887, p. 1368; Cooley Const. Law (6th ed.), p. 309; 185 U. S. 1, 13. The case of 38 Ark. 81, is a leading case. See also 54 *Id.* 374; 117 *Id.* 190. The latter case has no bearing here. Benton was attempting to exercise powers belonging to a city of the second class. Here the incorporated town had the power regardless of whether the act was void or not.

MCCULLOCH, C. J. Benton, the county seat of Saline County, has been an incorporated town for many years, and was organized under the general statutes of the State, but the General Assembly of 1911 passed a special statute attempting to raise its classification so as to constitute it a city of the second class. It was decided, however, by this court that the special statute was void for the reason that it constituted a violation of those sections of the constitution which provide that "the General Assembly shall pass no special act conferring corporate power," except in certain instances, and that the General Assembly "shall provide by general laws for the organization of cities and incorporated towns." Art. XII, Sections 2 and 3, Constitution of 1874. *Cotten* v. *City of Benton*, 117 Ark. 190.

The decision declaring the special statute void was rendered by this court on February 22, 1915, and the General Assembly enacted a statute, which was approved March 23, 1915 (Act No. 212, page 831, Acts of 1915), attempting to ratify and validate all acts performed by municipalities under special statutes raising their grades, and also confirming in office the *de facto* officers in those municipalities until an election could be held to elect their successors. The statute, after a recital in the preamble to the effect that the grade of many incorporated towns had been raised by acts of the Legislature to cities of the second class, and that the Supreme Court had held that all such special statutes were void, reads as follows:

"Section 1. It is declared that the constituted govments of municipalities, which the Legislature has de-

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clared to be cities of the second class, have been and are the *de facto* governments of such municipalities, and all their acts heretofore done, which would be valid if they were cities of the second class, or which would be valid if they were incorporated towns, are hereby ratified and confirmed, and declared to be valid as the acts of *de facto* governments; and, inasmuch as some time must elapse before a government can be organized in such municipalities as incorporated towns, the present officers of such municipalities are hereby confirmed in office until their successors are elected and qualified, and are hereby declared to be the *de facto* and *de jure* officers of said municipalities, and all their acts as such shall be valid until their successors have been elected and qualified in the manner hereinafter provided."

The second section of the statute directed the Governor, at the earliest practical date, to call a special election in all such municipalities for the purpose of electing a mayor, recorder, and five aldermen as the officers of said municipalities as incorporated towns. The section also provided how the election should be held, and the returns thereof made and declared, etc. The statute contained an emergency clause and therefore went into immediate effect.

On April 16, 1915, an ordinance was passed by the council creating an improvement district for the purpose of installing a system of water works, and appellees were appointed commissioners of the district, and on July 5, 1915, an ordinance was passed levying the assessments against the property in the district. The improvement was undertaken, and the assessments were levied, after obtaining the consent of the majority of the property owners of the district in accordance with the general statutes of this State with respect to improvement districts in cities and towns. Kirby's Digest, section 5664, *et seq.*

The only thing urged as a defect in the organization of the district is that all acts of the city council of Benton were absolutely void and that the Legislature had no authority to validate any acts which had already been

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performed, nor to authorize any further acts to be performed by the city council. We need not concern ourselves at present with that part of the statute which undertook to validate acts which had already been performed by the council of Benton as a city of the second class, for, as has already been shown, everything that was done affecting the organization of this improvement district was done after the passage of the statute, and we need only consider that portion of the act which declared that "the present officers of such municipalities are hereby confirmed in office until their successors are elected and qualified, and are hereby declared to be the *de facto* and *de jure* officers of said municipalities, and all their acts as such shall be valid until their successors have been elected and qualified in the manner hereinafter provided."

Appellant is a property owner in the improvement district, and undertakes to restrain the Board of Commissioners from issuing bonds and carrying forward the construction of the improvement. The creation of the improvement district was entirely within the statutory power of an incorporated town, as much so as within the powers of cities of either class, and the Legislature did not attempt to confer any new power in authorizing the council to perform acts for and on behalf of the incorporated town. The only constitutional limitation upon the creation of improvement districts in cities and towns is that the special assessments for local improvements must "be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected," and that "such assessments shall be *ad valorem* and uniform." Art. XIX, Sec. 27.

Pursuant to that provision of the constitution, the Legislature provided by general laws for the organization of improvement districts in cities and towns, upon the consent being obtained of a majority in value of the owners of property to be affected. Nor is there any constitutional restriction upon the power of the Legislature with respect to determining how the corporate power conferred under general statutes shall be exercised, the only limitation being that contained in the two sections to the effect that

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the General Assembly shall provide by general laws for the organization of cities and towns, and that "the General Assembly shall pass no special act conferring corporate power." All that the Legislature has done in the special statute now under consideration, so far as it relates to the question before us, is to declare that the corporate functions, pursuant to the original organization of the incorporated Town of Benton, should be exercised by the officers elected for the municipality as a city of the second class, and we are of the opinion that that statute does no violence to the constitutional authority of the lawmakers.

It must be remembered that the incorporated town ceased to exercise its functions through the agencies then existing, when the General Assembly of 1911 passed the statute raising the municipality to a city of the second class. The terms of those officers had expired when the Act of 1915 was passed and at most they could only have been deemed as holding over until their successors could be elected, and we see no constitutional objections to the Legislature providing other agencies, namely the officers which had been put into authority pursuant to the supposed power of the special act raising the municipality to that of a city of the second class, to execute the corporate authority until a new election could be held. The differences between the two classes of municipalities are purely statutory. An incorporated town has, under the statute, a mayor, a recorder and five aldermen, who constitute the city council, whereas the statute provides that the council of a city of the second class shall be composed of a mayor and two aldermen from each ward. While the members of the city council were elected under a void statute, and possessed no valid authority to act, yet it was within the province of the Legislature to authorize them to act for the incorporated town until the proper officers could be elected under general statutes. This was not an attempt to confer corporate authority by a special act. The authority was conferred under general statutes which provided for the organization of incorporated towns, and the Legislature in this special statute only designated the agencies through which that corporate

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power, which had already been conferred, could be exercised.

We are of the opinion, therefore, that the acts of the city council in creating this improvement district and levying assessments, being acts that were performed subsequent to the passage of the statute of March 23, 1915, and before the election was held to elect new officers, it was a valid exercise of power, and that the improvement district has been legally created, and the assessments levied pursuant thereto are valid.

The chancellor was correct in his decree dismissing appellants' complaint for want of equity, and the decree is therefore affirmed.

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## MERCHANTS & FARMERS BANK v. CITIZENS BANK.

Opinion delivered July 3, 1916.

1. MORTGAGES—UNRECORDED MORTGAGE—EFFECT AS TO THIRD PARTIES.—An unrecorded mortgage is without any effect against strangers to it, and is only good between the parties.
2. MORTGAGES—PLEDGE OF STOCK—PRIORITY OF LIEN THEREON AS BETWEEN TWO DEBTORS.—A transferred shares of stock which he held in appellant bank to appellee as security for a debt due appellee, neither this instrument nor a mortgage given to appellee, both given to secure the same debt, were recorded. A was also indebted to one H, and had pledged the same stock to H. Subsequent to the mortgage from A to appellee, H assigned his claim to appellant bank. *Held*, as between appellant and appellee, that appellant was entitled to a prior lien on A's stock.
3. MORTGAGES—PLEDGE OF STOCK—PRIORITY.—Under the above facts the fact that the president and cashier of appellant bank were notified of the pledge of the stock to appellee, would not defeat appellant's prior lien.

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

*R. G. Harper* and *W. E. Patterson*, for appellants.

1. Appellee bank acquired no lien on the securities under the written instrument. There was neither a pledge nor notice of one. To constitute a pledge there

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must be a delivery. 31 Cyc. 799-800; 81 Fed. 439; 103 U. S. 352; 135 *Id.* 478; 96 *Id.* 467; 133 *Id.* 233; 98 Ark. 384; 31 Cyc. 807.

2. The instrument, at most, was an unrecorded mortgage, good between the parties, but unavailing against third parties. 71 Ark. 517; 77 *Id.* 57; 97 *Id.* 432; 105 *Id.* 242.

3. There was no waiver by appellant bank of its mortgage under § 853 of Kirby's Digest. Act No. 113, Acts 1913; 10 Cyc. 585; 109 Ark. 168; 10 Cyc. 487, 586; 4 Thompson on Corp., §§ 4006, 4017; 7 R. C. L. 210.

*Mahony & Mahony* and *H. S. Powell*, for appellees.

1. Appellant bank waived its lien on the bank stock. Where a corporation has knowledge of a prior pledge of stock, the statutory lien is subordinate to the lien of the prior pledge. 112 Ark. 180; 20 L. R. A. 600; 15 C. C. A. 34; 56 *Id.* 174; 10 Bush, 54; 102 Ky. 346; 77 Vt. 123. Besides the bank did not rely on its lien on the stock. Having waived its lien, it had no lien of any kind. Cases *supra*. No rights of third parties intervened. The contract for a pledge, even if there is no actual delivery, will be enforced against general creditors of the pledgor. 31 Cyc. 997.

2. A tender was made by appellee bank. 93 Ark. 497; 96 *Id.* 156.

3. Appellee's lien was prior in time and it was never agreed that the personal collateral should secure the Harris Lumber Co. note. The appellee had the right to redeem by paying the balance due on the $5,500 note. The decree is right.

MCCULLOCH, C. J. Appellant, Merchants & Farmers Bank, is a banking corporation doing business at Junction City, Arkansas, and A. B. Henderson was its president at the time the transactions took place which are brought under review in this litigation.

On January 3, 1912, C. A. Harris became indebted to A. B. Henderson in the sum of $5,500 and executed his note to Henderson for that amount, due and payable one year after date with interest, and to secure the payment of

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the note, Harris executed to Henderson a mortgage conveying certain lands. Harris was the holder of certain shares of the capital stock of appellant corporation of the par value of $3,000, which he also pledged to Henderson as security for said note, and he delivered the certificates of shares to Henderson to hold. On that date, Harris entered into a contract with appellant to guarantee payment of a note previously executed by the Harris Lumber Company (of which corporation Harris was the principal stockholder), for the sum of $1,000, and one of the issues of fact in the present case is, whether or not Harris pledged the stock as security for that debt, as well as for the debt to Henderson. Harris also transferred to Henderson certain other collaterals which are unnecessary to mention in detail in disposing of the present controversy.

The debt of Harris to Henderson had been paid down to the sum of $3,499.05 at the time of the beginning of the present litigation, and in the meantime, Harris had become indebted to appellant in the sum of $2,644.93, for the payment of which debt, appellant asserts its statutory lien on the Harris shares of stock. This indebtedness was incurred in the year 1913, and was subsequently evidenced by a note executed by Harris to appellant.

On July 3, 1912, Harris became indebted to appellee, Citizens Bank of Junction City, upon two promissory notes, each for the sum of $3,500, and he executed to appellee a second mortgage on the lands embraced in the prior mortgage to Henderson, as well as upon certain other lands. He also executed to appellee an instrument whereby he transferred said shares of stock in appellant's bank to appellee, as security for said debt, with authority to redeem said shares of stock from the prior pledge to Henderson. That instrument was neither acknowledged nor recorded, but the evidence adduced by appellee tends to show that its existence was brought to the attention of appellant's president and cashier, and that the latter offered no objections to the transaction. There is a conflict upon that issue, but in view of the conclusions which we have reached decisive of the controversy, it is

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unnecessary to determine on which side of that issue the preponderance of the evidence lies.

On December 14, 1914, Henderson assigned the Harris note to appellant bank, and delivered all the collaterals which Harris had placed in his hands to secure the debt.

The present suit was instituted by appellee for the purpose of having the securities marshalled, and to compel appellant to resort, for the satisfaction of the original debt of Harris to Henderson, to securities other than the bank stock.

The contention of appellee is that its lien on the stock is superior to the statutory lien asserted by appellant.

On the final hearing of the case, the chancellor decided in favor of appellee as to the priority of the asserted liens on the stock. There are other questions presented here, but since we reach a conclusion favorable to appellant on the question of priority of liens on the stock, all other questions are eliminated from the case.

(1-2) The lien of the appellant corporation upon the shares of its own stock, is declared in the following statute: Sec. 853, Kirby's Digest: "The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation." Whether this lien has priority over a pledge to a third party with notice to the officers of a corporation, we need not decide. The cases cited by counsel for appellee on the brief, tend to support their contention that the statutory lien of a corporation is subordinate to a lien of a prior pledge of the stock. It was so decided by the United States Circuit Court of Appeals of this circuit in an opinion by Judge Thayer, in the case of *Curtice* v. *Crawford County Bank*, 118 Fed. 390, adjudicating the effect of a transaction which arose in Arkansas under the statute.

The question has never been decided by this court, but was mentioned by Judge Riddick in delivering the

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opinion in *Springfield Wagon Co.* v. *Bank of Batesville*, 68 Ark. 234, a decision of that question, however, being expressly pretermitted. Nor was that question decided in the recent case of *Young Coal Co.* v. *Hill*, 112 Ark. 180.

The transaction between Harris and appellee did not constitute a pledge of the stock, for there was lacking one of the essential elements of a pledge, i. e., manual delivery of the certificates of stock. "Possession of the property is of the very essence of a pledge," said this court in *Lee Wilson & Co.* v. *Crittenden County Bank*, 98 Ark. 384, "and without such possession in the pledgee, there can be no privilege thereunder as against third persons."

The instrument executed by Harris to appellee amounted to nothing more than a mortgage, which was not recorded, and was therefore only good between the parties. 31 Cyc., p. 807. It did not affect the rights of third parties, and therefore the statutory lien of appellant, which arose when the debt was subsequently incurred cannot be subordinated to it. The statute itself declares that a mortgage shall not become a lien until it has been duly acknowledged and filed for record. Kirby's Digest, 5396. This court has repeatedly held that an unrecorded mortgage is without any effect against strangers to it, and is only good between the parties.

(3) It is contended that appellant waived its lien, but we find in the record no evidence of conduct on the part of the bank which constitutes a waiver. All that is shown with reference to appellant's connection with the transaction between appellee and Harris, was that Harris called the attention of the cashier and the president of the appellant bank to the fact that he was going to give the Citizens Bank a second pledge of the stock, and those officers made no objection thereto. This was far from constituting a waiver by estoppel. If an actual pledge of the stock was effectual against the lien of the bank, it was unnecessary to obtain the consent of the officials of the corporation. Notice of the pledge would alone have been sufficient. Mere knowledge on the part of appellant's officers that there had been an effort to create a lien on the stock in favor of appellee was not

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sufficient to work an estoppel, and unless appellee's lien was made complete by manual delivery of the stock, or by acknowledgment and recording of the mortgage, so as to comply with the registration laws, it had no force against appellant when its statutory lien subsequently attached.

We are of the opinion, therefore, that the Chancellor erred in declaring appellee's lien on the stock to be prior to that of appellant. The decree is reversed and the cause is remanded with directions to enter a decree in appellant's favor in accordance with this opinion.

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## MATTHEWS v. CLAY COUNTY.

Opinion delivered July 3, 1916.

1. APPEAL AND ERROR—FINDING OF FACTS BY COURT—CONCLUSIVENESS.—When a case is tried before a court sitting as a jury, the court's findings of fact are as conclusive on appeal as the verdict of a jury.
2. APPEAL AND ERROR—TRIAL BEFORE COURT ALONE UNDER STATUTE—PRESUMPTION AS TO FINDING OF FACT.—When the circuit judge is, by statute, the trier of facts in cases to which the constitutional right of trial by jury does not extend, the same presumption attends his findings as when a jury is waived by the parties.
3. APPEAL AND ERROR—FINDINGS OF FACT.—The findings of fact made by the court below, will not be disturbed on appeal when supported by any evidence of a substantial character.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney*, Judge; affirmed.

*F. G. Taylor*, *J. L. Taylor* and *G. B. Oliver*, for appellant.

The questions here are almost entirely of fact and to be determined upon the weight of the evidence, the burden of proof being on appellee. The principal one is: Did Matthews inclose the $6,000 in scrip, and did Cargill receive it? The evidence of appellant and his witness is clear and convincing, while inconsistencies and contradictions appear in the evidence offered by appellee. The findings of the court are clearly against the weight of the evidence. 38 Ark. 482; 24 Cyc. 134; n; Kirby's Digest, § 7174.

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*L. Hunter* and *Spence & Dudley*, for appellee.

This action was brought under § 7174 Kirby's Digest. The principal item is the $6,000 in scrip. The court sitting as a jury found against appellant on sufficient evidence. Such finding is as conclusive as the verdict of a jury, and will not be disturbed if there is evidence to support it. 90 Ark. 512; 91 *Id.* 108; 100 *Id.* 166; 104 *Id.* 154; 88 *Id.* 587; 96 *Id.* 606.

HART, J. Section 7174 of Kirby's Digest provides that whenever any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, any time within two years from the date of such settlement, to reconsider and adjust the same.

J. E. Matthews was sheriff and collector of Clay County from October 31, 1910, to October 31, 1914. During that time C. A. Cargill was treasurer of the county. On July 18, 1913, Matthews filed a settlement as collector in the county court and his settlement was duly approved by the court. It was shown that he had paid to the county treasurer all the funds with which he was chargeable as collector. On February 5, 1915, Cargill filed his petition in the county court under the section of the statute above referred to, and asked that the settlement of Matthews as collector, be reconsidered and adjusted. Certain alleged errors in the settlement were specifically named in the petition. The county court opened the settlement for the purpose of correcting errors in it and caused a restatement of the collector's account to be made. Judgment was rendered against Matthews for the amount found to be due and Matthews appealed to the circuit court.

The circuit court after hearing the testimony, restated the account of Matthews. It found in his favor in regard to certain alleged errors and against him as to certain others. The circuit court found that Matthews as collector was indebted to Clay County in the sum of $5,980.21 and judgment was rendered against him and his

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bondsmen for that amount. The case is brought before us by appeal.

(1-3) It is well settled in this State than when a case is tried before a court sitting as a jury, the court's findings of fact are as conclusive on appeal as the verdict of a jury. This is conceded to be the law by counsel for Matthews but they contend that the rule is different when the trial court is properly the trier of the facts. This court has ruled adversely to their contention. When the law makes the circuit judge the trier of facts in cases, to which the constitutional right of trial by jury does not extend, the same presumption attends his findings as when a jury is waived by the parties. *Jones* v. *Glidewell*, 53 Ark. 161; *Schuman* v. *Sanderson*, 73 Ark. 187; *Williams* v. *Buchanan*, 86 Ark. 259. The reason is that in cases tried at law, we only review for errors. In chancery cases there is a trial *de novo* in this court and the findings of facts made by a chancellor are persuasive merely. The circuit court found the issues of facts against Matthews and under the settled rules of this court, if there is any evidence of a substantial character to sustain the findings of fact made by the trial court it is our duty to uphold them. On certain of the errors alleged against Matthews the court found in his favor and inasmuch as no appeal was taken by the county, the testimony in regard to these items need not be abstracted and no further reference need be made to them. The correctness of the judgment of the circuit court against Matthews depends upon whether or not Matthews sent to Cargill as treasurer, a package of scrip amounting to $6,000. This is conceded by counsel for both parties.

Matthews testified that on the 7th day of May, 1913, he sent Cargill the sum of $14,700 by registered letter; that $8,700 of this amount was in bank checks of various denominations and $6,000 of it was in county scrip of various amounts; from fifty cents to one hundred and twenty-five dollars or more. Matthews testified positively that he got most of this scrip from the two banks in the town of Corning and that he and his deputy checked it over in his office and that his deputy then placed

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checks and the scrip in an envelope and went over to the post office to mail it. His deputy corroborated him in this testimony. He stated that they went over the list of scrip carefully and checked it up and that after the bank checks and scrip were placed in an envelope he addressed the envelope to C. A. Cargill at Piggott in Clay County, Arkansas, and carried it to the post office where the letter was registered.

An attorney in the town of Corning testified that he was working in the county clerk's office at Corning in May, 1913, that the county clerk's office was just across the hall from the collector's office; that he went into the collector's office in May, 1913, and the deputy sheriff called his attention to a package containing $6,000 of county scrip that he was mailing to C. A. Cargill at Piggott. Other circumstances were introduced in evidence which tended to corroborate the testimony of Matthews and his deputy. Cargill admitted receiving a registered letter and that it was properly sealed and did not appear to have been opened in transit. He denied however that it contained $6,000 in scrip or any other amount of county scrip. He said that the remittance contained in the letter consisted entirely of bank checks aggregating the sum of $8,700. His testimony is corroborated by that of S. P. Johnson.

Johnson testified that he was working for Cargill in the spring of 1913 and that he remembered getting a registered letter out of the post office at Piggott for him; that he saw Cargill open the letter and noticed some bank checks in the letter but did not notice any county scrip; that he thinks he would have noticed the scrip if it had been there both on account of the bulk it would have made and of the color being green, a different color from that of the paper on which the checks were written. Other circumstances were adduced in evidence tending to corroborate the testimony of Cargill.

We need not abstract the testimony further, however. As we have already seen under the settled rule of this court we must uphold the findings of facts made by the circuit court if there is any substantial evidence to sup-

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port them. It is true Matthews and two other witnesses testified positively that $6,000 in county scrip was placed in a sealed envelope with some bank checks and mailed to Cargill. It is also shown that a registered letter containing the bank checks was received by Cargill and that the envelope did not appear to have been broken open. Cargill and Johnson admitted that the letter was received and that it did not appear to have been broken open but they denied that the scrip was in the letter.

The undisputed testimony that the letter did not appear to have been broken open during transit and the testimony of Matthews and others to the effect that the scrip was placed in the letter does not demonstrate beyond controversy that the findings of fact by the circuit court were based upon what is untrue and what could not be true and that on this account the court should have found for Matthews as a matter of law. At most their testimony only furnished a strong argument against the credibility of the testimony of Cargill and his witnesses and in favor of the credibility of Matthews and his witnesses. This, however, is as far as the record authorizes us to go. The testimony of the witnesses on both sides related to matters, situations and conditions which might or might not have existed. The testimony of Cargill and Johnson that the scrip was not in the letter when they received it, tended to contradict the testimony of Matthews and his witnesses and to establish the fact that they did not send the scrip to Cargill. The circuit court was the sole judge of the credibility of the witnesses and it made an express finding of fact that Cargill did not receive the scrip. The testimony upon which this finding was based is not opposed to any unquestioned law of nature but if believed by the court was sufficient to warrant its findings. *St. L. S. W. Ry. Co.* v. *Ellenwood*, 123 Ark. 428.

It follows that the judgment must be affirmed.

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## BURTON v. GORMAN.

Opinion delivered July 3, 1916.

1. ADMINISTRATION—PAYMENT OF DEBTS—LANDS—RIGHTS OF ADMINISTRATOR.—The lands of a decedent are assets in the hands of the executor or administrator and deemed in his possession and subject to his control for the payment of debts of the decedent; the administrator may maintain ejectment to recover possession of lands when necessary for the payment of the debts of the estate, without joining the heirs in the suit.
2. UNLAWFUL DETAINER—RIGHT.—The action of unlawful detainer is given only to test the right to the immediate possession of lands and tenements, and not to determine the right or title of the parties to or in them.
3. LANDLORD AND TENANT—DISPUTE OF LANDLORD'S TITLE BY TENANT.—A tenant can not dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title without surrendering possession.

Appeal from St. Francis Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

W. P. Gorman brought this action of unlawful detainer for the possession of a certain dwelling house in Forrest City, alleging that he had rented same to appellant by the month for $25 per month; that appellant paid the rent for the last four months of 1913 and failed and refused to pay any rent since the first day of January, 1915; was indebted in the sum of $112.50 for the months of January, February, March and half of April; that he had failed to surrender possession of the premises after demand made in writing therefor; prayed judgment for the rent due and damages in double the amount of the rent during the time defendant continued to hold over after notice to quit.

The answer denied he had leased the property from appellee; alleged that he had leased it from the administrator of the estate of J. E. Stone, deceased, through appellee her attorney; that after said administratrix was removed, Ellis Turley was appointed by the probate court administrator, with directions to take charge of

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and rent the properties of said estate and that he continued in possession of the property as the tenant of the Stone estate. Denied any agreement to pay rent indefinitely at $25 per month; alleged that $20 was a fair rental value for the property and that he had been renting same at said sum from said administrator of the Stone estate since January 1, 1914. Denied that appellee was entitled to the possession of the property or to collect the rents therefrom and that he was in the unlawful possession thereof or unlawfully detaining same.

It appears from the testimony that W. P. Gorman purchased the premises in April, 1913, from Mrs. Lizzie M. Evans and her two daughters, who conveyed it to him by a warranty deed and took immediate possession thereof. He first rented the place to a Mr. Allen and then to appellant who moved in the latter part of August and paid rent at $25 per month for the remaining four months of 1913.

Appellant continued to occupy the property after that and delivered the key to appellee on the 1st day of October, 1914. Dr. J. E. Stone devised by his last will the property to Mrs. Lizzie Evans and her two daughters and the estate was in course of administration at the time they conveyed it to appellant. There were some debts of the estate unpaid and no assets but the lots in controversy with which to pay them, but appellant agreed as part of the consideration for the conveyance from Mrs. Evans and daughters to pay all debts probated against the Stone estate.

E. Turley testified that the estate of J. E. Stone was still in the course of administration and that he succeeded Mrs. Evans as administrator; that there were no funds on hand with which to pay expenses of administration nor debts due by the estate, nor taxes upon the lands thereof. The court refused to allow witness to state that he had collected rents from appellant as tenant of the property from the 1st of January, 1914, at $20 per month, and also that he had paid the taxes on the property and had no assets of the estate with which to pay them. Appellee stated that he rented the property from Mr. Gorman's

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son and agreed to pay $25 a month therefor and paid that amount until January 1, 1914. He was not allowed to state what amount of rent he had paid thereafter or to whom, nor what the reasonable rental value of the premises was. He also stated that he had notified appellee that he would not continue to live in the house after December, unless the rent was reduced to $20 and continued thereafter, thinking, or assuming that he would only have to pay $20 per month.

The court over defendant's objection instructed the jury to return a verdict for the plaintiff for the possession of the property with damages for 9 months rent at $25 per month and from the judgment thereon, this appeal is prosecuted.

*Mann, Bussey & Mann*, for appellant.

1. Lands are assets in the hands of an administrator, and shall be deemed in possession and subject to his control until the debts of the estate are paid. Kirby's Digest, §§ 79, 186; 78 Ark. 111. The ordinary rules governing landlord and tenant are not applicable here. At the time of the conveyance to Gorman the property was under the control of the probate court. Mrs. Evans was a trustee for the creditors and could not relinquish control or possession until the debts were paid. 46 Ark. 373; 18 Cyc. 305. Testimony should have been admitted showing that the rent had been paid to the party entitled to receive it. 46 Ark. 373; 78 *Id.* 111.

2. The rents were necessary to pay taxes, repairs and debts. The court erred in ruling out all testimony as to the rental value of the premises; the application of rents to taxes, repairs or debts, and any contract as to the rent, or any agreement to show a change in the amount of rent to be paid. It was error to direct a verdict. Gorman could perhaps have maintained ejectment for the land but the answer presented a good defense to unlawful detainer and suit for rent. 73 Ark. 23; 42 *Id.* 28; 21 *Id.* 62; 46 *Id.* 373.

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*C. W. Norton* and *Walter Gorman*, for appellee.

This is simply a case of unlawful detainer by a landlord to recover the possession and accrued rent. A tenant cannot disclaim his landlord's title. He should have paid the rent or else returned possession. 43 Ark. 28; 98 *Id.* 240.

2. The administrator had no right to control the property unless needed to pay debts, nor to the rents. 46 Ark. 373. There were no debts and the testimony offered was properly excluded. Unlawful detainer cannot be converted into ejectment by an answer setting up title in the defendant or in another. 104 Ark. 322.

3. The prayer of the complaint and judgment comply with Kirby's Digest, § 3644.

KIRBY, J. (after stating the facts.) Appellant contends that the lands were assets in the hands of the administrator of the estate of J. E. Stone, deceased, and necessary to be used in the payment of the debts thereof and that the court erred in not permitting the introduction of the testimony showing these facts and the payment of rent by appellant to the administrator during the months for which appellee claimed he had unlawfully detained the premises and failed to pay the rent therefor.

(1) It is unquestionably true that lands of a decedent are assets in the hands of the executor or administrator and deemed in their possession and subject to their control for the payment of debts of the testator or intestate. Sections 79-186 Kirby's Digest; *Stewart* v. *Smiley*, 46 Ark. 373. It is also true that the administrator can maintain ejectment to recover possession of lands when necessary for the payment of the debts of the estate, without joining the heirs in the suit, but the administrator is not suing for possession. *Cook* v. *Franklin*, 73 Ark. 23.

(2) The action of unlawful detainer however, is given only to test the right to the immediate possession of lands and tenements and not to determine the right or title of the parties to or in them.

(3) It is likewise true that a tenant cannot dispute the title of his landlord while he remains in possession

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under him nor acquire possession from the landlord by a lease and then dispute his title without surrendering possession. *Dunlap* v. *Moose*, 98 Ark. 235; *Bryan* v. *Winburn*, 43 Ark. 32.

The undisputed testimony shows that Mrs. Evans and her daughters, the devisees, under the will, took possession of the property after the death of the testator and paid off certain debts against the estate and later conveyed the property to W. P. Gorman and delivered the possession thereof to him, said Gorman agreeing to pay as part of the consideration therefor, the debts thereafter probated against the estate.

It is likewise undisputed that appellee rented the premises from said Gorman, agreeing to pay $25 per month rent therefor and that he refused to pay him any rent after January 1, 1914, and continued in the possession of the premises for nine months of said year. It is true that he stated he notified appellee upon the payment of the December, 1913, rent that he would not continue in possession of the premises thereafter unless the rent was reduced to $20 per month. There was no testimony tending to show that appellee agreed to any such reduction, however, and appellant's statement that he thereafter continued in possession, understanding that he was only bound to the payment of the sum of $20 per month, was not testimony contradictory of and sufficient to show a change of the terms of the agreement under which appellant took possession. His statement alone that he gave notice that he would not retain the premises after January 1, unless a reduction of rent was made and that he did continue in possession thereafter, does not prove that appellee agreed to any such reduction.

The testimony being undisputed the court did not err in directing a verdict for the possession of the premises nor for the amount of damages to be recovered since there was no dispute as to the time the premises were occupied by appellee without the payment of rent, nor of the amount monthly agreed to be paid therefor.

The judgment is affirmed.

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## BAKER-MCGREW COMPANY *v.* UNION SEED & FERTILIZER COMPANY.

Opinion delivered July 3, 1916.

ESTOPPEL—CONDUCT—LIABILITY FOR DEBT.—B and M conducted a partnership business, and later attempted to turn over certain of its assets to another partnership composed of themselves and others. The two concerns did business with appellee, who believed them to be identical. *Held*, the latter organization was estopped by its conduct from denying liability for a debt due to appellee from B and M.

Appeal from Clay Chancery Court, Western District; *C. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Baker & McGrew, a partnership, composed of R. L. Baker and W. R. McGrew, was engaged in a general mercantile business and operated a cotton gin at Success, in Clay County, until February 1, 1912. On that date, a stock company composed of R. L. Baker and W. R. McGrew, and seven others, was organized, with a capital stock of $20,000, $13,500 of which was paid in. It was called Baker-McGrew Company and took over the mercantile business, but not the cotton gin formerly owned and operated by Baker and McGrew. On March 25, 1913, Baker and McGrew borrowed $4,000 from the oil company and executed a note therefor and a contract to sell their cotton seed to the oil company and secured the note by a second mortgage on their gin plant. Baker and McGrew operated their gin during the season of 1913 and 1914 and shipped seed to the oil company and reduced their indebtedness to about $1,000.

The appellee company, hereafter called the Seed Company, took over the business and the assets of the oil company, including the Baker and McGrew mortgage.

The Baker-McGrew Company continued its credit mercantile business during the year 1914 and Baker and McGrew not being financially able to operate their gin and purchase cotton, the Baker-McGrew Company in order to facilitate making its collections bought cotton and had it ginned by Baker and McGrew at $3.50 per bale and

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shipped a part of its cotton seed to the seed company. Part of the proceeds of the price of these seed shipments was applied by the seed company to the payment of the old account of Baker and McGrew and the right to make such application thereof is the matter involved in this suit and appeal.

The foregoing facts were alleged in the complaint and also that the Baker-McGrew Company and Baker and McGrew are in law one and the same person so far as the transactions involved are concerned, and that the seed company was entitled to credit the sums of money retained from the purchase price of the cotton seed on the old debt of Baker and McGrew. That although Baker-McGrew Company pretended to be an organization or stock company of some kind, that it was in fact a partnership virtually owned and controlled by R. L. Baker and W. R. McGrew and that the shipments of seed made to the seed company were in fact made by Baker and McGrew or on account of said partnership.

Judgment was prayed against Baker and McGrew for a balance of $264.17 claimed to be due and a foreclosure of the mortgage.

The defendants R. L. Baker and W. R. McGrew, admitted the execution of the note and that there was a balance due on it but denied that their firm Baker and McGrew had shipped any cotton seed to the seed company during the season of 1914 and 1915, or drawn any drafts on said company and any understanding by which any seed shipped during said season should be applied to the payment of their note. They denied the other allegations of the complaint above set out and that plaintiff was entitled to any credit upon their debt by reason of cotton seed shipped by Baker-McGrew Company.

Baker-McGrew Company filed an answer and cross-complaint, alleging that it was an association with R. L. Baker and W. R. McGrew as secretary and treasurer; the amount of its capital stock and names of the other seven stockholders; that Baker and McGrew was a partnership composed of R. L. Baker and W. R. McGrew; that the two concerns were entirely separate and distinct,

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conducting different kinds of business under different managements and with assets separate and distinct and in no way connected. Denied that Baker and McGrew had shipped any cotton seed to the seed company for said season and that it was in any way liable for the debts of Baker and McGrew and also the right of plaintiff to apply any proceeds of its cotton seed shipped to them to the discharge of the debt owing it by Baker and McGrew. By way of cross-complaint alleged it had shipped seed during October and November, 1914, to the plaintiff for which it was indebted for a balance of $960.81, with interest and prayed judgment therefor.

The testimony which consisted largely of correspondence was introduced and it appears that the two companies or partnerships are in fact separate concerns, conducting different businesses and that the cotton seed shipped to the seed company in October and November, 1914, was the property of Baker-McGrew Company, which conern, it was not contended, expressly authorized the seed company to apply any part of the proceeds thereof to the payment of the account of Baker and McGrew, or that it was known to said company that it was being so applied until the letter of October 29th. Appellant says there was no contention below that Baker-McGrew Company intended to mislead the seed company and that it may be conceded here that from the time shipments of seed began until the receipt of the letter of November 18, the seed company honestly believed that Baker and McGrew and Baker-McGrew Company were one and the same and said Baker-McGrew Company believed it was selling cotton seed to the seed company for the market price and of course entitled to all of the proceeds of the sale. Other facts will be stated in the opinion.

Judgment was rendered in favor of the seed company, from which this appeal is prosecuted.

*G. B. Oliver*, for appellant.

Appellee has utterly failed to make out a case of equitable estoppel; it has wholly failed by a preponderance of the evidence to establish any one of the five essen-

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tials of an equitable estoppel. No one represented that the partnership and the company were one and the same concern. Appellee knew better. There was neither misrepresentation, deceit nor fraud, nor any concealment of facts. It knew the facts or had the means of knowledge of the real facts. 16 Cyc. 722 (A); *Ib.* 726; Pom. Eq. Jur., § 805; 97 Ark. 43-49; 16 Cyc. 748-k. The burden was on appellee and it has wholly failed. The decree should be reversed and judgment rendered here for $1,009.84, with interest for appellant.

*Cockrill & Armistead*, for appellee.

Even looking upon Baker & McGrew and Baker-McGrew Co. as entirely distinct and separate concerns, the company so held itself out and dealt with appellee as to estop it from afterwards claiming that the seed company had no right to credit the $1,000 on the partnership account. But independent of estoppel the company is responsible for the company's acts. There is no proof of incorporation. Articles of agreement were entered, but not filed. The scheme known as the Massachusetts Trust was followed, which will not work as a corporation in Arkansas. It was not a corporation nor statutory joint stock company. 220 U. S. 178. It was simply a partnership. Cook on Corp., § 508; 17 A. & E. Enc. Law, 636; 30 Cyc. 397-8; 72 S. W. 875; 62 Ark. 229, 234; 35 *Id.* 144; 35 *Id.* 366; 19 A. & E. Enc. 337, etc.

2. A clear case of equitable estoppel is made. 16 Cyc. 723, 728, 730, 772; 97 Ark. 49; 89 *Id.* 349-352; 11 *Id.* 249; 33 *Id.* 465; 96 *Id.* 350; 85 *Id.* 144, 156; 29 *Id.* 512; 80 *Id.* 23; 93 *Id.* 301; 83 *Id.* 548; 55 *Id.* 296; 39 *Id.* 134.

3. Injury was shown. 62 Ark. 316; 101 *Id.* 135; 36 *Id.* 96-114; 82 *Id.* 367; 16 Cyc. 742; 81 Cal. 584; 3 Hun. 744; 132 La. 60; 120 S. W. 407; 24 Ark. 371; 38 *Id.* 571; 48 *Id.* 409; 64 *Id.* 213; 74 *Id.* 136.

KIRBY, J. (after stating the facts). It is contended by appellant that there is no showing of any ground of estoppel of it to recover the proceeds of the seed shipped by it to appellee company, nor authorizing the appropria-

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tion of the price thereof by said seed company to the payment of its debt against Baker and McGrew, but the majority do not agree with this contention.

It is true that the seed company did not pay any more than the market price for the cotton seed purchased, but it claims that because of the dullness and inactivity in the market of its products that it would not have purchased the seed at all from Baker-McGrew Company, had it known that a portion of the proceeds thereof could not be applied upon their debt against Baker and McGrew. In other words, commercial conditions were such and their supply of manufactured products, that they would not have purchased seed at the market price except from their customers, who were indebted for advances and in order to facilitate the collection of such debts.

Cyc. defines an equitable estoppel as follows: "The effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy." 16 Cyc. 722-A.

An estoppel *in pais* may arise from a transaction in which a party has led another into the belief of a particular state of facts by conduct of culpable negligence, which has been the proximate cause of leading, and has led such other party to act by mistake upon such belief to his prejudice, and gross negligence has been held evidence of an intent to deceive. 16 Cyc. 772; *Arkansas National Bank* v. *Boles*, 97 Ark. 43.

In *Jett* v. *Crittenden*, 89 Ark. 349, the court said: "The rule broadly stated is that a person who intentionally by culpable negligence induces another to act on his representations will be estopped from denying their truth." See also 16 Cyc. 732.

In *Jowers* v. *Phelps*, 33 Ark. 465, the court said (quoting syllabus): "A party who by his acts, declara-

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tions, or admissions, or by failing to act or speak when he should, either designedly or with wilful disregard of the interest of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, is estopped to assert his right afterward, to the injury of the party so misled." See also *Fagan* v. *Stuttgart Normal Institute*, 91 Ark. 148; *Graff* v. *Lena Lumber Co.*, 96 Ark. 350; *Graham* v. *Thompson*, 55 Ark. 296; *Bramble* v. *Kingsbury*, 39 Ark. 134.

On January 3, 1914, Baker and McGrew wrote the seed company, enclosing the bill of lading for a car of seed, stating it was their last, and "In regard to our account will say, that the unusual short crop has left us a little close and we would like to make arrangements about the same as last year and take up the old matter." On the 17th of July, following, the firm wrote another letter to the seed company asking for an additional loan of $1,000 and on the 23rd the seed company's manager went to Success to see R. L. Baker. He said they discussed the method of seed shipping and the probability of his continuing shipments on about the same plan as formerly and Baker said he would do so. This agent learned nothing of the concern called Baker-McGrew Company at the time and upon his return to St. Louis procured a report from the Bradstreet agency, which showed the Baker-McGrew Co. was some sort of a Massachusetts Trust concern "not a corporation," "succeeding Baker & McGrew" and reciting that the present company was formed to take over the business. After this report was received, the manager of the seed company concluded that the new company was successor to the old, or the same as Baker and McGrew.

All the transactions thereafter were carried on by correspondence and nearly all the letters written by the seed company were addressed to Baker & McGrew, and Baker-McGrew Co. answered most of these letters. The correspondence consisted of quotations of prices for cotton seed by the seed company, and notification of shipments in response thereto. The seed was ginned

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from the cotton purchased by Baker-McGrew Co. at Baker & McGrew's gin for an agreed price.

In July Baker & McGrew requested the loan of a thousand dollars, giving a statement of the seed shipped for the three former seasons, and that it expected to gin a certain amount of cotton for the 1914 and 1915 season and its manager permitted the loan, saying he had visited Success and found everything in a prosperous condition. The manager took it up with his division manager and discussed the chances of clearing up the old indebtedness and the new loan if made. On the 30th the old company wrote on Baker-McGrew Co.'s letter heads, again requesting an additional loan of $1,000, promising "to clean up our account with you this fall." The seed company answered this letter directing it to Baker & McGrew and saying they hoped to make the loan but expected the old balance to be covered by the seed shipment in any event.

Appellee then declined to make the loan and so notified Baker & McGrew on August 6th. It then on September 15, wrote to them quoting the price per ton for seed and on September 28th Baker-McGrew Co. wrote the seed company requesting quotations on seed. On September 29th the division manager of appellee wrote the manager instructing him to watch the indebtedness of the Baker and McGrew account. On the 29th the seed company acknowledged the receipt of Baker-McGrew Company's letter of the 28th, stating there had been no change in the market since "our letter of the 25th inst., naming you the price of $16.00 per ton."

The first bill of lading for seed shipped was enclosed in a letter signed Baker-McGrew Co., the bill showing the shipper to be Baker and McGrew.

This was acknowledged on October 2, in a letter addressed to Baker and McGrew and thanking them for the shipment and asking for another car. On the same day the manager of appellee wrote the division manager that Mr. McGrew had shipped one car of seed to apply on account. The correspondence from there on was by Baker-McGrew Co. notifying of the shipment of seed and

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drafts drawn for a certain amount of the price thereof. These letters were signed usually Baker-McGrew Co., by R. L. Baker, President, or by the secretary.

It was also shown that the secretary of the Baker-McGrew Co. usually answered the correspondence of Baker and McGrew at the direction of R. L. Baker of that firm, stamping the signature to the letters.

Appellant company drew drafts usually for less than the amount due for a car of seed shipped, the weight of which, however, was estimated as there was no track scale at their place.

This practice was continued into November, the Baker-McGrew Co. drawing for an amount in excess of the price of the car shipped only two or three times, which was consented to in advance by appellee. On Nov. 10, 1914, said company forwarded the bill of lading with notice to the seed company, that it had drawn for $900, the proceeds of the car only being about $430; to this appellee company replied they had directed the bank to hold the draft until they could hear from appellant and enclosed statement of the account asking that it be so handled that the balance would be wiped out by the end of the season.

This account showed credits for all the seed shipped with a charge against the Baker-McGrew Co. of the old balance of $1,200 on account of Baker & McGrew. On the 18th the seed company again wrote declining to accept the draft for $900 without at least three more bills of lading to apply against it. They advised of a payment of a draft for $350 without notice from the shipper, stating it would be charged against the first car shipped open. On the 18th, Baker and McGrew wrote appellee saying: "In regard to the statement you sent to Baker-McGrew Co. will say that their secretary called our attention to it, that the company's account is different from ours," also stated that times had been bad during the season and they would not be able to pay more than "the interest on our indebtedness this year to you."

On the same day, appellant company acknowledged receipt of the statement and approved it, "except the

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balance on the note and interest $1,207.74, which is not our account but Baker and McGrew's account." Also advised of a draft for $350 drawn and hoped to continue furnishing seed during the remainder of the season.

On the 19th, they wrote again regarding appellee's action in returning the draft and reiterating the statement that the old indebtedness was Baker and McGrew's and not the Baker-McGrew Co.'s. Also stated the Baker-Grew Co. was formed about two years ago and bought no cotton until this year and it was necessary to do so in order to collect accounts. Made another draft for $900 with the statement of the indebtedness and that two other bills of lading had been forwarded. Appellee company on the 20th answered expressing surprise at the claim, that the said appellee had nothing to do "with the balance due us from Baker & McGrew;" stated its understanding was that both concerns were the same and that any seed shipped during the season with the balance left in its hands would apply on the indebtedness carried over from last year, refused to pay the $900 draft and stated that any amounts due beyond the drafts paid must be applied to the credit of the old account, and "any balance due you from shipments this season is a matter you will have to adjust with Baker & McGrew and not with us."

On the 26th of February, 1915, Baker & McGrew wrote appellee company, stating the cotton season was over, that they were still behind in the payment of their account and asking a loan of $1,000 about April 1st, to be repaid in the fall. The company answered this letter, stating its record showed an indebtedness of $271.45, including interest on past due account and stating if it was paid promptly that the loan would be made.

The testimony is unquestionably sufficient to show that appellee company understood throughout the whole transaction until the letter of Nov. 10, when the season was practically over, that it was dealing with the successor of Baker and McGrew, which it understood was responsible for the indebtedness of the old firm.

The correspondence between the two concerns was calculated to confirm this belief and appellee's testimony

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is undisputed that it would not have purchased the seed from appellant company at all, had it not expected that part of the proceeds thereof was to be applied to payment of the old account. This in the opinion of the majority is sufficient to create an estoppel against the appellant company, precluding it from claiming the balance due for the seed shipped, that was in fact applied upon the old account of Baker & McGrew. 16 Cyc. 742; *Rhodes* v. *Cissel*, 82 Ark. 367.

The Baker-McGrew Company was not incorporated; was organized under a scheme known as the Massachusetts Trust and was in effect no more than a partnership. Certainly it was not a corporation or joint stock company. *Forbes* v. *Whittemore*, 62 Ark. 229; *Garnett* v. *Richardson*, 35 Ark. 144; *Elliott* v. *Freeman*, 220 U.S. 178; 17 A. & E. Enc. of Law 636; Cook on Corporations Sec. 508; 30 Cyc. 397.

While it is true one member of a partnership has no authority to pay an individual debt with the partnership funds or assets without its consent, no such payment was attempted to be made here, nor was any made unless by estoppel of appellant company by its conduct and dealings with appellee. There could be no ratification of the act if it were claimed that such payment was attempted to be made since there was no notice or knowledge of the other partners of the transaction shown by the testimony. Those in charge of appellant company represented all the individual members in their conduct of its affairs and sales of seed to the appellee and the members are accordingly bound by the estoppel arising from their conduct.

No prejudicial error is found in the record, and the judgment is affirmed.

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## McCLENDON v. WOOD, JUDGE.

Opinion delivered July 10, 1916.

PROHIBITION, WRIT OF—GROUNDS FOR.—A writ of prohibition will not lie to a circuit court to prohibit the circuit judge from proceeding under the terms of Kirby's Digest, § 5492, to try the mayor of a city for nonfeasance in office, without a jury; such act of the circuit judge if erroneous, is reversible only on appeal.

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Prohibition to Garland Circuit Court; petition denied.

*C. Floyd Huff*, *O. H. Sumpter*, *A. J. Murphy*, and *Murphy & McHaney* for relator.

The right of trial by jury extends to proceedings of this kind. The word "court" includes a trial by jury. The court is about to act beyond its power and in excess of its jurisdiction and prohibition will lie. 19 Nev. 332; 36 N. E. 237; 22 Nev. 280; 39 Pac. 570; 86 Minn. 140; 60 Neb. 773; 84 N. W. 262; 61 S. W. 252; 50 Am. Rep. 741; 17 Ark. 290; 16 *Id.* 601; 21 *Id.* 229; 39 *Id.* 82; 32 *Id.* 241; 65 S. W. 981; 33 L. R. A. 341; 38 *Id.* 554; 39 Ark. 211; 24 Cyc. 151; 11 Am. St. 948; 71 S. W. 1133; 71 *Id.* 52; 113 Am. St. 854; 88 N. W. 1115. If the act intended to confer upon the *judge* the power or jurisdiction to try, without a jury, the charge under the indictment, the Legislature had no power to do so, under the Constitution. Cases supra and many others cited. Const. Art. 2, § 10.

*A. B. Belding* and *Gibson Witt*, for defendant.

The construction placed by the court on the Act is clearly correct. Kirby's Digest, §§ 2305-6, 2342, 2381, 2544, etc., 5492, 2450; Const. Art. 2, § 10. The mere suspension of an officer violates no provision of the Constitution. 81 Ark. 60; 104 *Id.* 261; 100 *Id.* 418. Where the primary object is not punishment but the protection of the public, it is not a criminal prosecution in the sense that defendant is entitled to a jury trial. 81 Ark. 60; 47 *Id.* 246; 33 S. E. 274; 50 L. R. A. 275; 44 Tex. 137; 74 Mich. 411; 16 Am. St. 644; 145 Iowa 657; Ann. Cases, 1912, 1286; Kirby's Dig., §§ 5608, etc.; 82 Pac. 75; 7 L. R. A. 426. See also 94 Pac. 954.

PER CURIAM: The petitioner is the Mayor of the City of Hot Springs, and he is under indictment returned by the Garland County grand jury for nonfeasance in office, the indictment being returned under authority of section one of the Act of 1895 (Acts, 1895, p. 69. Kirby's Digest, section 5492), which provides that "if the mayor

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or police judge of any city of the first or second class or incorporated town in this State shall wilfully and knowingly fail, refuse, or neglect to execute or cause to be executed any of the laws or ordinances within their jurisdiction, they shall be deemed guilty of nonfeasance in office;" and that it shall be the duty of the circuit court of any county within which any mayor or police judge may be commissioned and acting, upon indictment charging any such mayor or police judge with nonfeasance in office, "to hear and determine such charges, and if upon such hearing the charges be proven to be true, to enter a judgment of record removing such guilty mayor or police judge from office."

The cause is pending now in the Garland circuit court, and petitioner alleges that the circuit judge is about to proceed to a trial of the cause without a jury, and he prays for a writ to prohibit the judge from proceeding in that manner. The contention is that the right of trial by jury extends to proceedings of this kind, and that the court is about to act beyond its power in attempting to try the case without giving the accused the benefit of a trial by jury.

The first question presented is whether or not this is a case in which a writ of prohibition will lie, and the court reaches the conclusion that it is not the appropriate remedy. "The office of the writ of prohibition," said this court in the case of *Russell* v. *Jacoway*, 33 Ark. 191, "is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted, unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation." Cases on that subject are reviewed in *Reese* v. *Steel*, 73 Ark. 66, where the rule above stated is reiterated as the correct one in determining the scope and effect of this remedy.

The text writers on the subject place the same limitations upon the remedy of prohibition. Mr. High, in his work on Extraordinary Legal Remedies (Section 767b) says: "Upon an application for a writ of prohibi-

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tion to stay the action of an inferior court, the sole question to be determined is the jurisdiction of that court, and the court to which the application is made will, for the purposes of the case, consider the cause of action of the plaintiff below to be such as he has stated it in his pleadings, without investigation or inquiry touching the merits of the action. Nor will the court in which the relief is sought consider any errors or irregularities occurring in the progress of the cause in the inferior court, since the writ of prohibition is not an appropriate remedy for the correction of errors." The same author, in another section of his work on this subject (Section 772) says: "Another fundamental principle, and one which is to be constantly borne in mind in determining whether an appropriate case is presented for the exercise of this extraordinary jurisdiction, is that the writ is never allowed to usurp the functions of a writ of error or certiorari, and it is never employed as a process for the correction of errors of inferior tribunals. And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or to be confounded with a writ or error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded." The same rule is stated in other authorities. 2 Spelling on Injunctions and other Extraordinary Remedies, Chap. LV.; 32 Cyc. 613.

There seems very little, if any, conflict among the authorities in the statement of the rule itself, but there are somewhat divergent views in the application of the rule. We are unable to find any case in which the precise question involved here is treated, but we are of the opinion that the act of the court in proceeding to trial without allowing a jury, if erroneous, constitutes only an error or an irregularity which must be corrected by appeal. The jurisdiction of the court itself is undoubted. The jury is but an arm of the court, and so far as jurisdiction is concerned it cannot be said that there is any separate jurisdiction of the jury. The jurisdiction is exercised by the court as a whole, and if there is an erroneous exercise of that jurisdiction during the progress of the matter

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while pending before the court, the error must be corrected by appeal. There appears to be no escape from that conclusion, and anything that might be said now with respect to the merits of the controversy would be mere *dictum*. We do not feel at liberty to disregard the settled principles which control the use of the writ of prohibition in order to decide in advance the question whether or not the circuit judge can refuse to allow a jury and proceed with the trial of the case himself.

The prayer for writ of prohibition is therefore denied.

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## LEE WILSON & CO. *v.* STATE.

Opinion delivered July 10, 1916.

1. SABBATH BREAKING—BURDEN OF PROOF.—Where defendants were indicted for Sabbath breaking, the burden is upon them to show the existence of necessity which justifies their non-observance of the Sabbath.
2. SABBATH BREAKING—NECESSITY.—It is no defense to a charge of Sabbath breaking against the employees of a saw mill, which furnished light and water to a certain town, that it was necessary for certain employees to get out logs on Sunday, in order that the mill might run on the other days in the week.

Appeal from Mississippi Circuit Court, Osceola District, *W. J. Driver*, Judge; affirmed.

*Coleman, Lewis & Cunningham*, for appellants.

The labor performed on the Sabbath was a work of *necessity*. Kirby's Digest, §§ 2030-2032; 61 Ark. 216; 72 *Id.* 167; 75 *Id.* 188. The fines were in excess of the statutory penalty. Kirby's Digest, § 2030.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, for Appellee.

The work done does not fall within the exception contemplated by the statute. The burden was on appellants to prove *unavoidable necessity*. 56 Ark. 116; 61 *Id.* 216; 118 Ind. 248; 97 Mass. 411; 190 *Id.* 578; 112 *Id.* 467; 85 Ark. 135; 76 Ind 310; 112 Mass. 112. The fine is not excessive, but if so, this court will modify the

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sentence. Only the excess is void. 45 L. R. A. 137; 47 Barb. 503; 45 Cal. 281; 7 Abb. Pr. 96; 91 Am. Dec. 546; 60 N. Y. 559; 66 N. Y. 8; 97 *Id.* 212; 106 U. S. 371; 146 Mass. 489; 103 Ind. 440; 71 Am. Dec. 374; 87 Ala. 1; 153 U. S. 48; 52 So. 627; 137 Pac. 121; 102 Fed. 473; 102 N. W. 883; 101 Fed. 817; 51 L. R. A. 373; Brown on Jurisdiction, § 106; 83 Ala. 55; 85 Cal. 600.

MCCULLOCH, C. J. Appellants were employees of Lee Wilson & Company, a corporation which operated a sawmill at Wilson, Mississippi County, Arkansas. They were members of a log train crew and were indicted for working unlawfully on the Sabbath day, in violation of the statute which makes it a criminal offense for anyone to labor on the Sabbath unless the labor performed is a work of charity or necessity. The case was tried before the court sitting as a jury, upon an agreed statement of facts, and the court adjudged the appellants to be guilty and assessed against each of them a small fine, and they have prosecuted an appeal to this court.

The sawmill of Lee Wilson & Company, situated at Wilson, is used not only for the manufacture of lumber, but the power which operates the mill is also used in supplying light and water to the inhabitants of Wilson, which is a town of about a thousand population. There are about 250 men employed at the mill, and they work six days in the week. The fact that water and light are supplied from the power generated at the mill makes it necessary to continuously keep up steam, and, of course, a few men are employed on Sunday for that purpose. Appellants, however, belong to the log crew and are not directly engaged in the work of operating the plant. The defense tendered is that it was necessary for the members of the log crew to work on Sunday in order to provide sufficient logs to prevent a shut-down of the mill during work days, and also to furnish enough fuel to keep the mill running continuously.

The agreed statement of facts contains the following stipulation with respect to the fuel proposition: "The boilers at the sawmill are so equipped that they use as fuel the sawdust and refuse which results from the manu-

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facture of logs into lumber. Other fuel cannot be used in them without extensive and expensive alterations." The other stipulation with respect to the necessity for furnishing logs reads as follows: "The sawmill by operating six days per week uses more logs than the log loader, log train and entire logging resources of Lee Wilson & Company could furnish in a like period. At the time mentioned in the information Lee Wilson & Company's entire reserve supply of logs and fuel had become exhausted, and it was necessary for the log loader and log train crew to work on Sunday to keep the mill in operation."

It is also stipulated that during a period of several weeks, including the time appellants are charged with having violated the Sabbath laws, "there was such an excess of rainfall in Mississippi County that the ground in the woods surrounding Wilson, Arkansas, for long distances, and in all the woods from which Lee Wilson & Company did and could obtain a supply of logs, became so soft that it was impossible to get logs from the woods to the railroad. It is impossible to handle logs from the woods to the mill by wagon, or to get them in any other manner than that in use by Lee Wilson & Company."

(1) Appellants attempt to make a showing of necessity on two grounds: one that the fuel ran out and that it was necessary to get the logs on Sunday in order to furnish the mill enough logs, the sawing of which would afford enough refuse to use for fuel on Sunday as well as the other days in the week; and also that it was necessary at this particular time for the log crew to work seven days in the week in order to furnish sufficient logs to keep the mill running six full days, and thus prevent a shut-down. The burden of proof was on appellants to show the existence of necessity which justified their non-observance of the Sabbath. *Shipley* v. *State*, 61 Ark. 216.

Counsel for appellants rely mainly upon the case of *Turner* v. *State*, 85 Ark. 188, but we do not think that there is sufficient similarity in the facts of that case to make it controlling in the present case. The accused in that case worked at a large sawmill, which also furnished

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the power for supplying light and water to the town where the mill was located. The accused was fireman at the mill, and it was his duty to keep up steam to generate enough power to run the machinery which supplied the water and light. Incidentally he cleaned out the boilers and did that work on Sunday in order to prevent a shut-down of the mill on work days, which would have thrown three or four hundred men out of employment. It was conceded that the work of operating the plant to furnish light and water was a work of necessity, and we held that under those circumstances the incidental work of cleaning out the boilers in order to prevent a shut-down of the mill on a work day was not a violation of the law, where it appeared that to prevent that it would have been necessary for the mill company to put in four more boilers at a large expense. The effect of that decision was that where the work was only incidental to that which was necessary, and the expense of providing means to obviate the work was considerable, the labor would be treated as necessary within the meaning of the law which justified its prosecution on the Sabbath day.

(2) Now, the contention in the present case that it was necessary for the men to work on Sunday to secure enough logs to keep the mill going on Monday is untenable, for if that be true it would justify almost any kind of Sabbath work. The policy of the law is to stop all kinds of labor on the Sabbath day except things of real necessity, and all men are expected to conform their business arrangements accordingly. If it was reasonable to provide means to keep the work going on without laboring on the Sabbath the duty rested upon everyone to do so, as it is only in case of extreme emergency that one is justified in disregarding the Sabbath in order to make preparations for work or to continue work begun on other days of the week. For instance, in *State* v. *Goff*, 20 Ark. 290, the court held that "the husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath." And in *Shipley* v. *State*, *supra*, it was held that the fact that it was necessary to keep the

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pumps and fan at work in a coal mine, in order to keep the mine in shape for operation on other days, did not constitute a defense to a charge of violating the Sabbath, and that it was the duty of those engaged in operating the mine to provide such means and appliances as would obviate the necessity of labor on the Sabbath.

So in the present case, it was the duty of Lee Wilson & Company, if it expected to operate its mill six days in the week, to make reasonable provision for supplying logs in emergencies of this kind so as not to require the members of the logging crew to work on Sunday in order that the other men could be given employment on week days.

Nor is it any excuse that it was necessary to furnish fuel, for the appellants have not shown that it would have been unreasonably expensive to procure additional fuel to run the boilers on Sunday so as to keep enough steam to furnish water and light to the town. It is true it is stipulated that other fuel could not be used without "extensive and expensive alterations," but it does not appear from this that the company could not at reasonable expense have procured other fuel of the same kind as that which was ordinarily used. Sawdust and slabs were used for fuel, according to the stipulation, and for aught that appears to the contrary other wood fuel might have been obtained at reasonable expense. The burden was, as before stated, on the appellants to show that there was a real necessity for the Sunday work, and we cannot say that the trial court was not warranted in drawing an inference from the agreed statement of facts that no real necessity for the work was proved.

The judgment is therefore affirmed.

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## MARTIN v. REYNOLDS.

Opinion delivered July 10, 1916.

IMPROVEMENT DISTRICTS—DISCRIMINATION—EXEMPTION FROM ASSESSMENT.—Act 330, Acts of 1909, exempting from assessment for an improvement district, lands in cities and towns upon which churches and parsonages were erected, but not exempting similar lands in rural districts, held invalid.

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Appeal from Randolph Chancery Court, *Geo. T. Humphries*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant is a land owner in what is designated as "Murray Creek Drainage District," Randolph County, Arkansas. The Legislature attempted to create the above district by Act 330 of the Acts of 1909. Appellant brought this suit against appellees, alleging that appellees as the directors of the district were about to assess his lands for purposes declared in the act; that the act "is void for the reason that it expressly exempts from assessments for the making of said contemplated improvements all church, parsonage and school property, including private schools, and that within said district there are a number of churches, parsonages and school houses, including private schools, which will not be taxed under the provisions of said act, and that with the increased settlement of said lands resulting from said drainage, there will be additional churches, parsonages and school houses built, which under the terms of this act, will be exempt from said drainage tax, thereby throwing upon the remainder of the lands in said district, including the lands of this plaintiff, an additional burden, thereby taking private property for public use without due process of law."

The court sustained a demurrer to the complaint and from a judgment dismissing same this appeal is prosecuted.

*S. A. D. Eaton*, for appellant.

The act is unconstitutional and void. Acts 1909, § 8, subd. "d," p. 967. The demurrer should have been sustained. 5-6 Ark. 354; 48 *Id.* 251; *Ib.* 370; 57 *Id.* 554; 49 *Id.* 199; 117 *Id.* 30. Dissenting op. 56 Ark. 361. The act is void on its face for discrimination.

*Baker & Sloan*, for appellees.

1. Act 330 is not invalid. Private schools are exempt. 42 Ark. 536. Art 19, §27 Const. does not

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apply where both rural and urban property is assessed. Its restraints only apply where the property lies wholly within a city or town. 84 Ark. 390; 59 *Id.* 513; 530, 531. The Constitution is silent as to districts outside cities and towns. 97 Ark. 322, 328.

2. The demurrer does not admit allegations legally impossible or contrary to legislative enactments or which the law does not allow to be proved. 6 Enc. Pl. and Pr. 338.

3. The presumption is that property omitted from assessment was because under the law it was not benefitted. 80 Ark. 462. The act was not intended to include churches and schools, which are exempt. 64 Ark. 432; 71 *Id.* 17, 21; 80 *Id.* 462; 83 *Id.* 344. The legislation will may be delegated and § 5, Art. 16, Const., does not apply to assessments for public improvements levied or authorized by the Legislature. 87 Ark. 8, 12.

4. The board met at the proper time. The statute is merely directory. 71 Ark. 17; 95 *Id.* 757. Mere irregularities in the form of the oath required by law, etc., are not material, as the proper safeguards are provided by the act, and as no prejudice resulted, the matters complained of are not available. 95 Ark. 757, 580.

5. The relief prayed will only go to a plaintiff to the extent of his property. 83 Ark. 54, 61.

WOOD, J. (after stating the facts). Section 8, subdivision (d) of the Act provides as follows:

"The property situated within the Murray Creek Drainage District, subject to assessment under the provisions of this act shall be as follows: All lands whether surveyed or unsurveyed, except lands of the United States; all school lands except tracts not to exceed three acres in area on which school buildings have been erected, or are in course of erection; all railroads owned, leased or operated in said district, including sidetracks; and all other real property belonging to railroad companies or bridge companies; all tram roads, whether made of wood, iron or steel; all town lots and blocks and other sub-divisions of lands in cities and towns, except those on which churches

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and parsonages are erected, and every other kind or character of real property whatsoever situated within said drainage district."

The act exempts from assessment the land "on which churches or parsonages are erected in cities and towns." The lands of the district not in the cities and towns on which churches and parsonages may be erected are not exempt.

The act is void on its face. The discrimination against the lands in the rural territory on which churches and parsonages may be located, and in favor of such land in cities and towns is purely arbitrary. The act does not itself suggest any reason for such discrimination. No reason can be conceived why the Legislature should have made the fact of the location of church houses and parsonages on city lots ground for exemption that does not likewise apply to the rural territory upon which such buildings are erected. If the presumption could be indulged that the Legislature exempted lands in cities and towns upon which such buildings were erected because it ascertained that such lands were not benefited, then why would not the same presumption obtain as to such lands in the rural territory. Manifestly, if the lands in cities and towns upon which churches and parsonages are built, are to be exempt from assessment because of that fact, then the same rule should apply to the rural lands under the same conditions.

The case is controlled by the decision of this court in *Davis, as Collector* v. *Gaines*, 48 Ark. 371, 374. That was a case where the Legislature exempted land owners of four townships in a levee district from assessments for a certain year, not because they did "not belong to the class upon which the burden was imposed, but because * * * no levee work had been done on their river front prior to the passage of the act." "Such a provision," says the court, "violates the constitutional requirements of equality and uniformity, requirements which have the same application to special assessments for the improvement of property that they have to other kinds of taxation. To omit a part of the lands benefited is to

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increase the burden of the others, and thus to defeat the rule of apportionment." See also *Monticello* v. *Banks*, 48 Ark. 251.

The principle of equality of burdens for all those similarly situated has never been departed from by this court in the matter of assessments for local improvements.

The terms "taxation" and "taxes" as used in article 16, section 5, of the constitution, and subsequent sections of that article, have reference alone to taxes for general purposes of revenue, State, county and municipal, and not to special assessments for local improvements. *Board of Improvement* v. *School District*, 56 Ark. 335; *Carson* v. *St. Francis Levee District*, 59 Ark. 513, 531; *Cribbs* v. *Benedict*, 64 Ark. 555, 562; *Sanders* v. *Brown*, 65 Ark. 498, 503; *Paving Dist.* v. *Sisters of Mercy*, 86 Ark. 109; *Caton* v. *Western Clay Drainage Dist.* 87 Ark. 8, 12. See also *McGehee* v. *Mathis*, 21 Ark. 40.

But while there is a clear distinction between the terms "taxation" and "taxes" and the words "assessment" or "special assessment," as used in our statute, the one referring to exactions laid by the government for purposes of general revenue and the other referring to exactions laid for making local improvements for the benefit of property owners, nevertheless they are both referable alike to the State's sovereign power of taxation. See Cooley on Taxation, 2nd Ed., p. 636; *Ahern* v. *Board of Improvement District*, 69 Ark. 68.

When the sovereign, under our constitution, lays burdens of taxation, in whatever form, whether for taxes, for general revenue purposes or in the way of special taxes or assessments for local improvements, all property owners similarly situated must be dealt with impartially. Hence the rule of uniformity and equality regnant in our constitution as to general taxation has also been invariably recognized and applied to special taxes or assessments for local improvements, and the doctrine announced in *Davis, as Collector*, v. *Gaines, supra*, is the rule as to these assessments. *Shibley* v. *Fort Smith & Van Buren Dist.*, 96 Ark. 410, 419.

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In *Board of Directors, etc.* v. *Crawford County Bank*, 108 Ark. 419, 421, quoting from *Salmon* v. *Board of Directors*, 100 Ark. 366, we said: "The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, and in determining, or in providing means for determining, the amount of assessments based on benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the courts."

But in the instant case the act on its face discovers that the Legislature exempted lots in cities and towns on which churches and parsonages were situated from assessment, presumably for the reason that they found that such lots were not benefited by the improvement. But it did not exempt lots in the country on which churches and parsonages were situated. Thus there was an unjust and unequal discrimination between lands of the same class. In this respect the act is an arbitrary and manifest abuse of power. The Legislature having exempted the lots and blocks in cities and towns on which churches and parsonages are located, it is not the province of the court to eliminate this feature of the act, for, in so doing, the court would be laying burdens of taxation upon the owners of such property. That is purely a legislative function. Courts have no such power.

It follows that the court erred in sustaining the demurrer to the appellant's complaint. The judgment is therefore reversed and the cause is remanded with directions to overrule the demurrer and to grant the prayer of appellant's complaint.

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## ARD v. BOWIE.

Opinion delivered July 10, 1916.

GARNISHMENT—DRAFT IN PAYMENT OF FIRE LOSS.—An insurance agent, holding an undelivered draft in payment of a fire loss sustained by the defendant, can not be garnished by the defendant's creditor, since the draft is the property of the insurance company and not the agent, and no debt to the defendant is created until delivery.

Appeal from Jackson Circuit Court; *D. H. Coleman*, Judge; affirmed in part, reversed in part.

STATEMENT BY THE COURT.

Phillips & Ferguson Agency, hereinafter for convenience called Agency, was a corporation, located at Newport, and were agents for the Connecticut Fire Insurance Co. As such agents, on the application of one J. U. Ard, they insured in the name of Alice S. Ard, his wife, some household goods. There was a loss and Ard, acting as agent of his wife, adjusted the matter, and the insurance company sent to its agency a draft payable to J. U. Ard.

The appellee, Bowie, filed his complaint against J. U. Ard in the Jackson circuit court, asking judgment in the sum of $502.84, and also caused a writ of garnishment to be issued directed to the Agency, while it held in its hands the draft.

In its answer to the interrogatories the Agency stated that it was not indebted to the defendant and had no goods or moneys in its hands belonging to him.

On the trial it was shown that the Agency insured the property as that of J. U. Ard. The Agency books showed J. U. Ard to be the insured and the owner, and reports that the Agency sent the company showed the same. When the loss occurred it was reported to the company as the loss of J. U. Ard. The policy was written in the name of Alice S. Ard, but the Agency did not know that such was the case until the institution of this suit. The name of Mrs. Ard appearing in the body of the policy instead of J. U. Ard was a mistake. At the time the Agency wrote the policy in question it wrote also another policy for

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J. U. Ard on the same property for cyclone insurance. The accounts of J. U. Ard and Alice S. Ard were kept separately.

A witness testified that she was the clerk in the office of the Agency at the time the policy was issued. She wrote a policy on the house in the name of Alice S. Ard, and also, through mistake, put the name of Alice S. Ard in the policy insuring the household goods. That should have been in the name of J. U. Ard instead of Alice S. Ard. It was the purpose of the Agency at the time to insure the household goods as the property of J. U. Ard, and Mrs. Ard's name was written in the policy through mistake.

Ard testified that he had made proof of loss, stating that the property was his, and that he had assessed the property on the tax books as his property. He further testified that he did not make any contention as to the correctness of the account sued on; that his wife was the owner of the household goods. As her agent he instructed the Agency to insure the house and the household goods. The policy was made payable to his wife, Alice S. Ard, which was correct and according to his understanding with the Agency. The policy was endorsed on the back as being the policy of J. U. Ard. He sometimes assessed the personal property in his name and sometimes in his wife's name. After the loss he adjusted the same with the Agency.

Mrs. Ard testified that the property insured and on which the loss occurred and for which the draft was issued was her property.

The writ of garnishment was directed to Phillips & Ferguson Agency, a corporation. The draft was sent by the Insurance Company to the Agency after the service of the writ of garnishment, to be delivered, but before the same was delivered the Insurance Company ordered the draft returned, which was done. Neither Ard nor Mrs. Ard were notified that the Agency had the draft, and no attempt was made to deliver it before the same was recalled by the Insurance Company. Afterwards the Insurance Company made another draft payable to the

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joint orders of J. U. Ard, Alice S. Ard and the Farmers Bank. This draft was sent to Stayton & Stayton, attorneys, and upon the execution of a bond indemnifying the parties in interest the draft was delivered to the payees.

The appellants Ard and the Agency asked a peremptory instruction in favor of the Agency, which the court refused. The court directed the jury to return a verdict in favor of the appellee against Ard, and the Agency, as garnishee, and this appeal has been duly prosecuted.

*L. L. Campbell*, for appellants.

1. The garnishee was entitled to an instructed verdict. Plaintiff could acquire no greater rights as against the garnishee than the defendant below might have exercised. 20 Cyc. 983; 70 Ark. 10; 36 L. R. A. 561; 138 Ala. 342; 123 *Id.* 336; 64 Ala. 368; 57 Cal. 193; 83 Ill. 55; 62 Ore. 476.

2. The check or draft was not the property of the insured until delivered. 7 Cyc. 683; 48 S. E. 122; Acts 1913, Act 81, § 16; 41 Ark. 331; 23 *Id.* 212. A corporation can act only by agents. 51 Me. 370. The check not having been delivered was still the property of the Insurance Company. The fire insurance company is liable. 45 Pa. Sup. Ct., 505; 80 S. E. 18.

3. The funds could not be reached by serving a writ upon the agent of the fire insurance company. Officers and employees of a corporation with whom money is deposited in their official capacity are not liable to garnishment in a suit against creditors of such corporations. 20 Cyc. 987; 39 Mich. 469; 18 Mo. 277; 2 Cranch, C. C., 571.

4. If there was a mistake in the insurance policy, it would not avail appellee. 1 R. C. S., 316. A verdict should have been instructed for defendant and garnishee.

The appellee *pro se*.

1. The judgment is for the right party. 92 Ark. 189; 73 *Id.* 211; 69 *Id.* 30. There is no dispute about the debt. It is also undisputed that the Phillips & Fer-

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guson Agency had in its possession, after the garnishment was served the draft for $1,000 payable to J. U. Ard. Hence the judgment was right.

WOOD, J. (after stating the facts). The appellants do not challenge the correctness of the judgment against Ard. The only question presented by this appeal is as to whether or not a judgment, under the facts above disclosed, should have been rendered against the Agency as garnishee.

The Insurance Company is not a party to this record. Neither was the Agency garnished as the agent of the Insurance Company. The Agency was garnished simply as a corporation.

The judgment against the Agency, as garnishee, was erroneous for several reasons:

1. In the first place, the draft was sent to the Agency to be delivered and was held by it as the property of the Insurance Company until it was delivered. It was never delivered to Ard, and until delivery took place it remained the property of the Insurance Company and was held by the Agency as the property of the Company, and not as the property of Ard. So long as the Agency held the draft it was subject to recall by the Insurance Company, and was recalled before it was delivered to Ard. The Agency represented the Company and not Ard. It owed no duty to Ard, and was under no liability to him for the amount of the draft. The draft could not become Ard's property until it was delivered to him.

Our statute to make uniform the law of negotiable instruments, provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Act. 81, sec. 16, Acts of 1913.

It is the general rule of the Law Merchant that delivery is necessary for the completion of commercial paper. 7 Cyc. 683, *et seq.*; *Jones* v. *Jones*, 23 Ark. 212; *German Bank* v. *DeShon*, 41 Ark. 331.

The agency had not notified Ard that it held the draft for him, and the Insurance company, by sending the draft

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to its agent, rather than mailing it direct to Ard, indicated an intention to retain control over the same until it was transferred by manual delivery to Ard.

2. As the agency was not indebted to the appellee Ard, the defendant in the original suit, and did not have in its hands any money or property belonging to the debtor Ard, garnishment proceedings could not be maintained against the agency.

In *Graf* v. *Wilson*, 62 Oregon 476; it is said: "The general rule is that the creditor has no greater rights against the garnishee than the defendant had before the writ was served; that he steps into the shoes of the defendant and prosecutes for him in order that the credit or property of the latter may be subjected to the payment of such judgment as may be obtained against him." And it is further said in that case: "It is not a decisive test, though a usual one, that the principal debtor be able to maintain an action or suit against the garnishee in order for garnishment to lie."

Here the draft evidenced an indebtedness of the insurance company to Ard, and not an indebtedness of its agent, the Phillips & Ferguson Agency. The Agency was a separate corporation, and, as we have seen, was not even garnished as the agent of the insurance company. See *St. L., S. W. Ry. Co.* v. *Gate City Cooperative Grocery Co.*, 70 Ark. 10. See also case note 2 to *Mayo, et al.*, v. *Milwaukee Amusement Co.*, 36 L. R. A. 561.

3. The policy covering the loss for which the draft was made was in the name of Mrs. Ard, and this was at least *prima facie* sufficient to show that Mrs. Ard was entitled to the proceeds of the draft. Such being the facts disclosed by the record, the court was certainly justified in holding that the draft was not subject to garnishment in the hands of the appellee Agency.

The court, therefore, erred in not granting appellant Agency's prayer for judgment in its favor. The judgment therefore will be reversed as to the appellant Agency and judgment entered here in its favor.

The judgment against appellant Ard is affirmed.

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## PERSON v. WILLIAMS.

Opinion delivered July 10, 1916.

LEASES—REFUSAL TO DELIVER POSSESSION—MEASURE OF DAMAGES.—In an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises, the measure of damages is the difference between the rent reserved and the value of the premises for the term.

Appeal from Miller Circuit Court; *G. R. Haynie* Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit for damages for the rental value of certain farm lands which he was denied the right to cultivate during the year 1915. He rented different tracts of land for cultivation during 1914, on the Candler farm, in Miller County, at a stipulated price and certain new ground to be cleared by him, which he was to have rent free for two years.

The farm was sold early in 1914 to appellant and the testimony is sufficient to show that she had notice of the written lease for the new ground, or of such facts as should have put her on inquiry that would have disclosed the lease, which was not recorded.

She was to permit the tenants on the place for the year 1914 to continue the cultivation of the lands from her grantor and did so and did not, in fact know that appellee had a lease of any lands for another year.

On account of the overflow that year, appellee was not able to pay the rent agreed on for the old land and the contract was changed from "money rent" to "one-quarter of the crop produced."

There was testimony tending to show that appellee made a new contract with appellant's agent in 1914 for the old land, for 1915, but no testimony showing the price agreed to be paid for the rent thereof.

No crop was raised on the new ground in the year 1914 on account of the overflow and only some of it was plowed once. The rental value of such land was shown to be about one-half that of the old land, or $3 per acre.

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The court instructed the jury, over appellant's objection, that if it found appellee was entitled to the possession of any of said lands for the year 1915, it would find for him a resonable rental for such year and refused appellant's requested instruction that the damages recoverable "are the reasonable rental value of the new ground in the condition it was in January, 1915, and the difference, if any has been proven, between the rental price and the reasonable market rental value of the houses and fifty acres of old land, for the year 1915"; also instruction No. 7, telling the jury that they could only find nominal damages for the refusal to allow appellee to cultivate the old land, if the testimony showed he made a contract therefor.

From the judgment on the verdict against her, appellant prosecutes this appeal.

*Henry Moore, Jr.*, for appellant.

1. It is admitted that actual, visible pedal possession of land is notice to the world of the interest of the possessor. 101 Ark. 169. Here defendant had no notice, actual or constructive, of plaintiff's claim to the new ground. 28 A. & E. Enc. L. p. 238.

2. Plaintiff was not misled or influenced by any act of defendant to his inury and there is no question of estoppel. 82 Ark. 371; 16 Cyc. "Estoppel," and note; 97 Ark. 49; 99 *Id.* 263.

3. The measure of damages is laid down by this court in 42 Ark. 261 and 75 *Id.* 590. Profits cannot be considered, 102 Ark. 113.

4. In view of the above authorities the court erred in giving and refusing instructions.

*Webber & Webber*, for appellee.

1. Appellant had actual and constructive notice of appellee's rights and claims. The evidence shows it. Wilson, her own agent told her and she knew that appellee was making repairs on the property including the new ground. 39 Cyc. 1756.

2. Review the instructions and contend there is no error as to the damages recoverable, nor otherwise. The

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jury followed the court's charge; the verdict is right and is sustained by the evidence. Appellee had a written lease and was entitled to hold against a subsequent purchaser and the verdict is for the *minimum* amount shown by the testimony.

KIRBY, J. (after stating the facts). It is contended the court erred in the giving and refusing to give said instructions and the contention must be sustained. In *Rose* v. *Wynn*, the court said:

"The books agree that in the action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises, the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term. If the value of the premises for the term is no greater than the rent which the tenant has agreed to pay, then the latter is not substantially injured and can in general recover only nominal damages, though the landlord without just cause refused to give possession." *Rose* v. *Wynn*, 42 Ark. 261.

"The damages plaintiff was entitled to recover was the difference between the price he agreed to pay and the rental value." *Andrews* v. *Minter*, 75 Ark. 590.

This would not include probable profits of the lessee from the cultivation of the demised land. *Thomas* v. *Croom*, 102 Ark. 113. There was no testimony tending to show the price agreed to be paid as rent for the old lands for the year 1915, even if appellee had a contract for them for that year and said instruction given relative to the measure of damages was erroneous, since the suit was for damages for refusal to give possession of both the old and the new land.

A specific objection was made to said instruction, because it did not state correctly the rule as to damages for the old land and the court refused appellant's said instructions, stating the rule correctly.

There could be no recovery of damages for failure to give possession of the old lands for the year 1915, because there was no testimony showing any damages

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resulted. It is undisputed that the new ground was not worth as much as the old land for cultivation, the testimony showing the value thereof to be about one-half, or $3 per acre. No damages being shown to have resulted from the failure to deliver possession of the old lands, the verdict of the jury should not have been for more than the rental value of the new ground, 67 acres, for the year 1915, and if a remittitur is entered within fifteen days, reducing the judgment to that amount, or $201, the judgment will be affirmed; otherwise, for the errors indicated, the judgment is reversed and the case remanded for a new trial.

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## MOORE v. STATE.

Opinion delivered July 10, 1916.

1. EVIDENCE—DYING DECLARATIONS.—Dying declarations are admissible only in homicide cases, where the death of the deceased is the subject of the inquiry, and where the circumstances of the death are the subject of such declaration.
2. APPEAL AND ERROR—INSTRUCTIONS COVERED BY OTHERS.—It is not error to give a requested instruction covered by other instructions already given.

Appeal from Pulaski Circuit Court; *R. J. Lea*, Judge; affirmed.

STATEMENT BY THE COURT.

Leonard Moore was indicted for murder, for killing John Lee, Jr., and from a judgment of voluntary manslaughter, brings this appeal. The killing occurred eight or ten miles north of Little Rock, about 5:30 o'clock in the morning, on November 23, 1915.

Moore was driving along the pike, towards Little Rock, in a one horse wagon at the time he was overtaken by the deceased, who was riding a mule, and the killing followed.

Appellant testified that he had started to go to his father's at England and had nothing in his wagon but a wagon sheet; that Lee overtook him—cursed him and

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asked what he had in the wagon. He told him that he had nothing. He continued cursing him and said he was going to kill him—jerked out his pistol and shot at him twice. Moore jumped out of the wagon on the far side taking his shot gun with him, but kept driving. Lee turned his mule and started back. The witness drove on and Lee returned and began cursing him again. Witness then turned his wagon and started back home not wanting any trouble, but Lee kept coming on close and, as witness saw him draw his pistol and fire two shots, he also fired two with his gun and Lee fell from his mule. Two shots from the pistol struck the defendant, one in the hand and the other in the arm. He said the first two shots were fired at him while he was in the wagon; that he had nothing in the wagon; was sitting on part of the sheet and the other part was hanging down from the seat; that Lee did not try to look under the wagon sheet. It was moonlight, about 5.30 in the morning.

Other witnesses testified about hearing the shots and the sound thereof—some stating from the reports heard that two shots were first fired from the pistol; a little later, two more, then followed the two shots from the shot gun in quick succession, then more shots from the pistol. The State's witnesses testified that the louder, heavier reports of the gun were the first heard.

The dying declaration of the deceased was introduced, over objection, as follows: "Lee told me it was all up with him. I asked him how it happened and he said he had watched three negroes all night as they killed and skinned a cow; that he followed Moore to town. As he started to see what Moore had in the wagon, Moore shot him. The doctor was right by me when the statement was made."

Another witness stated: "Deceased said he was awakened by the snort of his mules at the lot and upon investigation, saw some negroes down in the thicket back of the field. He crept up close enough to see them. They were butchering a beef which he was sure belonged to him. He was there until they drove up to appellant's house

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through the thicket where one of the negroes let appellant have his wagon."

"He also named the three—Leonard Moore, Joseph Moore and Robert Coleman. After they started away with the meat, he followed and overtook Moore and tried to see what he had in the wagon and then Moore shot him off his mule. He said he fell off his mule, then shot 6 times at Moore with his pistol; that Moore jumped out of the wagon and shot him after he jumped out."

Several witnesses stated that there were no signs of blood on the wagon and no meat in it. One witness for the State, however, testified that appellant brought some meat to his house in a wagon and that it looked like the carcass of a yearling, with the feet still on it, and left it there and said he had had "a shooting scrape."

*Bratton* v. *Bratton*, for appellant.

1. It was error to admit the "dying declarations," especially that part stating what occurred prior to the shooting. 39 Ark. 231; 68 *Id.* 359, 104 *Id.* 175; 140 S. W. 298; 80 Ind. 338; 60 Kans. 772; 76 Ky. 246; 126 N. W. 837.

2. There was error in the instructions as to the plea of self-defense and reasonable doubt. 46 Ark. 141; 59 *Id.* 379. The refusal to give defendant's requests as to self-defense and the amount of proof necessary to sustain it was prejudicial error.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no error in admitting the dying declarations. They met the requirements of the law and a sufficient foundation was laid. 104 Ark. 176; Greenleaf on Evidence (15 ed.) § 159; 101 Mo. 464; 61 Cal. 164; 15 Tex. App. 304; 58 Ark. 54; 81 *Id.* 418; 68 *Id.* 359; 85 *Id.* 179; 43 Tex. Cr. Rep. 52.

2. There was no error in the court's instructions. Every phase of the law was fully and fairly covered and appellant's theory of self-defense and reasonable doubt fully and forcibly presented. 103 Ark. 353; 105 *Id.* 358; Kirby's Digest, § 1792-3.

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3. The evidence sustains the verdict—really, the jury were lenient.

KIRBY, J. (after stating the facts). 1. It is concontended that the court erred in admitting the dying declaration or that part of it stating what had occurred prior to the shooting and in the refusal to give certain instructions. It is sufficiently shown that the statement made by the deceased was made under a sense of impending death and admissible as a dying declaration. *Rhea* v. *State*, 104 Ark. 176; *Newberry* v. *State*, 68 Ark. 359.

It is contended, however, that the statement relating to matters antecedent or prior to the transaction which caused the death of the decedent was not competent.

"Dying declarations," as said in *Rhea* v. *State*, *supra*, "are admissible only in cases of homicide while the death of the person killed is the subject of the charge and the circumstances of the death are the subject of such declarations."

In *Newberry* v. *State*, 68 Ark. 359, the court said: "Such declarations can be admitted only to prove the circumstances attending or leading up to the homicide."

It is true the statement relative to watching the appellant and others skin the beef before he started to take it to town in the wagon was of matters antecedent to the shooting which followed upon the attempt of the deceased to ascertain what was contained in the wagon, but it was a part of the occurrence which caused the deceased to follow and overtake the appellant and attempt to discover what the wagon contained, and it would have been difficult to give an account of the occurrence of the homicide without stating said facts. The court properly limited their consideration of it by instructing the jury that "if they believed from the evidence that defendant had been guilty of grand larcency, it would not deprive him of the right to defend himself against an unwarranted assault," and no error was committed in the introduction of said dying declaration.

2. The complaint of the court's refusal to give the instructions requested upon reasonable doubt, is not well

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founded. The instructions given by the court fully declared the law upon that point and it is not error for the trial court to refuse to give a requested instruction as to reasonable doubt, where the instructions given properly declare the law on that subject. *Morris* v. *State*, 103 Ark. 353; *Johnston* v. *Fuqua*, 105 Ark. 358.

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

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## MAUPIN v. GAINS.

Opinion delivered July 10, 1916.

1. ADVERSE POSSESSION—CO-TENANTS—PRESUMPTION.—Where one of two co-tenants is in possession of land, the presumption is that he does not occupy adversely, but claims only his own interest.
2. ADVERSE POSSESSION—RECOGNITION OF TITLE.—A recognition of another's title will defeat the running of the statute.
3. FRAUDULENT CONVEYANCES—VALIDITY BETWEEN THE PARTIES.—A conveyance made in fraud of creditors is valid as between the parties.
4. HUSBAND AND WIFE—CONVEYANCE OF LAND—RIGHTS OF WIFE—EQUITABLE ESTATE.—Where a husband deeded a one-third interest in certain lands to his wife, she acquired only an equitable estate, and she can not maintain a suit at law for possession of the land where the holder of the legal title refused to join with her, and she is required to go into chancery to assert and secure recognition of her title.
5. PARTITION—TENANCY IN COMMON.—Unless a tenant in common is in possession, or his title is admitted, he can not maintain a bill in equity for the partition of the land, but when a court of chancery has possession of a case on some ground of equity jurisdiction wholly distinct from partition, the cause will be retained for that purpose.
6. CO-TENANCY—ACCOUNTING FOR RENTS.—Where one co-tenant sought to enjoy the exclusive possession of the land, he will be liable to his co-tenant for a proportionate share of the rents from the beginning of his possession.

Appeal from Fulton Chancery Court; *T. H. Humphreys*, Chancellor affirmed.

*John H. Caldwell*, for appellant.

1. Where property is held adversely, or where the title is in dispute, a Court of Chancery has no jurisdiction to award partition. 27 Ark. 96-7; 1 Watts & Serg., 185;

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42 Ill., 473; 3 Grant's Cases, Penn. 177; 97; 40 Ark. 156; 91 Ark. 29. Tenants in common can establish title against another co-tenant by adverse possession 1 Cyc. 1072. Plaintiff was only a tenant in common. 91 Ark. 30. Where ousted or his rights denied, the remedy is by ejectment. 119 Ark. 386

2. Joe Gains was not a party and no judgment as to him is valid or binding. It was error to render judgment for rents against appellants. 48 Ark. 135.

3. The deed from Joe Gains was fraudulent and void as to creditors, and Maupin was a creditor.

4. Appelleee was barred by limitation.

*C. E. Elmore*, for appellee.

1. The parties are tenants in common, eacn recognizing the interest of the other; appellant recognized appellee's interest by letter. Appellant's possession was not adverse and never could ripen into a title. 104 Ark. 341; 2 Wall. 328; 59 N. Y. 46; 80 Ark. 444; 117 *Id.* 418.

2. The Chancery Court had jurisdiction. 19 Ark. 233; 83 *Id.* 554. There was no such adverse possession as to take the case out of the jurisdiction of the chancery court. 83 Ark. 74; 88 *Id.* 610; 102 *Id.* 611; 117 *Id.* 418. Possession of one tenant in common is the possession of all and not adverse until the right is denied by some open, public notorious act amounting to ouster. 42 Ark. 289; 99 *Id.* 446.

3. The deed from the husband to the wife, in the absence of fraud, will convey the title. 60 Ark. 70; 62 *Id.* 26; 86 *Id.* 150; 116 *Id.* 142. There were no creditors of Joe Gains to complain. Mrs. Maupin was not a creditor. 47 Ark. 309.

4. There was no bar by limitation.

SMITH, J. This is a suit to partition certain town lots, which was brought to the September, 1914, term of the Fulton chancery court by appellee, who alleged in her complaint that she was the owner of an equitable one-third undivided interest in the lots in question, but that appellant, Mrs. M. E. Maupin, who was the defendant below, was wrong-

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fully in possession, asserting ownership of the whole title to said lots. There was a prayer that appellee be declared the owner of the one-third interest claimed by her and that the property be ordered sold and that she have judgment for the rents due her. The lots were originally owned by appellee's husband and his brother James and appellant Maupin, his sister, who had inherited the property from their father, who died in 1900. Appellee's husband, Joe Gains, conveyed to her his undivided one-third interest in the lots by warranty deed dated May 15, 1901.

Appellant asserted ownership of the whole title in her answer by virtue of a deed from her brother James, her own inheritance from her father, and her possession and adverse occupancy against appellee. Appellee was divorced from her husband, Joe Gains, at the time of the institution of this suit, yet she joined him as a party plaintiff. A number of preliminary motions were filed as a result of which the court found that Joe Gains was adversely interested to appellee and that she had no authority to use his name in her suit and his name was stricken from the complaint as a party plaintiff. Appellee filed motions and pleadings which indicated her purpose to make him a party defendant, but this action was never taken. The cause was transferred to the circuit court, and while it was pending there the complaint was amended by striking out the name of Joe Gains as a party plaintiff. Thereafter the cause was transferred back to the chancery court over appellant's objections. A number of motions were filed before the final submission of the cause, but we find it unnecessary to abstract them in this statement of facts.

The execution of the deed to appellee from her husband Joe Gains, was admitted, but Joe Gains testified that this deed was void because he had executed it to his wife for the purpose of defeating the collection of a judgment which he anticipated would be rendered against him and which was rendered against him in a suit pending in the court of a justice of the peace at the time of the execution of the deed. He testified that his wife knew this was the purpose of the deed and that there was no other con-

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sideration therefor. Mrs. Maupin testified that her adverse occupancy began on October 16, 1909, which was the date of the death of her mother, and continued down to the time of the institution of this suit, a period of sixty-four months. She also testified that she rendered certain services to her father and mother in the last years of their lives, and that it was in recognition and in payment of these services that her brother James had executed a deed to his undivided one-third interest in the lots in question, and she alleged further that she was a creditor of her brother Joe on that account and, as such, was entitled to attack the deed from him to appellee as being without consideration and in fraud of creditors. No other person claiming to be a creditor complains here.

(1) The lots were occupied by appellant's mother until her death in 1909, and this is the period from which appellant really dates her claim of adverse possession. This claim cannot be supported for several reasons. The first is that the suit was brought within seven years of the earliest period when the adverse posssession could have commenced to run, if it ran at all. Another reason is that appellee was a married woman until within three years of the date of the suit. And still another reason is that appellee and appellants were tenants in common, and the presumption is, and was, that appellant was not occupying adversely to her co-tenant, but was only claiming the interest to which she had the title. In February, 1911, appellant wrote appellee a letter in which she said:

"Dora, if you have not deeded that third interest in the house back here, you can hold it, and he can't help himself, for that is on record here at Salem, and you hold to that and anything more you can get. Of course, the share is not very much, but every little helps, and if you have got it, hold to it, and when you get loose from him I will buy it and pay you just all I can for it."

(2) Here was an express recognition of appellee's title before the statute of limitations could have run and one confirming the statutory presumption that the possession was not adverse. *Wilson* v. *Storthz*, 117 Ark. 418.

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(3) If it be assumed that the conveyance from Joe Gains to his wife was made in fraud of creditors, it is still good between the parties thereto. *Millington* v. *Hill, Fontaine & Co.*, 47 Ark. 301; *Johnson* v. *Johnson*, 106 Ark. 9.

It is true, of course, that such conveyances are open to the attack of creditors; but appellant is not such a creditor under her own statement. She never attempted to probate any claim against her father's estate, nor to have his land subjected to the payment of any demand in her favor. But in no event would she have a demand against her brother for services to their father in the absence of an agreement to pay for these services. There might be a moral obligation to share this burden, even in the absence of a promise to pay, but there would be no legal liability therefor.

(4) The conveyance to appellee from her husband did not operate to pass the legal title, but it did convey the equitable title. *Ogden* v. *Ogden*, 60 Ark. 70; *Geo. Taylor Commission Co.* v. *Bell*, 62 Ark. 26; *Carter* v. *McNeal*, 86 Ark. 150; *Wood* v. *Wood*, 116 Ark. 142.

Having only an equitable title appellee could not maintain a suit for possession in a court of law where the holder of the legal title had refused to join, or be joined, with her in the suit. But she was required to go into a court of chancery to secure the recognition and assertion of this title. Freeman on Cotenancy & Partition (2d ed.) Sec. 453.

(5) It has been frequently held that unless a tenant in common is in possession, or his title is admitted, he cannot maintain a bill in equity for the partition thereof. But it is equally as well settled that when a court of chancery has possession of a case on some ground of equity jurisdiction wholly distinct from partition, the cause will be retained for that purpose. *Criscoe* v. *Hambrick*, 47 Ark. 235; *Davis* v. *Whittaker*, 38 Ark. 435; *Trapnall* v. *Hill*, 31 Ark. 345; *Hankins* v. *Layne*, 48 Ark. 544; *Ashley* v. *Little Rock*, 56 Ark. 370.

Complaint is made that Gains was not made a party defendant. It appears from the recitals of the decree

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that no request to that effect was made until the final submission of the cause. But Gains had been made a party plaintiff, although this was done without his consent. His name was stricken from the complaint as a plaintiff pursuant to motions filed by Mrs. Maupin, yet he appears to have been treated as a party and to have prayed, and to have been granted, an appeal in the recitals of the decree. He testified in the cause and manifested his hostility to appellee's claim and his desire to assist his sister in defeating its assertion and in establishing the allegations of appellant's answer, but showed that he executed the deed to his wife and failed to show any defense to the action. He tendered no plea setting up a claim to the land or to any interest therein, and he would have been only a nominal party though a proper one. Under these circumstances we think no prejudicial error was committed in refusing his belated request to be allowed to file a formal answer in his own name. *Eagle* v. *Oldham*, 116 Ark. 565.

(6) No error was committed in ordering an accounting of the rents, improvements and taxes. This is not the case of exclusive occupancy by one co-tenant against another who had neglected to avail himself of his right of joint occupancy; but is the case of a co-tenant seeking to enjoy the exclusive possession. Appellant is, therefore, liable to appellee for her proportionate share of the rents from the beginning of such posession, the period from which the court ordered the accounting.

The decree establishing appellee's title is correct and is, therefore, affirmed.

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## PFEIFER STONE COMPANY *v.* SHIRLEY.

Opinion delivered July 10, 1916.

1. EVIDENCE—PERSONAL INJURIES—EXCLAMATIONS—RES GESTAE.—Plaintiff was injured when one B with whom he was carrying a heavy shaft, dropped the same. *Held*, evidence of exclamations made by both plaintiff and B at the time of the injury were admissible.

2. EVIDENCE—PERSONAL INJURIES—CAUSE—ADMISSIONS OF EMPLOYEE.—Statements of a fellow-employee as to the cause of plaintiff's injury

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are inadmissible against the defendant master, where they tend to show the manner in which he performed his duty and are a mere narrative of past occurrences.

3. EVIDENCE—MEDICAL EXPERT—NON-EXPERT OPINION.—In a personal injury action, testimony by a non-expert, as to the condition of the plaintiff is inadmissible, where a proper opinion could be based only upon a knowledge of anatomy and a skill in diagnosis.

Appeal from Independence Circuit Court; *D. H. Coleman*, Judge; reversed.

*McCaleb & Reeder*, for appellant.

1. The statements of Brickle made after the accident, and the court's statement in the hearing of the jury that defendant would be bound by such statements were highly improper, incompetent and prejudicial. 82 Ark 432 440; 176 *Id.* 430, 434; 99 *Id.* 558; 105 *Id.* 247; 58 *Id.* 168; 66 *Id.* 494; 78 *Id.* 381; 100 *Id.* 269; 97 *Id.* 422.

2. The court erred in permitting G. W. Brewer, a non-expert, to testify that he examined plaintiff for appendicitis and told him it was not that disease. 5 Enc. of Ev., p. 530, note 47; 57 Ark. 387; 23 *Id.* 215.

3. Plaintiffs injury may have resulted from natural causes and not from the injury. In such cases the verdict should be set aside. Where any injury may have resulted, from either of several theories, for some of which the employer is not liable, it is not for the jury to guess or speculate between the various causes, but the burden is on plaintiff to prove the exact cause. 179 W. S. 658; 165 Ark. 161; 79 *Id.* 76; 87 *Id.* 321; 82 *Id.* 372; 87 *Id.* 217; 18 S. W. 172; 70 *Id.* 376; 33 L. R. A. 492, 700, and many others.

*Ira J. Matheny* and *Samuel A. Moore*, for appellant.

1. There is no prejudicial error in admitting incompetent testimony of a fact proven by undisputed evidence. 111 Ark. 180.

2. It was not error to admit Brewer's testimony, when considered together with the other testimony; besides the objections were not specific, but general. A portion of it was competent and really it was not imma-

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terial. 64 Ark. 533; 5 Enc. Ev. p. 530-1; 87 Ark. 331, 334; 96 *Id.* 196; 78 *Id.* 71, 73-4; 99 *Id.* 489, 490.

3. There is no error in the instructions. The alleged errors were harmless. 96 Ark. 156, 162; 83 *Id.* 1; 85 *Id.* 452; 117 Ark. 524.

SMITH, J. Appellee recovered judgment for damages to compensate an injury sustained by him as a result of the negligence of one Joe Brickle, a fellow servant. In support of his cause of action appellee testified that he and Brickle were engaged in carrying out of the blacksmith shop of the appellant company for which they were working, a heavy iron shafting, which was shown to be of as great weight as they were able to carry, when Brickle dropped his end of the shafting and thereby inflicted upon appellee the injuries to compensate which he sues.

(1) Over appellant's objection appellee was permitted to detail certain profane exclamations used by both himself and Brickle at the time of the injury, the purport of which was to show carelessness on Brickle's part. This evidence we think was competent as a part of the *res gestae*, the exclamation being a part of the transaction and explaining the conduct of each of the parties at the time. In addition, upon his direct examination the court permitted appellee's counsel to ask him the following questions and the witness to give the testimony quoted:

Q. "I will ask you this, Mr. Shirley: Did Mr. Brickle after he had dropped the shafting while you all were talking about it there, did he tell you why he dropped it?

A. Yes, sir; yes, he told me he throwed it down to save himself.

Q. "Well, did he explain why it would save himself?

A. "Yes, he had a broken leg, he had a broken leg, and he said that he got in such shape that he couldn't go any further without throwing the shafting down, and he said he would not have broken his leg over for what the company was worth."

Upon his cross-examination it developed that the conversation detailed above occurred some days after the injury. Thereupon the following colloquy occurred:

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Judge McCaleb (of counsel for appellant): "Now, your Honor, we ask that all that evidence about Joe Brickle dropping that shaft to save himself be excluded from the jury for the reason that he says that now the conversation he had with Brickle occurred here in town long after this thing occurred."

Court: "I think the defendant would be bound by any statement he (Brickle) would make about it."

Judge McCaleb: "That the defendant would be bound by any statement that Brickle would make? Does the court hold that defendant is bound by anything Brickle said about two or three months after it occurred?"

Court: "With reference to this injury, I think so."

Exceptions were duly saved to this ruling of the court.

There was a sharp conflict in the evidence as to the nature, cause and extent of the injuries from which appellee claimed to be suffering. On the part of appellant, there was expert evidence to the effect that appellee was suffering from chronic appendicitis and that this condition existed prior to the time of his injury. In contradiction of this theory, the court permitted a Mr. Brewer to testify, over appellant's objection, as follows:

"Why, some time about Christmas, I think it was in February, Mr. Stone was up to my house and said, 'Well, I heard that he (Shirley) had appendicitis and was bad sick,' so I went down there to see him after supper. It is just about a quarter down to his house. And I examined to see whether he had appendicitis or not, and I discovered that he didn't have any appendicitis, but I found the hurt above the hip, right up here (indicating to the jury). The appendix is about half-way from the corner of the hip here (indicating to the jury) to the penis. I found that hip swollen there and I told him not to let the doctors cut any on him for appendicitis. I told him it was not his appendix that was hurt at all, and he seemed to be mighty sore there, that is, for me to press on it."

The witness was appellee's uncle, and, upon being asked on his cross-examination if he was a doctor, stated that he "had studied medicine some," and, upon being asked if he had ever practiced medicine, answered, "Not

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only in my own family." He admitted, however, that he had never attended any school. Other answers given by the witness indicated that his occupation was that of a farmer.

(2) Appellee's evidence in regard to Brickle's admission was incompetent and necessarily prejudicial. In the recent case of *River, Rail & Harbor Construction Co.* v. *Goodwin*, 105 Ark. 247, the plaintiff in a personal injury case was permitted to prove an admission of negligence on the part of a fellow-servant which caused the injury complained of. It was there said that inasmuch as the declaration was not made by an officer of the defendant company having the right to speak for it and bind it by declarations of that kind, the evidence was improperly admitted and constituted prejudicial error, and in that connection we quoted with approval the following statement of the law from Jones on Evidence, section 357:

"The declarations of an employee or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration did not accompany the act from which the injuries arose, and was not explanatory of anything in which he was then engaged, but that it was a mere narration of a past occurrence."

We think, too, the court should not have permitted the witness Brewer to express the opinion that appellee did not have appendicitis at the time of his examination of him. It is true the witness stated the facts upon which he based his opinion, but there is no contention that he had any special information or training that enabled him to form or express an opinion upon these facts. The rule in such cases is stated in 5 Encyclopedia of Evidence, 530, as follows:

"2. Requisite Knowledge, Skill and Experience.—A. In General. While undoubtedly it must appear that

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a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject as to which he proposes to testify, no hard and fast rule can be laid down as to the extent of such knowledge or experience. The reason for allowing an expert to testify, and the object of his testimony, indicate to some extent the qualifications he should possess in order to make him a competent witness. His competency depends upon either his actual experience with respect to the subject under investigation, or his previous study and scientific research concerning the same, and sometimes on both combined. A witness should not be permitted to testify as an expert unless he has such knowledge or experience with reference to the science, art or trade as to which he is called to testify, as will enable him to speak intelligently and enlighten the court. Where a witness is not called upon for an opinion, but simply for a statement of a fact, *e. g.*, whether such and such a thing was done—this rule is not applicable, and there is no necessity to show the qualifications of the witness as an expert, even though he may happen to be a professional man."

Numerous cases are cited in support of the text, among others certain Arkansas cases. In addition, see also, Wigmore on Evidence, sections 555-560; *Railway Co.* v. *Lyman*, 57 Ark. 512; *Railway Co.* v. *Bruce*, 55 Ark. 65; *Arkansas Southwestern Rd. Co.* v. *Wingfield*, 94 Ark. 75.

(3) It would have been entirely proper to permit the witness to describe the condition he observed, but it was improper and prejudicial to permit him to express an opinion upon a subject which necessarily required a knowledge of anatomy and a skill in diagnosis when the witness was not shown to have possessed such knowledge.

Appellant also complains of the action of the court in giving certain instructions and in refusing certain others. But no error prejudicial to appellant was committed in this respect as the instructions were as favorable as it had the right to ask.

For the errors indicated the judgment of the court below will be reversed and the cause remanded for a new trial.

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## ABRAMS v. CITIZENS BUILDING & LOAN ASSOCIATION.

Opinion delivered July 10, 1916.

1. BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE LOAN—COMPUTATION OF AMOUNT DUE.—Unless there is an express provision in the building and loan contract providing a method of settlement with defaulting borrowers, the rule for determining the amount due in cases of foreclosure of building and loan mortgages is to ascertain the amount of stated dues and interest which will become due during the future existence of the association (the particular series of stock) as estimated. Then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated. This will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale.

2. SAME—SAME—SAME.—In computing the present worth of the anticipated payments, the interest should be computed for the average time of the payments which would be one-half of the time from the date of the decree to estimated maturity.

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

*Sam Frauenthal* and *Bruce T. Bullion*, for appellants.

1. The accountant Hennegin erred in the manner in which he estimated the amount due upon the stock and loans. He also failed to give credit for numerous payments made, and the court erred in following his findings and report as to the amount due. The accountant did not make the estimate in accordance with the rule laid down by this court as to delinquent borrowers. 62 Ark. 572. The amount due upon loans totaled $7,510.73. From this should be deducted the credits for amounts paid; the Green loan, Sawyer notes and rents collected $3,161.47, leaving only due a balance of $4,349.26 in June, 1913.

2. The testimony clearly shows that appellant made payments for which she never received any credit. The evidence is clear. Nor was she credited with rents collected and other items to which she was clearly entitled.

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Appellee was a mortgagee in possession and chargeable with rents.

3. It was error to declare a lien upon 110 feet of the property, when only 100 feet was covered by the mortgage.

4. The other accountants followed the rule in 62 Ark. 572, and the amount found due was only $4,351.19. This is the largest amount for which the decree should have been rendered.

*Roscoe R. Lynn*, for appellee. *Cockrill & Armistead*, of counsel.

1. On the cross-appeal appellee contends that the court erred in allowing credit for $238.00, being six months' interest and dues credited on the pass books.

2. The rule in the Roberts Case 62 Ark. 572, is not the correct rule and should be overruled. 71 Ark. 104; 68 *Id.* 24; 73 *Id.* 522; 74 *Id.* 56; 56 *Id.* 337; 69 *Id.* 356; 74 *Id.* 220; 75 *Id.* 497; 69 *Id.* 616; 43 L. R. A. (N. S.) 874, 886; 59 S. W. 35; 85 *Id.* 231. No rule of property is involved. 47 Ark. 359; 1 S. W. 702.

3. The rule in the Roberts Case does not apply. Defaulting members are not entitled to share in the profits. Endlich on Build. Asso., §§ 99, 100, 149, 480-481-482; 6 Cyc. 13. By-laws change the rule. 65 Ark. 575; 4 Enc. of Law (2d ed.), 1075-1077. In the Roberts Case the court made a mathematical error. See 5 Weekly Law Bulletin, 364.

4. The Chancellor's findings will be sustained unless clearly against the preponderance of the evidence. 73 Ark. 489.

MCCULLOCH, C. J. Appellee is a corporation, domiciled at the city of Little Rock, engaged in business as a building and loan association according to the plan peculiar to that character of business. Its business is governed by certain by-laws, and it issues stock from time to time in series to be matured by payment of monthly dues of the members and the accumulation of interest from borrowers. Maggie G. Abrams, one of the appellants, took stock in the Association and borrowed money on the

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stock and mortgaged certain real property in the City of Little Rock to secure the payment of the loans. Her husband, C. W. Abrams, who is also one of the appellants, joined in the execution of the mortgages. There were five loans, aggregating $7,600.00 made during the period of about two years from 1904 to 1906. Mrs. Abrams failed to meet her monthly payments, and appellee instituted this action in the Pulaski Chancery court on April 12, 1912, against C. W. and Maggie G. Abrams, to foreclose the mortgages.

Appellants appeared in the action by their attorneys and filed an answer and joined in a request for the appointment of an accountant to state the account between the parties, and pursuant to that stipulation the court appointed H. W. Hennegin, an expert accountant, as special master to state the account. The master filed his report, to which exceptions were made by appellants but subsequently withdrawn, and the Chancery Court on June 2, 1913, rendered a final decree in favor of appellee for recovery of the sum of $8,800.79, which was the amount reported by the master, and decreed foreclosure of the mortgages.

On August 6, 1913, which was during the same term of court at which the decree was rendered, appellants appeared by attorneys and filed a petition to set aside the decree and re-open the cause for further hearing. No formal order is found in the record setting aside the decree, but it is evident that such an order was made, for there were further proceedings had in the court from time to time and the final decree rendered November 24, 1915, recites the fact that the decree of June 12, 1913, had been set aside by an order of the court rendered on October 4, 1913. At any rate the decree was treated as having been set aside, and there is no point made here against the further consideration of the cause. Further testimony was heard by the chancellor and in the last decree the amount of recovery was fixed by the court at the sum of $6,852.00, as of the date of the original decree (June 2, 1913), together with the additional sum of $295.00 paid out by appellee in taxes, insurance and other expenses

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since the date of the original decree, making the total sum of $7,147.00, with interest from June 2, 1913, which the court decreed to be a lien on the mortgaged property.

Mrs. Abrams in her answer denied that she owed any balance on the mortgage debts except a comparatively small sum, but the expert accountants, whose testimony she relied on, figured the balance of the indebtedness to be a large sum, but somewhat less than the amount found by the court. Mrs. Abrams also disputed the correctness of some of the loans and claimed that she had made large payments on the loans for which she had received no credit, but the court found against her on those issues of fact, except as to certain payments on monthly dues aggregating the sum of $238.00. The record is voluminous and involves an examination of the somewhat intricate statements of the master and other accountants who testified, and there is a conflict in the testimony of the witnesses—Mrs. Abrams on the one side and the secretary of the appellee association and other witnesses on the other side—and upon consideration of it all we are unable to discover any error in the findings of the chancellor upon the issues of fact. The chancellor's findings seem to be in accord with the preponderance of the evidence, or at least they are not against the preponderance of the evidence.

It appears from the testimony adduced by appellee that the stock issued to Mrs. Abrams was cancelled and re-issued from time to time because of the fact that she became delinquent on the dues, and in order to prevent a foreclosure it was necessary to reissue the stock so as to cover the delinquency. Mrs. Abrams now objects to that procedure, but the evidence is sufficient to warrant the finding that it was done for her benefit and that she consented to it. We find nothing in the decree which is prejudicial to the interest of appellants. They owe at least the amount decreed against them, and so far as concerns their appeal there is no reason for disturbing the decree.

There is, however, a cross-appeal which raises other questions, particularly the method adopted by the court in fixing the terms of the settlement between the parties. It is contended by counsel for appellee that the court

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adopted a method of settlement which is contrary to that in vogue among building and loan associations and contrary to the weight of authority as expressed in decisions of the courts of the country. In *Roberts* v. *American Building & Loan Association*, 62 Ark. 572, this court declared the following rule for settlement in cases of foreclosure of building and loan mortgages: "Ascertain the amount of stated dues and interest which will become due during the future existence of the corporation (the particular series of stock), as estimated; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale."

It is argued by counsel with much earnestness that this rule is not only against the weight of authority on the subject, but that it works an injustice to the other holders of stock in the series, in that it gives the delinquent borrowing stockholder the benefit of anticipated profits of the series, whereas the borrower who refuses to pay should be excluded from participation in the profits. They contend that the more equitable rule would be to charge the borrower with the sums originally borrowed with unpaid interest up to the date of foreclosure, and then give credit for dues paid, with interest from the respective dates of the payments up to the time of the foreclosure, and that the difference between those two sums should represent the correct amount due by the borrower. It is urged that this method of settlement gives the borrower the full benefit of his payments with interest at the same rate which he has contracted to pay. In other words, that it is fairer to all the parties to the contract to merely give the delinquent borrower interest on his payments instead of allowing him to participate in future profits.

There is much force in the contention of counsel on this phase of the case, but we are of the opinion that the rule established in the Roberts case, *supra*, is not without

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justice and merit, and since it has been established by the decision of this court it ought not to be disturbed. It has, in other words, become a rule of property. The rule thus announced preserves the mutuality in the contract, and in that way follows out the common building and loan association plan. It is said that this ignores the possibility of future losses, but we apprehend that the matter of losses is always taken into consideration in estimating the date of maturity of the series. This method of settlement takes nothing from the persistent stockholders that is conferred by their contract. It is contended also that the rule of the Roberts case has been disregarded in subsequent decisions of this court, but we do not think so. The cases of *Hough* v. *Maupin*, 73 Ark. 518, and *Taylor* v. *Clark*, 74 Ark. 220, have laid down a different rule, but those cases related to settlements in insolvent corporations where a different rule necessarily prevails.

This rule does no violence to the by-laws of the Association, and therefore does not constitute the making by the court of a new contract for the parties. The parties have a right to stipulate in advance what the terms of settlement shall be in the event of foreclosure, and a by-law on the subject would constitute the contract. But there is no by-law of appellee association providi g for terms of settlement in case of foreclosure. There is a by-law fixing the terms of withdrawal for borrowing stockholders, but counsel for appellee contend that that was not designed as a provision for settlement with a defaulting borrower and would not be a just rule for that class of stockholders. We agree with counsel that that by-law has no application to settlements with a defaulting borrower. So we have no express provision in the contract between the parties on this particular subject, and it becomes necessary for the chancery court to fix the terms of settlement which are found to result from the contract, and we believe it to be not an unjust method to follow the rule laid down in the Roberts case.

Our attention is called to the fact, however, that in the Roberts case the computation made under the rule was to figure the interest for the whole of the unexpired

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time in ascertaining what would be the present value of the aggregate amount of the dues and interest for the future period. It is argued that that computation is not consistent with the rule thus announced, and that it works out an unfair result for the reason that the payments of dues and interest were to be made in monthly installments, and that in estimating the present value of the aggregate amount that fact ought to be considered as the basis of the computation. We think that counsel are clearly right in that contention, and that it would do violence to the contract itself to compute the interest for the whole estimated period of the future life of the series of stock.

A very simple illustration makes the injustice of any other view apparent. If one entered into an obligation to pay a certain aggregate sum in monthly installments, covering a period of years, it would be unjust to figure the present value upon a basis of the payment of the whole amount at the end of the period instead of in installments.

We do not consider the erroneous computation made in the Roberts case as a part of the rule itself, so as to become a rule of property, and since it is called to our attention we do not hesitate to correct it and to declare that in making the computation the interest should be computed for the average time of the payments, which would be one-half of the estimated future period. If the court had observed that method of computation, the decree should have been for the sum of $7,545.04, as of June 2, 1913, with the sum of $295 paid out by appellee since the date added, instead of the sum of $7,147.00 as decreed by the court. The court adopted the date of the original decree as a convenient one from which to compute interest on the amount found to be due, because of the fact that the estimates of the accountants brought down the sum to that date. No complaint has been made of the adoption of that method of entering the decree.

The decree of the chancellor is therefore, on the cross-appeal of appellee, reversed and the cause is remanded with directions to enter a decree in favor of appellee for the sum of $7,545.04, as of the date of the

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original decree, June 2, 1913, with the addition of $295 paid out since then, and to decree a foreclosure of the mortgage to satisfy the debt.

It appears, however, that appellee has in writing released from the mortgage fifty feet off the west end of the two lots embraced in the mortgage, leaving the area of the property 100 by 100 feet, but that the chancery court erroneously declared an existing lien in appellee's favor on 100 by 110 feet. This error should be corrected in the decree to be entered on remand of the cause. It is so ordered.

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## RADFORD & GUISE *v.* PRACTICAL PREMIUM COMPANY.

Opinion delivered July 10, 1916.

1. CONTRACTS—CONSTRUCTION—DUTY OF COURT.—Where a contract is made up of correspondence, it is the duty of the trial court to construe it, and declare its terms to the jury.
2. CONTRACTS—ACCEPTANCE.—The mere mention in a letter of acceptance, of matters upon which the acceptance does not depend, will not prevent the contract from being completed.
3. CONTRACTS—ACCEPTANCE.—A wrote B agreeing to accept goods shipped upon certain terms. B replied, accepting the terms unconditionally, but expressing the wish that A would agree to other terms more to the liking of B. *Held* a valid and binding contract was formed between the parties.

Appeal from Pike Circuit Court; *J. T. Cowling*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee instituted this suit on account before a justice of the peace to recover the sum of $76.50, the amount claimed to be due for certain goods sold by the appellee to the appellants on what is termed in the record a signed order "for a premium deal." It appears from the correspondence between the parties that the appellants gave to the agent of the appellee a written order for some goods. The appellee at first refused to accept the order and ship the goods. Afterwards the appellee shipped the goods to Delight, where appellants reside, and they were unloaded at the station.

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Appellants then wrote John J. Wolf, the agent of appellee, at Houston, Texas, through whom appellants gave the order, and, among other things, stated that they had waited a reasonable time before the goods arrived, and not knowing whether appellee intended to ship the goods they had ordered elsewhere, and therefore declined to receive the order from appellee. They however proposed to appellee that if it would allow appellants ten months from the date of the letter in which to pay for the goods, and if appellee would pay the storage charges that had accrued, appellants would accept the shipment, otherwise they would refuse to receive the goods. They stated in the letter that if appellee decided to accept appellants' proposition appellants would like the approval of appellee on the same. That letter was dated July 24, 1913.

Wolf, on July 26, 1913, in answer to the above letter, wrote appellants as follows: "Your favor of the 24th received. Upon receipt hereof please take goods out of depot and pay charges. Our office will promptly arrange terms to your satisfaction."

Afterwards, on July 30th, appellee wrote appellants, in which it referred to appellants' letter to Wolf, stating that Wolf had communicated appellants' proposition to the appellee, and appellee stated, among other things: "We do not like to wait ten months for our money, and, in fact, cannot afford to do so, as we give you good value, and sell our premiums on a very close margin. Of course, if Mr. Wolf has tacitly agreed to your terms, we will abide by the agreement if you insist upon it." In this letter appellee protested that ten months was too long to wait, and stated, "rather than wait this length of time for our money we would prefer to make you some inducement to pay for the goods at once, providing you would consent to use them at once. Would you not be agreeable, therefore, to sending us a check less 10 per cent. of your bill? You could not make 10 per cent. on your money easier, and we would rather sacrifice this sum which figures to be $7.65 and close your account. Our main idea in offering this is not entirely to get immediate returns on our goods, but to have you give our goods the preference."

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Then appellee, after giving other reasons why it thought that appellants should accept the proposition to pay cash, with a discount of ten per cent. further stated: "We hope that our proposition will appeal to you, but if it don't there will be no ill feeling. Kindly let us hear from you by return mail, so that we may know what to expect. If it is necessary to wait ten months for our money from you, then we will mark your account accordingly, and settle down for the long wait."

Upon the receipt of this letter appellants wrote to appellee, stating, among other things: "We are in receipt of yours of the 30th ult., and inasmuch as you do not want to accept our proposition to your Mr. Wolf, and as it seems that there has already been several misunderstandings in our business relations, we have decided it is best not to try to handle your shipment in question, and your goods are here subject to your order."

On this evidence the court instructed the jury to return a verdict in favor of appellee. Appellant duly reserved their exceptions to the court's ruling. Judgment was entered for the appellee, from which this appeal has been duly prosecuted.

*C. E. Johnson*, for appellant.

1. The court erred in directing a verdict. The correspondence did not constitute a contract. There never was an acceptance of the offer of the appellants. On the contrary it appears that the offer was never accepted. An acceptance must be clear, absolute, unambiguous, in exact accordance with the offer. 116 S. W. 219; 92 *Id.* 783; 69 *Id.* 37; 27 *Id.* 385.

2. A contract will be construed most strongly against the party drafting it. 23 Ark. 582; 53 *Id.* 58; 135 S. W. 343; 149 *Id.* 75; 130 *Id.* 452; 84 *Id.* 1041; 27 *Id.* 385.

*O. A. Featherston* and *W. S. Coblentz*, for appellee.

1. Where a contract is in writing, it is the duty of the court to construe it. The letters show a meeting of minds—a contract. The offer was accepted according

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to the terms of the offer. 39 Mass. 33; 6 R. C. L. 605; 24 S. W. 1020.

2. There was no question for a jury. It was a matter of law for the court. 89 Ark. 239; 103 Pac. 370; 128 S. W. 7; 69 *Id.* 34.

WOOD, J. (after stating the facts). The letters constituted the contract between the parties. It was the duty of the court to construe it and declare its terms to the jury. *Mann* v. *Urquhart*, 89 Ark. 239 The letter of appellants to appellee's agent, John J. Wolf, was an offer on the part of the appellants to accept the goods that were then in storage at the depot, provided the appellee would pay the storage and would give the appellants ten months from the date of the letter to pay for the goods. Wolf's answer to this letter, of July 6, 1913, was an acceptance of appellants' offer, for in that letter Wolf instructed appellants to take the goods out of the freight depot and pay the charges, and notified appellants that appellee would promptly arrange terms to appellants' satisfaction. Wolf sent the letter to his principal, the appellee, and it wrote the letter of July 30, 1913, in which it ratified what its agent had done by stating, "If Mr. Wolf has tacitly agreed to your terms we will abide by the agreement if you insist upon it," and by further stating "If it is necessary to wait ten months for our money from you we will mark your account accordingly and settle down for the long wait." It is true this letter of appellee made appellants a different proposition as to the time of payment, and recommended that appellants accept such proposition instead of the one they had made to appellee. But, at the same time, appellee notified appellants that if the proposition made by it was not satisfactory appellee would ratify the act of its agent and accept the offer of appellants in accordance with the terms proposed by them.

In 11 Enc. of Ev., p. 507, it is stated: "If the evidence shows an acceptance in accordance with the terms of the offer, but accompanied with a request to modify

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them, such request constitutes no evidence of a conditional acceptance."

Appellee's letter of acceptance was unconditional. It simply suggested a cash payment for appellants' consideration and left the matter optional with appellants as to whether they would adopt the cash payment at a discount rather than the terms proposed by them, but at the same time, as we have stated, definitely declaring to appellants that appellees would wait ten months as proposed by appellants, if necessary.

In 6 R. C. L., p. 609, it is said: "From the rule that the acceptance must be unconditional, it must not be inferred that the mere mention, in the letter of acceptance, of matters upon which the acceptance of the proposition does not depend prevents the contract from being completed." See also *Id.* 605.

The court correctly construed the contract. There was no error in instructing the jury to return a verdict in favor of the appellee. The judgment is therefore affirmed.

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## BELLECLAIR PLANTING CO. *v.* HALL.

Opinion delivered July 10, 1916.

1. TAXES—PAYMENT BY ATTORNEY—COMPENSATION UNDER KIRBY'S DIGEST, § 7131.—An agent or attorney cannot recover compensation for paying taxes on defendant's lands under Kirby's Digest, § 7131, where he has not brought himself within the terms of the statute by averring or showing that he was seized of or had the care of the defendant's lands in any capacity.
2. TAXES—PAYMENT FOR ANOTHER—RECOVERY—LIEN.—Appellee paid certain taxes on certain real estate at the request of the owner, the latter agreeing to reimburse him. *Held,* under the facts, the land was charged with a lien in appellee's favor for the amount paid out by him.

Appeal from Mississippi Chancery Court, Osceola District; *Chas. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

C. B. Hall instituted this action in the chancery court against the Belleclair Planting Company and A.

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J. Peifer to recover the amount of taxes paid by him on lands belonging to the defendant corporation which he alleges he paid under an agreement with the representative of the defendant. He prayed judgment for the amount of taxes paid by him and asked that the same be charged as a lien on the lands on which the taxes were paid. The material facts are as follows:

O. R. Lilly was the owner of large tracts of lands in Mississippi County and on the 2nd day of December, 1911, he executed to the Belleclair Planting Company, a corporation organized by him, a deed to 1570 acres of land in Mississippi County, Arkansas. He covenanted in the deed that he would pay all taxes assessed against the land for the year 1911. On the 31st day of May, 1912, C. B. Hall, sheriff and collector of Mississippi County issued a tax receipt for said lands to the Belleclair Planting Company and accounted to the state and county for the taxes on said lands. At the time O. R. Lilly was the president of the corporation and had charge of its affairs.

Hall testified that Lilly at the time resided in Mississippi County and told him to issue the tax receipt and that the Belleclair Planting Company would pay him the taxes. He said that he would not have issued the tax receipt at the request of Lilly individually because he knew that while Lilly owned large quantities of land, he was insolvent.

Lilly testified for the defendant and said that he was not acting for the Belleclair Planting Company at the time he requested the issuance of the tax receipts in controversy, but was acting for himself. He said that he paid part of his taxes and that the collector extended credit to him for the balance; that he executed to the collector his note for the balance of the taxes.

The chancellor found the issues for the plaintiff and a decree was entered accordingly. The defendants have appealed.

*J. N. Thomason* for appellants.

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1. Appellee did not bring himself within the statute and the court erred in overruling the demurrer. The complaint did not aver that appelle was either an agent, attorney or other things mentioned in the statute; nor that he was seized or had the care of the lands, but on the contrary alleges that he was sheriff and collector and issued the receipt at the request of Lilly, who was president and agent; but there was no proof that Lilly was the agent at the time or any other time for the company. 43 Ark. 521; 30 *Id.* 600. No lien was created, *Ib.*

2. Appellee was not subrogated to the lien of the State—he was a mere volunteer. 17 Am. & Eng. Ann. Cas. 1136; 76 Fed. 673; 56 Ct. J. Eq. 547.

3. Appellee could not have acquired any greater right than Lilly could have acquired. The receipt contained land not owned by appellant.

4. The president could not bind the corporation by his acts. The board of directors did not authorize or ratify. 2 Cook on Corp. 1766–8; §716; 37 N. J. L. 98; 25 Ore. 364; 35 Pac. 304; 62 Ark. 37.

5. The credit was extended to Lilly and not to the company. There is no equity in the claim.

The appellee *pro se.*

1. Appellee had a lien for the amount of the taxes paid on request of the president of the corporation. Kirby's Digest, §7131.

2. Appellee was subrogated to the State's lien for taxes. 54 Atl. 586; 122 Ind. 372; 80 *Id.* 443; 44 Atl. 771; 16 So. 487. Subrogation is not founded on contract—it is a creation of equity. 124 W. S., 534; 19 N. E. 199; 78 N. W. 303; 44 Pac. 292; 59 N. E. 867; 4 Am. St. 484; 32 Ark. 258; 44 *Id.* 504; 31 *Id.* 334.

3. The corporation is bound by the act of its president. Clark on Corp. 496, 498-9, 500.

4. The rule is where either paragraph of a complaint states a cause of action, the whole complaint is not demurrable. 72 Ark. 29.

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HART, J. (after stating the facts). Counsel for the defendants claim that this suit was instituted under Section 7131 of Kirby's Digest and that the decree should be reversed under the authority of *Woodall* v. *Delatour*, 43 Ark. 521 and *Peay* v. *Feild*, 30 Ark. 600. Section 7131 of Kirby's Digest was in force at the time the decisions in the cases referred to were rendered and reads as follows:

"Every attorney, agent, guardian, executor or administrator, seized or having the care of lands as aforesaid, who shall be put to any trouble or expense in listing or paying the taxes on such lands, shall be allowed a reasonable compensation for the time spent, the expenses incurred and money advanced as aforesaid, which shall be deemed in all courts a just charge against the person for whose benefit the same shall have been advanced, and the same shall be preferred to all other debts or claims, and be a lien on the real estate as well as the personal estate of the person for whose benefit the same shall have been advanced."

(1) In each of those cases there was no averment that the person who paid the taxes was seized of or had the care of the owner's land in any capacity. The amount paid for taxes on the personal property was included in the judgment and declared to be a lien upon the real estate. There was no distinction recognized by the trial court as to whether the taxes were paid on personal or real estate. The court held that it was error to hold that there was a lien upon the real estate for taxes paid on the personal property, because the person paying the taxes did not bring himself within the terms of the statute. So here the plaintiff would not be entitled to recover under section 7131 of Kirby's Digest because he has not brought himself within the terms of the statute by averring or showing that he was seized of or had the care of the defendant's land in any capacity. It does not follow however that because he was not entitled to recover under this statute, that he was not entitled to recover at all.

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Subrogation is an equitable and not a legal right. Being a creature of equity it will not be enforced where it will work an injustice to those having an equal equity. It is contended by counsel for the defendant that Hall paid the taxes at the request of Lilly individually and that Lilly covenanted in his deed to the Belleclair Planting Company when he conveyed the lands to it, that he would pay the taxes for the year 1911. Hence they claim that if it be conceded that Hall acquired any right of subrogation by the issuance of the tax receipts and payment of the taxes at the request of Lilly, that right must be subject to the prior equity of the defendant corporation on the covenant in the deed of Lilly.

Counsel would be correct in this contention if this testimony was undisputed or if the chancellor had found the facts in their favor. The chancellor, however, found against them as to the facts on this point. The chancellor found that Lilly as a representative of the Belleclair Planting Company made an agreement with the sheriff to issue a tax receipt to the lands to that corporation and agreed that the corporation would pay him back the taxes. At the time the agreement was made Lilly resided in Mississippi County and had charge of the affairs of the corporation and was president of it. He was known to be insolvent by the sheriff, who stated that he would not have made such an agreement with Lilly individually. Under these circumstances we think that Lilly had the apparent, if not the real authority, to make the agreement testified to by Hall, for the corporation, in regard to the payment of the taxes, and that the chancellor was warranted in so finding. Under this finding there was no prior equity in favor of the defendant corporation.

(2.) Hall paid the taxes at the request of the defendant corporation and under an express agreement upon its part that it would repay him therefor. He is entitled to judgment against the corporation for the amount of taxes so paid. The legality of the taxes is not disputed. They were a paramount lien on the lands. It was the duty of the owner to pay them. This was necessary to protect its interest. Hall did not act officiously in paying the

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taxes. He acted in good faith upon the express promise of the corporation to repay him. No prior equities intervened and no right of a third party would be affected by charging the land with a lien in favor of Hall for the taxes paid by him.

While it might not be said that Hall is entitled to enforce the lien of the State on the said lands by way of subrogation, yet under the circumstances of this case we are of the opinion that a lien in his favor arises in equity, that will protect him and that he is entitled to have the lands charged with a lien for the payment of the taxes on them.

Therefore the decree will be affirmed.

HART, J. (on rehearing). Lilly testified that he was president of the corporation at the time he made the agreement with Hall in regard to the issuance of the tax receipt and the payment of the taxes by the corporation. Lilly at that time had charge of the local affairs of the corporation and we adhere to our original opinion that the contract which he made with Hall in regard to the payment of the taxes was a valid one and bound the corporation. But it is insisted by counsel for appellant that the equities of the corporation are superior to those of Hall and for that reason Hall should not be entitled to recover in this case. They based their contention on the fact that Peifer, who succeeded Lilly as president of the corporation went to the sheriff's office on the day before the day of sale of lands for delinquent taxes and inquired if Lilly had paid the taxes on the land and that he was told by a deputy sheriff that all the taxes had been paid and that he so reported to the corporation. It will be noted that this inquiry was not made of Hall with whom Lilly made the original agreement. The deputy sheriff to whom the inquiry was made knew nothing about the agreement Hall had made with Lilly and was not the agent of Hall with reference thereto. He was only clothed with the power to collect taxes and to give tax payers any information contained upon the tax records. He was in no sense the agent of Hall in regard to the agreement

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made by him with Lilly as to the payment of taxes by the corporation and under these circumstances, we do not think the equities of the corporation are superior to those of Hall.

Therefore we adhere to our original opinion and the motion for rehearing will be denied.

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## PAUL v. STATE.

### Opinion delivered July 10, 1916.

1. HOMICIDE—VOLUNATRY MANSLAUGHTER.—The evidence held sufficient to sustain a conviction for voluntary manslaughter.
2. EVIDENCE—DYING DECLARATIONS.—The admissibility of dying declarations is for the court to determine; their credibility, when admitted, is for the jury.
3. EVIDENCE—DYING DECLARATIONS.—Whether declarations were made under a sense of impending death, so as to render them admissible as dying declarations, is a preliminary question for the trial court, and its finding will not be disturbed if there is evidence to support it.
4. EVIDENCE—DYING DECLARATIONS—CONSCIOUSNESS OF IMPENDING DEATH.—It is not necessary that the declarent should state expressly that declarations made by him are made under a consciousness of impending death, and such a consciousness may be inferred from his wounded condition and evident danger, from expressions or statements made to him or in his hearing by physicians or others in attendance, from his manner and conduct, and other circumstances.
5. EVIDENCE—DYING DECLARATIONS.—Where deceased stated "I will never go home alive; I am bound to die," declarations made by him may be admitted as dying declarations.
6. APPEAL AND ERROR—CAUSE FOR REVERSAL.—A judgment will be reversed for errors only which are prejudicial to the defendant's rights.
7. TRIAL—REMARKS OF COUNSEL—DUTY TO EXCEPT.—If the trial court fails to control the argument of counsel within proper bounds, and fails to instruct the jury to disregard the improper remarks, an exception should be taken to the ruling of the court, and where no exception is saved, the appellant cannot complain on appeal.
8. NEW TRIAL—NEW EVIDENCE.—Motions for new trials upon the ground of newly discovered evidence which is cumulative merely, are addressed to the sound discretion of the trial court, and the exercise of this discretion will not be disturbed on appeal unless it is apparent that it has been abused.

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Appeal from Mississippi Circuit Court, Chickasawba District; *W. J. Driver*, Judge; affirmed.

*L. L. Collins*, of Springfield, Mo., for appellant.

1. Incompetent, irrelevant and immaterial evidence was admitted. The statements admitted were not "dying declaration," nor admissible as such. 21 Cyc. 976; 2 Ark. 229; 20 *Id.* 36; 81 *Id*, 417; 126 Ill. 81; 69 Kans. 767; 1 Wharton Cr. Ev. 556 et seq; 74 Ala. 9; 11 Ga. 353; 63 Ind. 548; 50 Mo. 370; 21 Cyc. 979; 98; and cases cited, etc.; 164 S. W. 275; 8 R. C. L. 8.

2. Guilt is never presumed—it must be proven. The court erred in its charge as to murder.

3. The Prosecuting Attorney's remarks were highly prejudicial.

4. The court erred in overruling the supplemental motion for new trial. The verdict is against the law and the evidence.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no prejudicial error in the "dying declarations" of the deceased. They were properly admitted, having been made "*in extremis*." 1 Bishop Crim. Proc., §1216; 37 Tex. 366; 51 Mo. 160; 38 Ark. 508; 2 *Id.* 229; 246-7; 58 Ark. 54; 81 *Id.* 419; 1 Greml. Ev. (16 ed.) §158.

2. There was no error in the court's instructions. If any were wrong it was appellant's duty to tender correct instructions on the particular points contended for. This he failed to do and the verdict was for a lower grade of homicide than charged. 60 Ark. 76; 76 *Id.* 84; 73 *Id.* 280; 99 *Id.* 591; 54 *Id.* 4; 58 *Id.* 513; 102 *Id.* 199.

3. The record is silent as to the prosecuting attorney's remarks. But the control of such arguments is within the discretion of the court below, and unless a clear abuse of discretion is shown, this court will not reverse. 74 Ark. 256; 95 *Id.* 326; Thompson on Trials. §964; 91 Ark. 95; 74 *Id.* 286; 100 Id. 108.

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4. The new trial was properly refused. No abuse of discretion was shown. 96 Ark. 400; 103 *Id.* 589; 97 *Id.* 92; 85 *Id.* 179; 85 *Id.* 184; 99 *Id.* 125.

HART, J. Ollie M. Paul was indicted for murder in the first degree, charged to have been committed by shooting Joe Bracken. He was tried before a jury and found guilty of voluntary manslaughter, his punishment being fixed at imprisonment in the state penitentiary for seven years.

From the judgment of conviction the defendant has duly prosecuted an appeal to this court.

The facts as detailed by the witnesses for the State are substantially as follows:

Joe Bracken lived in Mississippi County, Arkansas, and owned a farm near the farm of the defendant's father. Joe Bracken was shot on the 10th day of October, 1915, by Ollie M. Paul on the farm of his father in the Chickasawba District of Mississippi County, Arkansas, and died in about twenty-four days thereafter as the result of his wounds.

On the morning of the killing, one of Bracken's brothers gave him a quart of whiskey but according to the testimony of another brother he never drank any of it. Two of Bracken's brothers were near by when the shooting occurred but did not see it. They stated they heard two shots from a large gun and then they heard a shot from a smaller one. Then they ran to the scene and found their brother and the defendant clinched and each one claimed that the other had shot him. One of the brothers took charge of the deceased and the other of the defendant. The deceased had a thirty-two caliber pistol. The defendant had a thirty-eight caliber pistol. The defendant first claimed that the deceased had shot him but an examination of his body showed that he was mistaken. The pistol of the defendant was empty, all of the cartridges in it having been fired. It was also shown in evidence that the deceased on the night that he died, stated that the defendant had shot at him first and had shot him when he had both hands up.

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Another witness testified that he heard the shooting and that the first and second shots were louder. He said he knew the kind of pistol Joe Bracken had and it was thirty-two-twenty and the defendant had a thirty-eight special.

Another witness testified that a short time before the shooting, he met the defendant and he had a pistol in his hand.

(1) According to the testimony of the defendant himself and other witnesses introduced in his behalf, he had had a difficulty with the deceased on the morning preceding the shooting and the deceased without cause had slapped him. That he met the deceased again in the afternoon; that the deceased was drinking heavily and renewed the difficulty; that he did not pull his pistol out and fire until deceased had first shot at him. It is not necessary to abstract the testimony in behalf of the defendant in detail. It is sufficient to say that if believed by the jury it showed that the defendant shot the deceased in his necessary self defense. The jury however, was the sole judge of the credibility of the witnesses. By its verdict it has said that it did not believe the testimony of the defendant and his witnesses and that it did believe the witnesses for the State. The testimony of the witnesses for the State was sufficient to warrant the jury in finding the defendant guilty of voluntary manslaughter. The defendant had the larger pistol and according to the testimony of the witnesses, the larger pistol was fired twice before any report was heard from the smaller one. Then, too, according to the dying declaration of the deceased, he was shot while he had his hands up.

(2) It is next insisted that the court erred in admitting the dying declarations of the deceased; but we do not agree with them in this contention. The admissibility of dying declarations is for the court to determine; their credibility, when admitted, is for the jury. *Fogg* v. *State*, 81 Ark. 417.

(3–4) Whether declarations were made under a sense of impending death, so as to render them admissible as dying declarations, is a preliminary question for

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the trial court, and its finding will not be disturbed if there is evidence to support it. *Robinson* v. *State*, 99 Ark. 208; *Jones* v. *State*, 88 Ark. 579. While dying declarations to be admissible must be made under consciousness of impending death and without expectation or hope of recovery, it is not necessary that the declarant should expressly state that they are so made, but it may also be inferred from his wounded condition and evident danger, from expressions or statements made to him or in his hearing by physicians or others in attendance, from his manner and conduct, and other circumstances. *Rhea* v. *State*, 104 Ark. 162.

(5) After the deceased was shot he was carried to Memphis and placed in a hospital and lived for twenty-four days. On the night that he died, a cousin went out to the hospital to see him at about midnight; he asked Bracken how he felt. Bracken told him he was feeling some better and his cousin then told him if he was feeling better possibly he would soon be able to go home. Bracken then said, "No he was about to die; no possible chance for him." He then requested his cousin to send a telegram for his wife before he died. He said to his cousin, "I will never go home alive; I am bound to die."

It was in this connection that he told his cousin that the defendant shot him first and had shot while his hands were up. This testimony warranted the court in finding that the declarations were made under a sense of impending death so as to render them admissible as a dying declaration.

(6) It is next contended that the court erred in giving certain instructions relating to murder in the first degree and murder in the second degree. We need not consider the objections to these instructions. It is well settled that this court only reverses a judgment for errors prejudicial to the rights of the defendant. The defendant was only convicted of voluntary manslaughter and it is plain that whether the instructions complained of were erroneous or not they did him no harm. *Easley* v *State*, 109 Ark. 130.

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(7) It is next contended that the court erred in not excluding from the jury certain remarks made by the prosecuting attorney. The record is silent on this matter. It does not contain the remarks of which complaint is made. If the court fails to control the argument within proper bounds and to instruct the jury to discard the improper remarks, an exception should be taken to the ruling of the court. Not having done so, the defendant cannot complain here. *K. C. Sou. Ry. Co.* v. *Murphy*, 74 Ark. 256; *Decker* v. *Laws*, 74 Ark. 286; *Powell* v. *State*, 74 Ark. 355; *St. L., I. M. & S. R. Co.* v. *Brown*, 100 Ark. 108.

(8) Finally it is insisted that the court erred in refusing to grant defendant a new trial for newly discovered evidence. One of the attorneys for the defendant stated on oath that he went to Caruthersville, Missouri, after the trial and learned from O. H. Harris that the deceased had told him that he brought the trouble on himself; that he was drinking and that Ollie Paul was not to blame. This evidence was cumulative merely and it is well settled that motions for a new trial upon the ground of newly discovered evidence which is cumulative merely, are addressed to the sound discretion of the trial court, and the exercise of this discretion will not be disturbed on appeal unless it is apparent that it has been abused. *Ward* v. *State*, 85 Ark. 179; *Osborne* v. *State*, 96 Ark. 400; *Russell* v. *State*, 97 Ark. 92.

The record shows that the case was submitted to the jury upon proper instructions, covering every phase of the case, and that the defendant had a fair trial. We do not find any prejudicial errors in the record, and the judgment will be affirmed.

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## STITH v. STATE.

Opinion delivered September 25, 1916.

1. FORGERY—INDICTMENT—NAME OF PERSON ATTEMPTED TO BE DEFRAUDED.—In an indictment charging forgery it is necessary to set forth the name of the person defrauded or attempted to be defrauded; however it is unnecessary to state the facts showing the manner in which the party has been defrauded by the forgery, for that is a matter to be established by the proof upon the trial of the case.

2. FORGERY—SUFFICIENCY OF INDICTMENT.—An indictment charging defendant with forging the name of Sam Stith to a writing in the following form: "Express Agt. please let bearer have my package, oblige Sam Stith," and containing an allegation that the act of forgery was committed for the purpose of cheating and defrauding Sam Stith, *held* to be a valid indictment.

Appeal from Ouachita Circuit Court; *C. W. Smith*, Judge; affirmed.

*H. P. Smead* for appellant.

1. The indictment does not allege the name of any person, firm or corporation to or upon whom the alleged false instrument was uttered or passed. Unless excused by an allegation that such person was to the grand jury unknown, this is a fatal omission. 120 Ark. 170.

2. A bill of exceptions is not necessary where the error appears from the record and does not grow out of the admission or exclusion of evidence, or the giving or refusing instructions. 46 Ark. 21; 111 Ark. 474; 100 Ark. 517.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

The offense charged is not the uttering or passing of a forged instrument, but the crime of forgery only—a distinctly different offense. Hence, neither the case relied on by appellant, *Stith* v. *State*, 179 S. W. 178, 120 Ark. 170; nor *McClellan* v. *State*, 32 Ark. 609, applies. The indictment is sufficient. Kirby's Dig., §§ 1714, 1712; 12 Ruling Case Law, 140; *Id*, 155; 91 Ark. 485; 85 Ark. 203.

MCCULLOCH, C. J. Appellant was convicted under an indictment charging him with forging the name of

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his father, Sam Stith, to a writing in the following form: "Express Agt. please let bearer have my package, oblige, Sam Stith." The indictment contains an allegation that the act of forgery was committed for the purpose of cheating and defrauding Sam Stith.

The only question raised on this appeal concerns the sufficiency of the indictment. Counsel for appellant rely on the case of *Stith* v. *State*, 120 Ark. 170, 179 S. W. 178, which was an indictment against the present appellant for the same act; but it was alleged therein that the forgery was committed for the purpose of defrauding the express agent, without naming him, and we held that the indictment was insufficient. The indictment in the present case is different, however, in that it directly charges the felonious intent to defraud a particular individual—Sam Stith. There is a conflict in the authorities concerning the necessity for a specific allegation designating the person sought to be defrauded, but this court is committed to the rule that in such cases it is necessary to set forth the name of the person defrauded or attempted to be defrauded. *McClellan* v. *State*, 32 Ark. 609; *Stith* v. *State*, *supra*.

The allegations concerning the person defrauded may, however, be general, and it is unnecessary to state the facts showing the manner in which the party has been defrauded by the forgery, for that is a matter to be established by the proof upon the trial of the case. *Snow* v. *State*, 85 Ark. 203.

We are of the opinion, therefore, that the indictment is sufficient, and that the court was correct in overruling the demurrer.

Affirmed.

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## ROLLINS v. STATE.

Opinion delivered September 25, 1916.

1. LIQUOR—ILLEGAL SALE—EVIDENCE—NARRATIVE OF EVENTS.—Appellant was indicted for the crime of selling liquor illegally; *held* testimony by a witness that he called at appellant's place, asking one W. there for whiskey, that W. replied that witness would have to wait for appellant, and that he bought whiskey from appellant a few moments later, was competent and admissible.
2. EVIDENCE—HEARSAY—ILLEGAL SALE OF LIQUOR.—In a prosecution for the illegal sale of liquor, testimony of a police officer that he went to appellant's place, where he found one W. who claimed to be the proprietor thereof, and that he arrested W. for keeping a disorderly house, is hearsay and inadmissible.

Appeal from Garland Circuit Court, *Scott Wood*, Judge; affirmed.

*C. Floyd Huff* for appellant.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

McCULLOCH, C. J. Appellant was convicted of the offense of selling intoxicating liquors in violation of the Act of the General Assembly of 1915, known as the State-Wide Prohibition Law (Acts, 1915, Act No. 30 p. 98). Two errors of the trial court are assigned in rulings upon the introduction of evidence.

Appellant formerly operated a saloon in the City of Hot Springs, but claims that he quit the business on January 1, 1916, when the State-Wide Prohibition Law went into effect, and that his former place of business was taken over by a man named Andrew Williams, who operated a cold drink stand there. The theory of the State is that appellant continued as the proprietor of the establishment and sold intoxicating liquors unlawfully, and that Williams was his bar-keeper. Several witnesses were introduced by the State who testified that they bought whiskey and other intoxicating drinks from appellant in person at his place of business, and that Williams was there acting as bar-keeper.

(1) The principal ground urged for reversal is that the court allowed witness Luke Wesson to testify

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concerning a conversation with Williams in the absence of appellant. Wesson testified that he bought whiskey from appellant on several occasions, and that on one of the occasions when he went to the place appellant was absent, and when he asked Williams for whiskey the latter replied that he (witness) would have to wait for Mr. Rollins. He further testified in the same connection that appellant came to the place in a few moments afterwards and sold him the whiskey. It is earnestly insisted that this testimony amounts to an admission on the part of Williams that whiskey was being sold there, and that it was inadmissible because it was made in the absence of appellant.

The statement of the witness was merely introductory of the transaction in which he purchased whiskey from appellant in person. It was a part of the narrative of the transaction which culminated in the purchase of the whiskey, and could not have been prejudicial for the reason that the jury must, in order to have reached a verdict of conviction, have believed the statement of the witness that he purchased the whiskey from appellant in person. If the testimony of the witness had not shown that Rollins came in shortly after the conversation with Williams, and sold him the whiskey, then a different question would arise as to the competency of that part of his testimony which relates to the statement of Williams; but since it is shown by his testimony that Rollins subsequently made the sale to him, we cannot see how the other testimony could have had any prejudicial effect.

(2) The other assignment relates to the refusal of the court to allow witness Dave Young, who was a police officer in Hot Springs, to testify that he went to the place of business in question and arrested Williams for running a disorderly house, and that Williams claimed to be the proprietor. Appellant testified that Williams was the proprietor and that he had nothing to do with the operation of the business, and that he had not sold any whiskey. It was one of the issues in the case whether the business was operated by Williams for himself or as

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bar-tender for appellant, and the statements of Williams on that subject were incompetent, being merely hearsay testimony.

We are of the opinion, therefore, that the court did not commit any error in the trial of the cause.

Judgment affirmed.

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## LUCE v. ARKANSAS BRICK MANUFACTURING COMPANY.

Opinion delivered September 25, 1916.

1. APPEAL AND ERROR—STATEMENT OF TWO CAUSES OF ACTION—ELECTION—DUTY OF TRIAL COURT.—Appellee sued appellant, setting out two causes of action one for deceit and one for damages for negligence; *held* it was not error for the trial court not to require an election by appellee where appellee asked an instruction only upon the issue of negligence, and where the court instructed a verdict for appellant on the issue of deceit.

2. EVIDENCE—ACTION FOR DAMAGES—PERFORMANCE OF CONTRACT—OPINION.—In an action for damages for breach of contract, a witness for plaintiff was asked what plaintiff company had done in performance of its portion of the contract. Witness replied "everything." *Held*, the admission of this testimony was not erroneous, when witness then detailed the acts done by plaintiff company in the performance of its part of the contract.

3. EVIDENCE—REFRESHING RECOLLECTION—WRITTEN MEMORANDUM.—A witness may refresh his recollection from a memorandum, made by him at the time the transactions testified to were had.

4. EVIDENCE—STATEMENTS OF DEFENDANT.—Defendant undertook to burn certain brick for plaintiff by a certain process. In an action by plaintiff for damages for failure to perform the contract, testimony by a witness that one of defendants said "there is absolutely no use to fool with our brick unless he put coal in them; said it couldn't be done," is admissible, on the issue of defendant's negligence, and on the issue of whether it had violated its contract.

5. CONTRACTS—BREACH—SUFFICIENT EVIDENCE.—Defendant agreed to burn certain brick for appellee company, by a certain process at a cost not to exceed a certain figure. In an action by appellee for damages against defendant, the evidence held sufficient to show a breach of the contract by defendant.

6. CONTRACTS—BREACH—MEASURE OF DAMAGES.—Appellant agreed to burn certain brick for appellee, and if the burning was done at or below a certain figure the appellee agreed to pay appellant a certain sum for the right to use the process. Before the brick were properly burned appellant turned off the fires in the kilns, and appellee

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brought an action for the resulting damage to it. *Held.* The measure of appellee's damage was the loss which it sustained by reason of appellant's negligence, viz., the value of the merchantable brick which it lost by reason of the failure on the part of appellant to comply with its contract.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellee is a corporation engaged, among other things, in the manufacture of brick, at Little Rock, Arkansas. Appellant is a partnership, of Chicago, having the exclusive sales agency for what is designated as the "Lambert Process" of burning clay products, which will hereafter be designated as the "Process."

On the 17th of June, 1914, appellee and appellant entered into a written contract by which appellant agreed to install the process and burn for the appellee at least five kilns of brick, and as many as twelve kilns if the appellee demanded it. The appellant also agreed to furnish experts who were familiar with installing the process and burning the brick. Appellant was to furnish certain personal property, designated as "equipment."

The appellee was to pay the experts furnished by the appellant $500 per month while the brick was being burned. On completion of the burning of five merchantable kilns of clay products, acceptable in the local market, appellee agreed to purchase the right to use the process and to pay therefor the sum of $12,500.00. Appellee, under the contract, was to pay all the expenses of transportation of the process and equipment, and to furnish all the steam, fuel and labor, and to set up the kilns of clay products for burning according to the plans and specifications furnished by the appellant.

Under the contract the appellant was not to be responsible for the mistakes or misburns by the agents of the burner of the appellee, nor for any failure of oil supply. It was mutually agreed that if the fuel cost of burning the brick exceeded 50 cents per thousand brick,

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appellee would not be required to pay the purchase money for the right to use the process.

There were other provisions of the contract which it is not material to state.

Appellee sued the appellant, alleging, as its first cause of action, that it had been induced to enter into the contract by reason of the representations of appellant that it could burn brick for less than fifty cents per thousand; that the representations were false, and that appellee relied upon them, to its damage in the sum of $8,405.00.

And for a second cause of action appellee alleged that the appellant had "committed a breach of contract by carelessly and negligently burning the brick so as to entirely spoil and ruin them and render them worthless;" that appellant "carelessly, negligently and wrongfully turned off the fire and heat for the purpose of misleading and defrauding the appellee in an effort to make it appear that the plaintiff's brick could be burned by the process at a cost not to exceed fifty cents per thousand;" that by the careless, negligent and wilful breach of the contract the appellee lost the amount expended by it for material and labor, as well as the value of the brick destroyed, to the damage of the appellee in the sum of $8,405.00, for which it prayed judgment.

The appellant moved to dismiss the complaint for misjoinder of causes of action, and also moved to have appellant elect as to causes of action. Appellant also demurred to the complaint. The court overruled these motions and the demurrer.

The appellant filed an answer, admitting that it had entered into the contract, but denying the other material allegations of the complaint, and setting up specifically that it had complied with the contract on its part, specifying the particulars, and that appellee had wholly failed to perform the contract upon its part, specifying the particulars, and alleging that by reason of appellee's failure to perform the contract on its part the appellant was prevented from carrying out the contract.

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It alleged that it had been damaged in the sum of $12,500.00.

The appellee introduced the contract, which contained the provisions above set forth.

W. W. Dickinson, for the appellee, testified, among other things, that Mr. Luce, for the appellant, made certain representations to the effect that he could burn the brick by the process for less than fifty cents a thousand; that the clay in Chicago was very much of the same character as the clay at appellee's plant; that he had taken brick from appellee's plant; and had burned them in Chicago under the process and knew what he was talking about. And other representations to the effect that he had used the process at several places successfully. Appellant duly excepted to the ruling of the court in permitting this testimony.

There was testimony introduced on behalf of the appellee, over the objection of appellant, tending to prove that the appellee had performed the contract on its part, and specifying the particulars tending to show that it had carried out its contract. The testimony on behalf of the appellee further tended to show that in order to burn its kilns of brick so as to make them merchantable it was necessary that there should be from 2000 to 2125 degrees of heat; that the degree of heat was measured by an instrument placed in the kiln which was called a pyrometer; that appellant's agent in charge of the burning turned off the fire when the pyrometer registered 1640 degrees. Appellee called the agent's attention to the fact that the pyrometer did not show a sufficient degree of heat to burn the brick properly, and he said that the instrument was broken and was not registering correctly.

There was testimony on behalf of the appellee tending to show that when appellant's agent had burned oil enough to reach the contract price that he turned it off and quit; that if appellant had kept on the oil sufficient to raise the temperature of the brick to 2100 degrees the kilns would have been successfully burned and merchantable brick produced. A witness testified: "I

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think if they had held back on those fires about five hours they would have burned the brick. Mr. Luce got out of line when he started to do under the same conditions he did in Chicago, and the conditions varied, and he was up in the air. I think when he burned enough oil to reach the contract price he quit on No. 1 and 3. I was standing there when Mr. Aregood was blowing the kiln and I said 'if you are going to do that there is not any use.' In the first kiln there was burned about 10½ gallons of oil and the second about 30 gallons, maybe 35. If they had not turned it off I think the result would have been different."

One of appellant's brick burners was asked why he posed as a brick burner when he could not burn the brick, and he replied: "I am under orders just like you are, and when I burn so much I have to quit." This brick burner was also a witness for appellant, and testified on cross-examination that appellant wanted to demonstrate that it could burn the brick for less than fifty cents a thousand. At the time they were burning the brick witness did not pay any attention to the oil until the kiln was burnt. He had been burning brick by oil. About 1730 degrees of heat was generated on the bottom of the first kiln. If they had burned more oil the heat would have overrun 2000 degrees. The reason they did not get over 2000 degrees of heat was because they did not use enough oil. They could have used that amount of oil by continuing to supply it in those kilns, but witness did not think it was necessary, and cut it off because he thought enough heat had been supplied.

On the other hand, there was testimony tending to prove that appellant would have carried out its contract if appellee had installed certain machinery, made certain changes in the pulleys, furnished hard coal screenings and plenty of fuel, and, furthermore, if there had not been excessive rainfall.

Over the objection of the appellant, appellee was permitted to prove that the cost of merchantable, or properly burned brick, was from $6 to $10 per thousand, and there was evidence tending to show that appellee's loss on

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account of the brick not being properly burned was $7,422.00.

The court, at the instance of the appellee, and over the objection of appellant, instructed the jury as follows:

"You are instructed that on the 17th day of June, 1914, the plaintiff and defendants entered into a contract, by the terms of which, among other things, it was agreed that the defendants should burn not less than five and not more than twelve kilns of clay products by the Lambert process at the plaintiff's plant near the city of Little Rock, and if the fuel cost of burning said kilns should not exceed fifty cents per 1000 brick, the plaintiff was to pay to the defendants, among other things, $12,500.00 for the use of said process, but if the fuel cost of burning said kilns should exceed fifty cents per 1000 brick, then the contract in that respect was to be terminated and the plaintiff was not to pay any part of said $12,500.00. You are instructed that in burning the kilns of brick under the contract for the purpose of determining whether the fuel cost should exceed or be less than fifty cents per thousand brick, the defendants were bound to act in good faith and to burn merchantable brick acceptable in the local market if they were able to do so by the use of the Lambert process. If, therefore, you find from the evidence that defendants could have burned merchantable brick acceptable in the local market by the use of the Lambert process, but that, instead of completing the burning of said brick, they carelessly or negligently cut short the supply of oil and turned out the fires before the kilns were burned, and thereby ruined the kilns so that the brick were worthless, and inflicted a loss upon plaintiff, then your verdict should be for the plaintiff, on this issue, for the amount of the damage which the evidence may show it sustained."

The jury returned a verdict in favor of the appellee for $4,436.00, and from a judgment entered for that sum this appeal has been duly prosecuted. Such other facts as may be necessary will be stated in the opinion.

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*Mehaffy, Reid & Mehaffy* and *A. P. Clark Matson* for appellants.

1. The demurrer and motion to require plaintiff to elect should have been sustained. The two causes of action were inconsistent. 1 Enc. Pl. & Pr. p. 166; 28 N. H. 134; 1 Cyc. Pl. & Pr. p. 181; Kirby's Digest, § 6079; 10 N. Y. St. Rep. 8; 4 Hun (N. Y.) 415; 63 Cal. 99; 58 Ark. 136; 23 *Id.* 637.

2. There was error in the admission and rejection of testimony. The testimony admitted was neither relevant nor admissible, and hence prejudicial. This is particularly true of the evidence of the Dickinsons. 1 Moore on Facts, § 1; 8 S. E. 387; 43 S. W. 913; 42 Ark. 542; 16 Cyc. p. 1115.

3. There is no evidence to sustain the verdict. The action is based on negligence alone and none is shown.

4. The court erred in its rulings and charge as to the measure of damages. Compensation is the value of the material plus the labor and money expended and is not the value of the finished product. 106 U. S. 432; 44 Fed. 129; 94 Ark. 511; 93 Ark. 353. It is only in cases of willful trespass that the increased value is allowed. *Ib.*

5. The verdict is excessive. See cases *supra.*

6. The court erred in its charge to the jury.

*Coleman & Lewis* for appellee.

1. Conceding that the two causes of action are inconsistent, still, under § 6080 Kirby's Digest, the plaintiff was privileged to strike from its complaint, at any time before submission any or either cause of action. This was done and no prejudice resulted.

2. The testimony objected to was relevant and proper. Jones on Ev. § 874.

3. There is evidence to support the verdict. It was contradictory, but the jury, under proper instructions found for the plaintiff.

4. There is no just cause for complaint as to the measure of damages, as the jury figured on a basis of

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$6.00 per thousand, and deducted $522.00 from the amount.

5. There is no error in the instructions. No specific objections were made and defendant cannot complain. 95 Ark. 220; 87 *Id.* 607; 65 *Id.* 255; 102 *Id.* 640. The plaintiff lost the value of the brick by defendant's negligence and the verdict is right.

WOOD, J., (after stating the facts). I. Appellant contends that the court erred in overruling its motion to require appellee to elect between inconsistent causes of action and in overruling its demurrer to the complaint, which embraced inconsistent causes of action, and in admitting testimony as to alleged false representations made by one of the partners before the contract was entered into. Appellee, in its prayer for instruction, which the court granted, only asked that the issue of negligence set up in its second cause of action be submitted to the jury. This was tantamount to an abandonment by the appellee of its alleged cause of action for deceit and fraud. The court expressly instructed the jury, at the request of the appellant, "to find in favor of the defendants" (appellants) "on the first cause of action."

The legal effect of these rulings of the court was to permit appellee to strike from the complaint its cause of action for deceit and fraud and to withdraw that issue entirely from the jury. This is expressly authorized by section 6080 of Kirby's Digest. But even if the first cause of action had not thus been stricken out, the instruction to find affirmatively for the appellant on the first cause of action removed all possible prejudice that could have resulted to appellant from a consideration by the jury of this issue.

II. Objection is urged to various rulings of the court in the admission of testimony. (a) Witness, W. W. Dickinson, was asked by appellee this question: "After entering into the contract what did you do in the performance of it?" and answered, "Everything that he requested to be done."

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After making the above answer, witness detailed the things that were done by him in the performance of the contract. There was no prejudicial error in witness stating his conclusion since he detailed the facts upon which the jury could determine whether or not the contract had been performed by the appellee. It was competent, under the issues joined, for the appellee to show whether or not it had complied with its contract. Appellee alleged "that it had performed all things required of it by the contract." This allegation was specifically denied by the appellant. Furthermore, appellant affirmatively alleged that appellee "failed in every way to comply with the contract, and that by its failure and refusal to perform the contract it prevented the defendants from carrying out the contract." And appellant alleged that it had been damaged in the sum of $12,500.00 "by reason of plaintiff's violation of the contract," and prayed judgment for such damages.

(b) W. W. Dickinson, Jr., testified that he kept a daily register of what transpired at the plant while the appellee and the appellant were operating under the contract. He was asked to refer to this for the purpose of refreshing his memory and to tell the jury what was done by the defendants (appellants) from the time they first came to the plant. The record shows that the court instructed the jury "that the written memorandum is not evidence and cannot be used as evidence in the suit, only to refresh the memory of the witness. The witness is required to testify from what he knows, not what he had written."

There was no error in the court permitting the witness to use the memoranda for the purpose indicated, and the court's rulings on the various objections along this line show that the court permitted the witness to use the memoranda solely for the purpose of refreshing his memory, and not as affirmative evidence.

(c) Counsel for appellants urge in their brief that the court erred in permitting W. W. Dickinson, Jr., to state what Leggate said. The record shows that the witness testified that Leggate, a partner in the firm

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of appellants, while the brick were being burned, said to witness, "there was absolutely no use in trying to fool with our brick unless he put coal in them; said it couldn't be done."

This testimony was competent on the issue as to whether or not appellant had violated its contract and as to whether or not it was negligent in the manner of burning the brick.

(d) There was no error in permitting W. W. Dickinson, Jr., to testify that 2100 degrees of heat would have burned the brick. This testimony was relevant to the issue of negligence.

III. It is next contended that there was no evidence to support the verdict. The testimony on this issue is set forth in the statement, and we will not repeat it here. The testimony warranted the jury in finding that the appellant was negligent in not bringing the kilns to a sufficient degree of heat to successfully burn them. Appellant's attention was called to the fact, while the kilns were being burned, that the pyrometer, the instrument for measuring the degrees of heat, showed that the temperature of the kiln was not sufficient to burn merchantable brick. While appellant's agent in charge stated that the instrument had been broken and was not working properly, the evidence does not show that he made any demand upon the appellee for a new instrument or that he was dissatisfied with the pyrometer that was being used, or took any steps to obtain another, and there was testimony before the jury sufficient to warrant the finding that the necessary temperature to burn the brick so as to make them merchantable was not produced because appellant's agent in charge of the burning negligently turned off the oil used as fuel and thus reduced the temperature or prevented the temperature from reaching the necessary degree to properly burn the brick.

The contract provided that if the fuel cost of burning the first five kilns, or any number of kilns demanded by the appellee, not to exceed twelve, was over fifty cents per thousand brick, then the appellee was not

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liable to the appellant in the sum of $12,500 for the purchase price of the use of the process. There was sufficient evidence to warrant the jury in concluding that the necessary degree of heat was not attained because of the desire and effort on the part of the appellant in burning the brick to keep the fuel cost within the limit of fifty cents per thousand in order to secure the contract price for the use of the process.

IV. It would unnecessarily lengthen this opinion to set out the evidence in detail bearing on the issue as to whether or not the appellee violated its contract, and as to whether or not the appellant was negligent in the manner in which it burnt the brick. These were issues of fact for the jury, under the evidence.

V. The next question is, were these issues properly submitted. The contract bound the appellee to set up the kilns and install the machinery necessary for the use of the process, according to the plans and specifications to be furnished by the appellant, and to pay for the services of the experts that were necessary to be used in building the kilns and installing the machinery and in burning the brick. Appellee was also required to furnish all necessary steam and fuel.

The contract bound the appellant to burn at least five kilns of brick, and not more than twelve if demanded by the appellee, and these brick were to be burned so that they would be "merchantable, acceptable in the local market." If the cost of burning these was less than fifty cents per thousand, then appellee was to pay the sum of $12,500.00 for its right to the use of the process, according to the terms of the contract, but if the cost of burning the brick exceeded fifty cents per thousand, then appellee was not required to make the payments.

As we construe the contract, it absolutely bound the appellant to burn as many as twelve kilns of merchantable brick if the appellee demanded that many to be burned. It bound appellant to burn these kilns so as to make the brick merchantable whether the fuel cost exceeded fifty cents per thousand brick or not.

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The contract, in these respects, is unambiguous and no oral testimony could be permitted to change its express terms. The language of the contract itself shows that the parties to it did not contemplate that there should be any experimenting to determine whether or not merchantable brick could be burned by the process. That they could be so burned was treated by the parties as a certainty. The only uncertainty contemplated by the parties was the cost of the fuel necessary to burn the brick so as to make them merchantable. This they treated as uncertain, and hence the contract only bound appellee to pay the purchase price ($12,500.00) for the use of the process in the event that the fuel cost of burning merchantable brick should not exceed fifty cents per thousand.

Appellee, by its complaint and evidence, and its prayer for instruction, has sought to hold the appellant liable for its negligent failure to burn the brick. The appellee's prayer for instruction was predicated upon the issue of negligence raised by the pleadings and it correctly declared the law applicable to the evidence adduced on that issue. The instruction, among other things, as to the measure of damages, told the jury that if appellant negligently cut off the supply of oil and turned out the fires before the kilns were burned and the kilns were thereby ruined so that the brick were worthless, then their verdict should be for the plaintiff for the amount of damage which the evidence showed that the appellee had sustained.

Counsel for appellant urge that this portion of the instruction fixed an erroneous measure of damages. The instruction told the jury that if they found in favor of the appellee on the issue of negligence their verdict should be for the amount of damage which the evidence showed that the appellee had sustained. There was evidence tending to prove that appellee lost by reason of the failure to burn the kilns a total of 1237 thousand brick; that the minimum price for merchantable brick was $6.00 per thousand; that these brick which were not successfully burned by the process were worthless—a total loss. If this is true, the only rule that would allow appellee com-

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pensation for the damage it had sustained for the violation of the contract would be to permit appellee to recover the value of merchantable brick on the number of brick lost by appellant's failure to burn. It will be seen from this that the jury might have returned a verdict for $7,422. Their verdict for the loss of the brick was $6,900, $522 less than the actual loss according to the testimony adduced on behalf of the appellee. The instruction was correct in fixing the measure of damages at the "loss which appellee had sustained."

Appellant contends that the instruction permitted the jury to give appellee damages not only for the material and money expended by it, but also for the increased value of the manufactured brick. Under the contract appellee was to pay for all the labor and material furnished, and there was testimony which would at least warrant the finding by the jury that appellee had performed its contract in this as well as in other respects. The jury having so found, appellee was entitled, under the law and the evidence, to have the appellant perform its contract by the burning of merchantable brick. In other words, the jury were warranted in finding that if appellant had performed the contract on its part then appellee would have had on hand merchantable brick manufactured at its expense, which, on the local market, were worth more than the amount of the verdict returned by the jury. The total loss of this brick having been caused by the negligence of appellant, as the jury found, it was liable for the value of the brick so lost. Merely remunerating the appellee for the amount it had expended for material and labor in preparing and burning the brick would not compensate it for its loss under the contract. Appellee, under the contract, was entitled to be compensated to the extent of the value of the number of merchantable brick which it lost by reason of the failure on the part of appellant to comply with its contract.

It follows from what we have said that the verdict was not excessive, and the court did not err in refusing prayers for instructions on the part of appellant which

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were not in harmony with the construction which the trial court and this court has placed upon the contract.

It was conceded by the parties that the appellee had in its possession personal property of the appellant of the value of $2,640.00. The jury, under the court's direction, reduced the verdict in favor of the appellee by this amount and returned a verdict for the balance, for which judgment was entered.

The judgment is correct, and it is therefore affirmed.

SMITH, J., (dissenting). I concur in all that is here said except that I think the court has approved an erroneous measure of damages. In my opinion the recovery should have been limited to the value of the material used and the money expended in the attempt to manufacture this material into brick.

Mr. Justice KIRBY concurs in this view, if any recovery is permitted, but he is also of the opinion that no liability is shown and that a verdict should have been directed in appellant's favor.

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## STUART v. STATE.

Opinion delivered September 25, 1916.

LIQUOR—ILLEGAL SALE—ACT OF INTERMEDIARY.—Appellant, knowing that one C., who had whiskey for sale, would not sell the same to one F., went to C., procured a quart of whiskey, delivered the same to F., received pay therefor and handed the amount so received to C. *Held*, appellant was guilty of a violation of Act 30, p. 98, Acts of 1915.

Appeal from Hempstead Circuit Court; *George R. Haynie*, Judge; affirmed.

*O. A. Graves* for appellant.

1. The court should have directed a verdict of not guilty, because, the most that can be said of the evidence is that it shows that appellant aided the buyer in procuring the whiskey, confining his participation in the transaction exclusively to the buying, and not to the selling. *Wilson* v. *State*, MS. Op. June 19, 1916; 114 Ark. 391; 101 Ark. 569; 90 Ark. 579; *Id.* 589; 68 Ark. 468.

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2. If this was a case for the jury, the only proper question to be submitted to them was whether or not the appellant was interested, directly or indirectly in the sale, or, in good faith, confined himself exclusively to the buying. *Supra.*

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. This was not a proper case for a directed verdict of acquittal. The appellant was not charged with the procurement of liquor for another, but with the sale of it. The evidence establishes a sale. Act No. 30, Sec. 2, Acts 1915; 90 Ark. 579, 582; 105 Ark. 465.

2. Appellant was not prejudiced by the refusal to give the instruction requested. In an instruction given, the jury were specifically instructed that, before finding the defendant guilty, they must find either that he made the sale or was interested, directly or indirectly, in the sale. 114 Ark. 392.

HART, J. Ed Stuart was indicted, tried and convicted for a violation of Act No. 30 of the Acts of 1915, making it a felony to manufacture, sell or give away, or be interested directly, or indirectly, in the manufacture, sale or giving away of intoxicating liquors. (Acts of 1915, page 98.) The case is here on appeal.

The testimony on the part of the State tended to show that in February, 1916, Buster Flanagin purchased a quart of whiskey from the defendant, in Hempstead County, Arkansas, and paid him therefor one dollar and fifty cents.

Ed Stuart, the defendant, testified for himself substantially as follows:

Buster Flanagin met me in Columbus in Hempstead County and wanted to know if I knew where he might get any whiskey. I told him yes. He said that Henry Cheatham had quit letting him have it. I went on down the road to where Henry Cheatham lived and got a quart of whiskey from him. I carried it back and delivered it to Buster Flanagin. He paid me one dollar and fifty

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cents for the whiskey and I carried the money and gave it to Henry Cheatham.

A reversal of the judgment of conviction is asked by counsel for the defendant on the ground that the court erred in refusing to give to the jury a certain instruction asked for by him. We need not consider whether or not the court should have given the instruction; for the defendant under his own testimony was guilty. He admitted that he knew that Henry Cheatham would not sell the whiskey to Buster Flanagin but that he would let him have it. The defendant's own testimony thus shows that he was a necessary factor in making the sale and that he acted for the seller as well as the buyer. In other words he admits that he knew that Henry Cheatham would not sell to Buster Flanagin but would let him have the whiskey. He acted as intermediary in making the sale and was interested in the sale of the liquor within the rule announced in the cases of *Dale* v. *State*, 90 Ark. 579, and *Bobo* v. *State*, 105 Ark. 462. See also *Wilson* v. *State*, 124 Ark. 477.

The defendant being, according to his own testimony, guilty of the offense for which he was being tried, he was not prejudiced by the refusal of the court to give the instruction complained of. Therefore, the judgment will be affirmed.

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## WILSON v. STATE.

Opinion delivered September 25, 1916.

EVIDENCE—CRIMINAL PROSECUTION—WIFE AS WITNESS AGAINST HUSBAND.—Appellant was indicted for the crime of carnally knowing one T., a female under sixteen years of age. After the act, and before the trial, T. voluntarily married the appellant. *Held*, thereafter T. was incompetent to testify against appellant concerning the acts charged in the indictment.

Appeal from Miller Circuit Court; *George R. Haynie*, Judge; reversed.

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*M. E. Sanderson*, for appellant.

The prosecuting witness being the wife of the defendant was incompetent to testify for or against him. Kirby's Dig., § 3095. She does not come within the exception provided by the statute. Kirby's Dig., § 3092. 148 S. W. 328; 71 S. W. 20; 75 S. W. 497; 126 S. W. 591; 79 N. W. 518; 98 N. W. 510; 37 So. 156; 43 S. E. 720; 4 Utah 499; 137 Cal. 534; 59 L. R. A. 588.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

The Attorney General confesses error on the ground that a crime committed against one who is not at the time the spouse of the other, is not a crime against the husband or the wife. In this case there was no crime against the wife of the appellant, and she having subsequently married the appellant, was incompetent to testify. 209 Fed. 993; 146 Pac. 903; 98 N. W. 510; 98 Pac. 682; 39 S. W. 462; 79 N. W. 518; 40 S. W. 313; 45 L. R. A. (N. S.) 399; 94 Mass. 107; 70 Pac. 468; 129 Cal. 118; 122 Ia. 658; 92 Pac. 904; 4 Utah, 499; 37 So. 156; 43 S. E. 720; 130 N. C. 726; Wigmore on Evidence, § 2227; Jones on Evidence, § 734; Greenleaf on Evidence, § 336.

HART, J. Lawrence Wilson was indicted for the crime of carnal abuse, charged to have been committed by carnally knowing Emma Turner, a female under sixteen years of age. He was tried before a jury which returned a verdict of guilty and assessed his punishment at one year in the State penitentiary. The case is here on appeal.

It is conceded by counsel for the defendant that the testimony adduced in behalf of the State, if competent, is legally sufficient to support the verdict. Hence it is not necessary to abstract the testimony. The State relied on the evidence of Emma Turner to convict the defendant. After the indictment was found and before the trial commenced, Emma Turner married the defendant. She was permitted to testify over the objections of the defendant and the action of the court in this

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regard is the only assignment of error upon which a reversal of the judgment of conviction is asked. The Attorney General confesses error. The correctness of the ruling of the trial court depends upon the construction of section 3092 of Kirby's Digest, which reads as follows:

"In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either."

The common law upon considerations of public policy and to preserve the harmony of the marriage relation, prohibits the husband and wife from testifying for or against each other in criminal cases. Section 3092 of Kirby's Digest makes the statutory exception to the rule of the exclusion of the husband or wife as a witness against each other while the marriage relation exists. The exception mentioned in the statute means an injury against the person or property of the husband or wife while they occupy that relation. In other words, an injury done by either against the person or property of either committed against one who is not at the time the spouse of the other, does not come within the exception provided for in the statute. Decisions so construing acts similar in terms to the one in question have been cited by both the Attorney General and by the counsel for the defendant. The rule is so nearly universal in its application that we need cite only a few of the cases. In none of the cases cited do we find any warrant for the conclusion that the wife would be co npetent as a witness against the husband upon his trial for an offense consisting of an injury to her unless the act occurred during the existence of the marriage relation, or was brought within it by force exerted by him, beginning before and continuing into and beyond the beginning of that relation. *Norman* v. *State* (Tenn.) 45 L. R. A. (N. S.) 399; *State* v. *McKay* (Iowa) 98 N. W. 510; *State* v. *Evans*, (Mo.) 39 S. W. 462; *State* v. *Frey*, (Minn.) 79 N. W. 518; *Miller* v. *State*, (Tex.) 40 S. W. 313; *People* v. *Vann*, (Cal.) 61 Pac. 776; Greenleaf on Evidence, 16th ed. Section 336.

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In the instant case Emma Turner, the injured person, voluntarily married the defendant after the commission of the offense upon her person. She was not, therefore, a competent witness against her husband and the court erred in admitting her testimony before the jury. For that error the judgment will be reversed and the cause remanded for a new trial.

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## HENRY v. STATE.

Opinion delivered September 25, 1916.

MAIMING—INTENT—SUFFICIENT EVIDENCE.—Appellant went into the field where one R. was at work, cursed and abused him, assaulted him with some sort of weapon that cut a three inch gash in R's head, and then in the continuance of the fight, bit off R's nose, intending to bite and knowing that he was doing so. *Held*, the evidence was sufficient to support a verdict and judgment of the crime of maiming.

Appeal from Miller Circuit Court; *George R. Haynie*, Judge; affirmed.

STATEMENT BY THE COURT.

Sol Henry brings this appeal from a judgment of conviction of the crime of maiming, by biting off the nose of one John Robinson.

It appears from the testimony that appellant's mules had broken into the field of Jno. Robinson, a tenant on his place and had torn down some corn. The next morning Robinson spoke to defendant's brother about the matter and told him that he did not claim any damages but wanted them to keep the stock up. While he was plowing in his field about 15 minutes afterwards, appellant came up and stated his brother had told him that his mules had gotten into the field last night and torn down a lot of corn, to which he replied "Yes." Appellant said "God damn it, if my brother had listened to me he would not have rented you this land," and "There is going to be hell." Robinson replied "I don't see where you got any kick coming." Appellant then said, "You God damned hill-billies come down here and try to run the bottom.

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I had rather this land lay out than you God damned hill-billies work it."

Robinson's wife came up and called to him and as he turned his head toward her, appellant struck him on the head and they fell together to the ground, Robinson finally getting on top.

Appellant's brother, while they were fighting, took hold of Robinson, pulled him up and appellant reached his arm up around Robinson's neck and pulled him down and bit his nose off.

John Coleman, who saw the fight, said that appellant struck Robinson first, that they clinched and fell to the ground, "and when Bobbie, appellant's brother, went to pull John up off Sol, he reaches and catches him around his neck and pulls him back, and that's when he bit his nose off."

Appellant stated that when he walked up, Robinson said, "I charge you boys nothing, and all I ask you to see is to keep the mule out," that he walked around him and Robinson struck and knocked him down; that he fell on top of him and was beating him in the face and choking him and said, "If I cannot choke you, I will bite you" and I had my eyes shut and he bit me and I guess his nose struck against me both and I bit. I did not know what I was biting. Denied having sworn at Robinson and stated that he ran off after Robinson whipped him. Said he only went to see Robinson to settle about the damage his mule had done and not to raise any row.

*M. E. Sanderson*, for appellant.

The evidence does not support the verdict. There is not that premeditated design shown to commit the act, which is contemplated by the statute. Kirby's Dig., § 1865; 63 N. Y. 207; 67 N. Y. 15; 18 Ore. 506; 23 Pac. 891.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

The facts shown in evidence justified the verdict, sufficient to show that the act was done "wilfully and of

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his malice aforethought." Maiming is not excusable or justified because inflicted in a sudden conflict. Kirby's Dig., §§ 1864, 1865; Wharton on Crim. Law, 980; Clark, Crim. Law, 213; 87 N. C. 513; 23 N. C. 121; 2 *Id.* 112; *Id.* 325; 3 Ala. 497; 49 *Id.* 18; 86 Tenn. 512; 13 N. C. 425; 22 Tex. App. 45; 41 Tex. 619; 70 Iowa 505; 93 Cal. 564; 4 Ark. 56.

The New York statute on maiming differs so materially from ours that the case relied on by appellant is not persuasive.

KIRBY, J. (after stating the facts). Appellant complains only that the evidence is not sufficient to support the verdict. The statute provides, Sec. 1865, Kirby's Digest, "If any person shall wilfully and of his malice aforethought, cut or bite off the ear * * * cut or bite off the nose or lip of any person, he shall be adjudged guilty of maiming." Maiming consists in unlawfully disabling a human being by depriving him of the use of a limb or member, etc. Sec. 1864.

It is argued for appellant that in order to commit the offense the act must be done with premeditated design to do the very act, that it occurred in an ordinary affray while the parties were fighting together and without any intention to do the particular thing and that no offense was committed within the meaning of the statute. He relies upon the case of *Godfrey* v. *The People*, 63 N. Y. 207, as authority for this contention and although this case supports the position, the statute under which the offense there was charged, is altogether unlike ours. If the testimony had only shown that the injury occurred while the parties were fighting by mutual agreement, it would not have constituted the offense of maiming. Sec. 1573, Kirby's Digest.

Appellant admits having fought with the injured person and that he bit off his nose and the testimony shows that he started the fight and struck the first blow. He intended to do the thing which he did. "The act being proved to have occurred in an encounter, the law presumes that the act was done with the intent re-

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quired by the law to constitute guilt." I. Wharton Criminal p. 981; Clark's Criminal Law, 213.

In *Baker* v. *State*, 4 Ark. 56, the court in discussing the statutory definition of maiming, said: "It is implied that the act being unlawful in itself, evidences a malicious intent and is immaterial by what means or with what instrument the injury is effected." It is immaterial at what period of time during the encounter the malicious design is formed to inflict the particular injury, so long as it was intended or purposely done.

The Supreme Court of Alabama under a statute similar to ours, in *State* v. *Simmons*, 3 Ala. 497, said: "It is not necessary where injury is done in a certain conflict that the defendant should have formed the design previous to the conflict. It was sufficient if the defendant maliciously and on purpose does the act in pursuance of a design formed during the conflict." See also *Molette* v. *State*, 49 Ala. 18; *Terrell* v. *State*, 86 Tenn. 523; *State* v. *Crawford*, 13 N. C. 425; *Slattery* v. *State*, 41 Tex. 619; *State* v. *Jones*, 70 Iowa 505.

Appellant went to the field where the injured party was at work, cursed and abused him, assaulted him with some sort of a weapon that cut a three inch gash in his head and then in the continuance of the fight, bit off his nose, at the time intending to bite and knowing he was doing so.

The evidence is sufficient to support the verdict and the judgment is affirmed.

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## PERRY v. JARMAN, TRUSTEE.

Opinion delivered September 25, 1916.

CONTRACT TO PAY DEBT OF ANOTHER—COLLATERAL UNDERTAKING—STATUTE OF FRAUDS.—An oral agreement by a landlord to pay for certain goods furnished to his tenants, only in the event that they failed to pay, is a collateral, and not an original undertaking, and is within the statute of frauds.

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver*, Judge; reversed.

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*Baker & Sloan*, for appellant.

1. Instruction No. 1, asked by defendant, was the law of this case and should have been given. 127 Ala. 240; 28 So. 665. As to collateral undertakings, see 12 Ark. 174; 31 *Id.* 613; 88 *Id.* 592; 102 *Id.* 435. As to original undertakings, see 40 Ark. 429; 76 *Id.* 1; 93 *Id.* 277.

2. Instruction No. 1 as given by the court was erroneous. It disregards the statute of frauds; it assumed that the statement of accounts was correct and is not the law of the case. See case cited, *supra*.

SMITH, J. This suit was brought by the trustee in bankruptcy of an insolvent merchant to enforce the collection of certain accounts for merchandise alleged to have been sold and delivered to tenants on the farm of appellant. The goods were sold by a firm of merchants doing business as Linville & Poff, but Linville subsequently acquired the interest of Poff and later became insolvent. The evidence of Linville and Poff is not altogether free from uncertainty as to the nature of the contract under which they sold and delivered the goods sued for.

Appellant denied that he had agreed to pay for the supplies furnished his tenants by Linville & Poff, and the cause was sub nitted to the jury for their decision upon this question of fact. Over appellant's objection, the jury was told that if the goods were furnished to him by delivering them to his tenants under an agreement by which they were to be so charged and delivered, to find for the plaintiff. Abstractly considered, this instruction is, of course, a correct declaration of the law, but it ignores a defense which appellant sought to submit in an instruction requested by him and refused by the court, which instruction reads as follows:

"If you find from the evidence that defendant Perry was merely a guarantor for Cleveland and Morrow, and that he was to become liable to Linville and Poff only in the event that one or the other, or both of the said parties, Cleveland ro Morrow, failed to pay, and that he did not assume original liability for their accounts, then your

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verdict must be for the defendant. If there was liability of Cleveland and Morrow to pay Linville and Poff for the goods, wares and merchandise received by them, then plaintiff cannot recover from the defendant, and you will so find by your verdict."

Appellant contends this instruction should have been given for the reason that the proof of the merchants shows a collateral and not an original agreement to pay, and that the agreement not having been in writing was void under the statute of frauds. We have not been favored with a brief by appellee and we do not know upon what ground this instruction was refused, but presume that it was upon the ground that the issue in the case was whether appellant had agreed to pay at all, and not whether the agreement was original or collateral.

It is true appellant denied any agreement on his part to pay, and that Linville and Poff testified they sold the goods to appellant and delivered them to his tenants; and if no other issue was raised by the evidence, then it could be said that appellant's instruction was properly refused, and the one given covered the issue in the case. But this does not appear to have been the only issue. During the course of his examination Linville made the following statements: That he told the tenants, when they applied for advances and credit to make the crop, that they would have to have Mr. Perry (appellant) come in and stand for the bill. That he advised Mr. Perry he would not let the tenants have goods unless he was responsible for them. That the goods "were charged to Mr. Perry by whoever bought them," and that he was extending credit to Mr. Perry. That he asked Perry whether he would stand for the tenants as he had done the year before, and that Perry talked as if he would not do so, but later asked what discounts would be given if the bills were paid monthly. There were no notes or other writing and nothing was said about notes, but Perry just said he would stand for the tenants. That he had tried him out on the note proposition the year before and knew he would not sign one, and that every year before

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he had given orders for all the tenants got, but during the year in question had given no orders.

Poff, who was a partner at the time, testified that they had been trying to get Morrow (one of the tenants) to make a note with Perry as surety, and they called Perry in and talked to him about it. That Perry said he had a tenant on the farm by the name of Cooper and that they (Poff and Linville) would have to look out for him, but as for the others it would be all right; that they were asking Perry to guarantee the accounts and that he was called in for that purpose and said it would be all right.

Under this evidence the jury might have found that even though appellant had promised to pay for the goods, the promise amounted only to an agreement to do so in the event only that the tenants failed to pay, and such a promise is a collateral and not an original undertaking and should, therefore, have been evidenced by some writing to be binding. *Swaboda* v. *Throgmorton-Bruce Co.*, 88 Ark. 592.

The instruction requested by appellant should have been given, notwithstanding the concluding clause thereof is not necessarily the law. There could, of course, be such a thing as joint liability, but this qualifying clause did not render the instruction erroneous under the evidence in this case.

Other assignments of error are urged, but we think they are not of sufficient importance to require discussion. For the refusal to give the instruction requested by appellant, the judgment will be reversed and the cause remanded.

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## STATE v. LEATHERMAN.

Opinion delivered September 25, 1916.

PERJURY—SUFFICIENCY OF INDICTMENT.—The indictment charging that defendant was guilty of the crime of perjury, *held* sufficient, and that the trial court erred in sustaining a demurrer thereto.

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Appeal from Greene Circuit Court; *J. F. Gautney*, Judge; reversed.

*Wallace Davis*, Attorney General, *Hamilton Moses*, Assistant, and *M. P. Huddleston*, Prosecuting Attorney, for appellant.

1. It was error to sustain the demurrer to the indictment. 110 Ark. 549; 91 *Id.* 200; 124 Ark. 38.

SMITH, J. This appeal has been prosecuted from an order and judgment of the Greene Circuit Court sustaining a demurrer to the following indictment:

"The grand jury within and for Greene county, Arkansas, in the name and by the authority of the State of Arkansas, accuse the defendant, Charles Leatherman, of the crime of perjury, committed as follows, to wit:

"In the county and State aforesaid, on the 8th day of April, 1916, then and there came on for preliminary investigation and trial, before A. B. Hays, justice of the peace within and for Clark township, Greene county, Arkansas, a case wherein the State of Arkansas was plaintiff and Ed Clark defendant upon a felony charge, to wit: upon the charge that he, the said Ed Clark, had sold intoxicating liquor in Greene county, Arkansas, since the first of January, 1916. The said justice of the peace court aforesaid then and there having jurisdiction to try, hear and determine said case aforesaid; and then and there came the defendant, Charles Leatherman, who was then and there by A. B. Hays, justice of the peace aforesaid, duly sworn that the testimony that he should give in said cause should be the truth, the whole truth and nothing but the truth; he, the said A. B. Hays aforesaid, then and there having lawful authority to administer said oath aforesaid to said Charles Leatherman aforesaid. The said Charles Leatherman aforesaid then and there being qualified as a witness aforesaid to testify in behalf of the State of Arkansas; and, then and there being duly sworn as aforesaid, in the manner and form as required by law, and hereinbefore set out; did then and there unlawfully, wilfully, knowingly, corruptly, wickedly, falsely and feloniously testify, depose and say that on the

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27th day of March, 1916, one Buck Taylor did not deliver to him one dollar in money with which to purchase intoxicating liquor; and that he, the said Charles Leatherman, did not receive from the said Buck Taylor one dollar in money for which to purchase intoxicating liquor, and that he, the said Charles Leatherman, did not on said day, or at any other times since January 1, 1916, and in the county and State aforesaid, purchase a pint of intoxicating liquor for him, the said Buck Taylor, and deliver to him, the said Buck Taylor, said intoxicating liquor aforesaid. Which said testimony so given aforesaid, in said cause aforesaid, was then and there unlawfully, wilfully, wickedly, corruptly and feloniously false in this: That on the 27th day of March, 1916, in the county and State aforesaid, the said Buck Taylor did deliver to the said Charles Leatherman one dollar in money, for which to purchase intoxicating liquor, and the said Charles Leatherman did, on the 27th day of March, 1916, in the county and State aforesaid, receive from the said Buck Taylor one dollar in money with which to purchase intoxicating liquor; and the said Charles Leatherman, on the 27th day of March, 1916, in the county and State aforesaid, after receiving said one dollar in money aforesaid, did purchase and deliver to the said Buck Taylor one pint of intoxicating liquor. Which said testimony aforesaid, so given aforesaid, in said cause aforesaid, was then and there material to the inquiry then and there under investigation. The court then and there inquiring into the question as to whether a felony had been committed in said county and State aforesaid by the said Ed Clark aforesaid. The said Charles Leatherman aforesaid then and there well knowing that his said testimony aforesaid was then and there unlawfully, wilfully, knowingly, corruptly and feloniously false, against the peace and dignity of the State of Arkansas.

"M. P. Huddleston, Prosecuting Attorney."

In his demurrer appellee sets up twelve separate and distinct reasons for which he alleges the indictment is bad. Most of these reasons have so little merit that we assume they were not seriously considered by the court

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below. We are not aware upon which one or more of the grounds assigned the demurrer was sustained, as appellee has not favored us with a brief, but the Attorney General has apparently briefed the grounds which were pressed upon the attention of the court below and we shall discuss those only.

It is urged that "the indictment does not allege that A. B. Hays, the alleged justice of the peace before whom the alleged cause of the State of Arkansas against Ed Clark was pending was either an elected, appointed, qualified or acting justice of the peace within and for Greene county, Arkansas." In answer to this ground of demurrer, it may be said that section 1970 of Kirby's Digest provides:

"In indictments for perjury, it shall be sufficient to set forth the substance of the offense charged, and by what court or before whom the oath or affirmation was taken, averring such court or person to have competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury is charged or assigned, without setting forth any part of the record, proceedings or processes either in law or equity, or any commission or authority of the court or person before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same."

The allegations of the indictment as to the jurisdiction of the officer administering the oath are as follows: "The said justice of the peace court aforesaid then and there having jurisdiction to try, hear and determine said case aforesaid, and then and there came the defendant, Charles Leatherman, who was then and there by A. B. Hays, justice of the peace aforesaid, duly sworn that the testimony he should give in said cause should be the truth, the whole truth and nothing but the truth; he, the said A. B. Hays aforesaid, then and there having lawful authority to administer said oath aforesaid to said Charles Leatherman aforesaid." These allegations appear to meet the requirements of the section of the statute quoted. An allegation somewhat less specific

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than the one set out was held sufficient in the case of *Loudermilk* v. *State*, 110 Ark. 549, in which case we quoted from 30 Cyc. 1429, the following language:

"In an indictment for perjury, the authority of the officer to administer the oath must be shown by proper averment. If it is not, the indictment will be fatally defective. This may be done either by an express averment that the officer had authority, or by setting out such facts as make it judicially appear that he had such authority. Where the authority of the officer to administer the oath fully appears by the facts set forth in the indictment, the formal allegation of his authority is unnecessary, since the court will take judicial notice thereof."

It is urged that "the indictment does not allege that defendant, Charles Leatherman, testified the alleged false testimony in the case of State of Arkansas against Ed Clark, so alleged to have been pending before said alleged justice of the peace." The allegations of the indictment are: "Then and there came the defendant, Charles Leatherman, who was then and there by A. B. Hays, justice of the peace aforesaid, duly sworn that the testimony he should give in said cause should be the truth, the whole truth and nothing but the truth; he, the said A. B. Hays aforesaid, then and there having lawful authority to administer said oath aforesaid to said Charles Leatherman aforesaid. The said Charles Leatherman aforesaid then and there being qualified as a witness aforesaid to testify in behalf of the State of Arkansas; and, then and there being duly sworn as aforesaid, in the manner and form as required by law, and hereinbefore set out; did then and there unlawfully, wilfully, knowingly, corruptly, wickedly, falsely and feloniously testify, depose and say." These allegations appear to charge that appellee was sworn to testify on behalf of the State in the case of the *State of Arkansas* v. *Ed Clark*, and that he testified in that cause. Further allegation or recital on that score was not only unnecessary but would have been without effect.

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One of the grounds urged upon the court below was that the indictment did not sufficiently negative the affirmative matter pleaded. There is a statement of the evidence given which is transversed by a recital of what the truth in fact was.

It is finally urged that the materiality of the false evidence is not alleged. But it is alleged that the justice of the peace was investigating a charge of selling "intoxicating liquors in Greene County, Arkansas, since the first of January, 1916," and we judicially know that such an act is a felony under the laws of this State. Act No. 30, Acts, 1915, p. 98. Moreover, the indictment alleges that the false evidence was material, and this allegation is sufficient even though there were no recitals from which the materiality of the evidence appeared. *Smith* v. *State*, 91 Ark. 200; *Loudermilk* v. *State*, *supra*.

A very recent case defining the essentials of a valid indictment for perjury is that of *Beavers* v. *State*, 124 Ark. 38, 186 S. W. 300, and we think the indictment set out meets the requirements of that case.

It follows, therefore, that the court erred in sustaining the demurrer, and the same should have been overruled.

Reversed and remanded.

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## MERRILL v. CITY OF VAN BUREN.

Opinion delivered September 25, 1916.

1. ANIMALS—RUNNING AT LARGE—VIOLATION OF CITY ORDINANCE.—In a prosecution for a violation of a city ordinance rendering it unlawful for certain fowls to run at large in a certain city, *held*, an instruction on the intent of the defendant in permitting certain fowls to run at large, properly covered the issue.

2. APPEAL AND ERROR—FAILURE OF TRIAL JUDGE TO REDUCE INSTRUCTIONS TO WRITING.—Trial judges should always reduce instructions given to the jury to writing, and a cause will be reversed when the court fails to do so when requested by either of the parties, except in cases where it affirmatively appears that no prejudice resulted from the failure.

3. NUISANCES—POWER OF CITY OR TOWN.—A municipal corporation cannot declare that to be a nuisance which is not such *per se*.

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4. MUNICIPAL CORPORATIONS—CONTROL OF FOWLS RUNNING AT LARGE WITHIN CORPORATE LIMITS.—A city ordinance "that it shall be unlawful for any chickens, geese, turkeys, guineas, and like and similar fowls, to run at large within the corporate limits of" the said city, is a valid exercise of the right given to cities to cause any nuisance to be abated.

Appeal from Crawford Circuit Court; *James Cochran*, Judge; affirmed.

*Sam R. Chew* for appellant. *Park Crutcher* of Counsel.

1. If the power to pass this ordinance is not given by Kirby's Digest, §§ 5438, 5450 and 5453, the ordinance is void. A municipal corporation has no powers except such as are specifically delegated to it. 3 Ark. 114; 45 *Id.* 454; 27 *Id.* 467; 31 *Id.* 462.

2. A cotton gin is not *per se* a nuisance. 93 Ark. 362. A city has no power to prevent the sale of fresh pork within its limits. 64 Ark. 424. The running at large of fowls is not a nuisance *per se*. 70 Ark. 12.

3. If cattle or hogs while running at large are under the supervision or care of some person it cannot be said that they are running at large in violation of law. 27 S. W. 200; 124 Ind. 499; 27 N. E. 505; 24 Kans. 588; 63 Me. 468.

4. In refusing to reduce its instructions to writing the Court committed reversible and prejudicial error. 51 Ark. 177.

*E. L. Matlock*, City Attorney, for appellee.

1. The city had power to pass the ordinance. Kirby's Digest, §§ 5438, 5461; 70 Ark. 12. It is a *reasonable* regulation.

2. There is no error in the instructions. The word "suffered" or "permit" as used means willful or intentional. The jury knew that chickens in charge of some one does not constitute "running at large." Taking all the instructions together in connection with the evidence the refusal to give No. 1 was not prejudicial.

3. The taking down by the stenographer and reducing to writing, etc., of the Court's instructions is a sub-

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stantial compliance with the spirit and intention of the constitution. The purpose was to preserve the instructions in the record. This court can see that no prejudicial error resulted. 51 Ark. 177, 47 *Id.* 407; 13 *Id.* 705; 25 Mich. 379-80.

SMITH, J. Appellant was convicted for a violation of an ordinance of the City of Van Buren which provides "that it shall be unlawful for any chickens, geese, turkeys, guineas, and like and similar fowls to run at large within the corporate limits of Van Buren, Arkansas." Section 2 of the ordinance reads as follows:

"That the running at large within the corporate limits of said City, above described, stock, fowls and animals, is hereby declared to be a nuisance and any owners or controller or manager of any of above-dsscribed animals who suffer the same to run at large as above specified shall be guilty of a misdemeanor and on conviction thereof in the City Court of said City fined in any sum not less than $5.00, nor more than $25.00 for each and every time that said owners or managers shall allow said animals to run at large as above specified he shall be guilty of a misdemeanor for each day thereof, each day constituting a separate offense."

Appellant denied that he had violated the ordinance, and he questions the authority of the city to enact it. He also says that error was committed by the court in refusing to reduce the instructions given by the court to writing, instead of giving them orally and having them reported in shorthand by the official court stenographer and later transcribed and filed with the bill of exceptions.

(1) Appellant complains of the action of the court in refusing to give an instruction requested by him numbered 1, which reads as follows:

"If defendant turned out either his chickens or ducks and guarded them while out then this would not constitute a violation of the ordinance in evidence."

If defendant turned out his chickens or ducks and guarded them while out, this would not constitute a violation of the ordinance in question. But the court

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gave an instruction in which the jury was told that a conviction could not be had unless they found beyond a reasonable doubt that defendant suffered or permitted chickens or ducks or other fowls to run at large within the corporate limits of the City of Van Buren, and at appellant's request charged the jury that "the word 'suffered' or 'permit' as used in the ordinance and instructions means willful or intentional and unless you find from the evidence beyond a reasonable doubt that defendants willfully or intentionally permitted their chickens or ducks to run at large in the City of Van Buren your verdict should be one of not guilty."

It appears that appellant kept large numbers of domestic fowls for the market, and the evidence on behalf of the prosecution was to the effect that chickens, ducks and other fowls strayed away from appellant's barnyard, where the fowls were kept, and went unattended about the neighborhood. Appellant insists that he attempted to keep the fowls within his enclosure provided for that purpose, although he admits they were occasionally released to catch bugs and worms and that the ducks were released after rains, but he says they were always attended by some one.

We think the instructions set out made it plain that the penalty of the ordinance could be imposed only upon persons who willfully and intentionally permitted their fowls to run at large, and the term "running at large" is one of a well-defined meaning, and we think the jury could not have been misled as to the conditions under which appellant would be guilty of a violation of the ordinance.

The Constitution and statute of this State requires judges in jury trials to reduce their charges or instructions to writing at the request of either party. Article 7, Section 23, of the Constitution; Section 6196. of Kirby's Digest. And in the case of *Burnett* v. *State*, 72 Ark. 398, it was held that this provision was not complied with where the judge delivered his charge orally but directed the stenographer to take it down in short-

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hand and afterwards copy it in longhand which was done after the trial. In the case cited it was said:

"It is probably true that most of the purposes for which this provision of the constitution was intended can be accomplished by the method adopted by the judge in this case. If the charge had been copied by the stenographer, and read by the judge to the jury before the case was finally submitted to them, it is probable that no prejudicial error would have been committed. *National Lumber Co.* v. *Snell*, 47 Ark. 407. But one purpose of this provision was to obtain a carefully considered charge and to place it in such shape as to avoid any possible dispute or misunderstanding as to its exact phraseology. Stenographers, like other persons, sometimes misunderstand what is said, and make mistakes; and, as comparatively few people can read shorthand, the parties under the procedure adopted in this case would ordinarily have no means of guarding against and detecting such mistake. An instruction reduced to writing is open to the inspection of every one, and is the safeguard which the law gives the litigant to protect himself against controversies of that kind. The provision that secures it is imperative, and, even if we deemed it unwise, we could not disregard or refuse to enforce it. For these reasons we are of the opinion that the course pursued did not fully meet the requirements of the law, and the contention of appellant in regard thereto must be sustained."

Another case which discusses the duty of circuit judges in this regard is that of *Mazzia* v. *State*, 51 Ark. 181, and in that case it was said:

"A judgment will not be reversed, however, for an unsubstantial error in this regard more than any other; as where provisions of the statute are read to the jury without being transcribed (*Palmore* v. *State*, 29 Ark. 268) or where the oral charge is simple and without complication and is accurately reduced to writing without unnecessary delay and is set out in the bill of exceptions. *National Lumber Co.* v. *Snell*, 47 Ark. *supra*. In such cases we can judicially determine that the error was not prejudicial. *O'Donnell* v. *Segar*, 25 Mich. 379-80. But when it does

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not affirmatively appear that the error is harmless, we cannot disregard the mandate of the constitution. The right guaranteed by the fundamental law would be worthless if it was incumbent on the defendant to show that the charge was erroneous, because that error itself would be ground for reversal. The object of the law was to obtain a carefully considered charge and to prevent any misconception and after-misunderstanding as to its exact tenor and phraseology, when the bill of exceptions came to be considered. *Barkman* v. *State*, 13 Ark. 705."

(2) We would be compelled to reverse the judgment of the court below because of the failure to reduce the charge to writing if we did not think it affirmatively appears that no prejudice resulted from the failure of the court to reduce the instructions given to writing. Appellant's instructions, both those given and those refused, were in writing, while the ones given by the court were few in number and simple in their nature and there was no opportunity for disagreement about what the court had declared the law to be. This is not a case where a copy of the instructions would have been required in a discussion before the jury of the law of the case as applied to the evidence, nor one in which there was opportunity for disagreement in settling the bill of exceptions. It is, of course, proper always for the trial court to reduce the instructions to writing and thereby obey the letter of the Constitution and of the statute, and reversals must follow the failure so to do when the request is made, except in cases similar to this where it can be affirmatively said that no prejudice resulted from that failure.

The remaining question in the case is the one of real importance. The cities and towns of the State have only such powers as are conferred upon them, either expressly or by necessary implication, under the statutes of the State. Express power has been given them to prevent the running at large within their corporate limits of cattle, horses, mules, asses, swine, sheep, goats, and other animals of like kind. Section 5450 of Kirby's Digest. Domestic fowls are not included in this grant of authority. If such authority exists it is conferred by

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Section 5438 of Kirby's Digest. So much of that section as is material here reads as follows:

"They (cities and towns) shall have power to prevent injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated. * * *"

(3) It has been several times said that a municipal corporation cannot declare that to be a nuisance which is not such *per se;* in other words, no mere *ipse dixit* can convert that thing into a nuisance which is not such in fact. As, for instance, a town or city has no right to declare the mere keeping of bees within the corporate limits a nuisance. *Arkadelphia* v. *Clark*, 52 Ark. 23. However, while it is settled that a town or city council cannot arbitrarily pass upon these questions, it is also settled that a large discretion abides with them in their determination of these questions. A leading case on this subject is that of *Foote, Ex parte*, 70 Ark. 12. There a town ordinance prohibited the keeping of a jackass within the city limits. It was there said that as no such express authority had been given the council, the ordinance could be upheld upon the theory only that the keeping of a jackass in a populous community was a nuisance *per se*, and upon a consideration of the habits of such animals and of the purposes for which they are kept it was held that the council had not exceeded its discretion in enacting that a jackass was a nuisance *per se*. and that the town council had the right to prohibit his being kept within the corporate limits. In this case definitions of nuisances, both public and private, are given, and it was there said:

"There are two kinds of public nuisances. One is that class of aggravated wrongs or injuries which affect the 'morality of mankind, and are in derogation of public morals and decency,' and being *malum in se*, are nuisances irrespective of their location and results. The other is that class of acts, exercise of occupations or trades, and use of property which become nuisances by reason of their location or surroundings. To constitute a nuisance in the latter class, the act or thing complained of

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must be in a public place, or so extensive in its consequences as to have a common effect upon many, as distinguished from a few. Where it is in a city or town, where many are congregated and have a right to be, and produces material annoyance, inconvenience, discomfort, or injury to the residents in the vicinity, it is a public nuisance of the latter class."

The proof in this case shows that these fowls were very annoying to the owners of lawns and gardens in that vicinity. And where there are no fences it requires no great amount of proof to support a finding that gardens, whether flower or vegetable, will not flourish to any advantage where domestic fowls are permitted to run at large, and that the well-known habits of these fowls may prove very annoying, indeed, so exasperating as to put one to the choice of peace and friends on the one hand or flowers and vegetables on the other.

(4) No question is involved here of the right of one to keep fowls on his own premises. The question is whether the city has the power by ordinance to prevent the running at large of these fowls over the premises of others, and we think it possesses this right, and that the ordinance in question is a valid exercise of the right given to cause any nuisance to be abated.

MCCULLOCH, C. J. (dissenting). I dissent from the conclusion expressed by the majority that permitting chickens to run at large in a city or town constitutes a nuisance *per se* and may be prohibited by ordinance of the municipality. The decision puts unrestrained chickens in a class with a jackass. *Foote, Ex parte*, 70 Ark. 12. A municipality, without express statutory authority conferred by the legislature, has no power to declare a thing to be a nuisance *per se* which is not in fact one in all circumstances, and the statutes of this state do not authorize a municipal corporation to prohibit the running at large of domestic fowls.

In *Arkadelphia* v. *Clark*, 52 Ark. 23, this court said: "Neither the keeping, owning, or raising of bees is, in itself, a nuisance. Bees may become a nuisance in a city,

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but whether they are so or not is a question to be judicially determined in each case. The ordinance under consideration undertakes to make each of the acts named a nuisance without regard to the fact whether it is so or not, or whether bees in general have become a nuisance in the city."

So the running at large of chickens may or may not constitute a nuisance according to circumstances. In a thickly settled neighborhood where there are no fences, and unprotected flowers and vegetable gardens abound, full grown chickens running at large will necessarily cause damage to some extent, but not under other circumstances. There is a remedy under the law for those who suffer injury, and the remedy must be applied only when injury occurs—not by a sweeping provision declaring acts complained of a nuisance under all circumstances.

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## GAGE v. STATE.

## DAL SASSO v. STATE.

Opinion delivered October 2, 1916.

1. LIQUOR—ILLEGAL SALE—PROOF. The evidence held sufficient to warrant a conviction for the crime of selling liquors in violation of Act 30, p. 98, Acts of 1915.
2. LIQUOR—ILLEGAL SALE—EVIDENCE OF SHIPMENTS TO DEFENDANT.—In a prosecution for the sale of intoxicating liquors illegally, it is proper to admit testimony of railroad and transfer agents to show that during the period in which a defendant is charged with the commission of said crime, that they at different times received and delivered to defendant large quantities of intoxicating liquors consigned to him or to other persons for him.

Appeals from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

*C. Floyd Huff*, for appellants.

1. The evidence of Reamey as to shipments of "Whiskey and Beer" over the Rock Island Railroad and consigned to other parties was improperly admitted. It was wholly incompetent and immaterial. So was the

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testimony of Sovett and Henderson, as to hauling "liquor" consigned to others.

2. Halliburton's testimony does not connect appellants with any sale of liquor.

3. The statements of Morris before the grand jury were incompetent testimony. Other incompetent and irrelevant testimony was admitted—none of which connected appellants with the sale of intoxicants. The only evidence in the whole case of a sale was Halleburton's, and he testified that appellant Gage did not make the sale. No partnership arrangement between Gage and Dal Sasso was proven. No liquors were kept for sale and there is absolutely no testimony to sustain the verdict.

4. The court erred in its instructions.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant for appellee.

1. The evidence shows that appellants were partners. That various shipments of whiskey and beer were to them and signed for by them as partners. Someone sold Halliburton whiskey in their place of business—either a proprietor or employee. Dal Sasso sold Morris beer or ginger ale "with something in it" at 15 cents. All this and more of the kind convinced the jury that appellants were guilty and this court will not disturb the verdict on questions of fact. 92 Ark. 590; 50 *Id.* 511; 47 *Id.* 196; 109 *Id.* 120, 138 and many others.

2. The cold drink stand is a dodge and subterfuge. Direct testimony of a conspiracy is not required. It is sufficient if the *circumstances* show concerted action. 77 Ark. 444; 105 *Id.* 72; 81 *Id.* 273; 98 *Id.* 575. No error of law was committed by the court and the verdicts should stand.

HART, J. Separate indictments were returned against Vince Gage and M. Dal Sasso for the crime of selling intoxicating liquors contrary to Act Number 30 of the Acts of 1915 (See Acts of 1915, p. 98). Each defendant was convicted in the circuit court and from the judgment

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of conviction has duly prosecuted an appeal to this court. The defendants were tried separately but practically the same evidence was introduced in each case and one opinion will settle the issues raised by the appeal.

The material facts are as follows: Prior to January 1, 1916, the defendants were engaged in the saloon business at the corner of Central Avenue and Chappell Street, in the city of Hot Springs, Garland County, Arkansas. After January 1, 1916, they continued in business at the same stand as partners and operated what they called a soft drink place. Both of the partners were actively engaged in running the business.

W. H. Halliburton testified that shortly after the 1st of January, 1916, he went into the business house of the defendants with another man for a bottle of beer; that a man behind the counter poured out something in a glass and set it up on the counter and set a Tally bottle in front of it; that he drank what was in the glass set before him and it tasted very much like beer, and that he knew the taste of beer. The man who waited on them was behind the bar and had his hat off and was in his shirt sleeves; that on the same occasion the man behind the bar sold him a pint of whiskey and that he paid him seventy-five cents for it. The local agent of one of the railroad companies of Hot Springs was permitted to read before the jury a record of the shipments of liquor to certain persons, received since the 1st of January, 1916. Some of the whiskey was consigned to Vince Gage, some of it to M. L. Dal Sasso, some of it to Gage & Dal Sasso, and some of it to other parties. These intoxicating liquors were delivered to a place in Hot Springs on the corner of Prospect Avenue and Crown Street. The defendants had control of this building and one of their employees testified that he frequently went there with Vince Gage to get Tally and other drinks for their place of business after the first of January, 1916.

Another witness testified that he gave Vince Gage permission to ship intoxicating liquors in his name, in the year 1916.

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The defendants testified for themselves and each denied that he had sold or been interested in the sale of intoxicating liquors since January 1, 1916.

Other evidence was adduced in their behalf tending to support their testimony. We need not abstract it, however, for the testimony on behalf of the State warranted the jury in returning the verdict of guilty.

The defendants were partners engaged in running a saloon in the City of Hot Springs prior to the 1st of January, 1916. After that date they continued to carry on a business as partners at the same stand. The bar fixtures were not removed but they were operating what they called a soft drink place.

(1) A witness for the State testified that he went in there and was served with a drink that tasted like beer by a person behind the counter who had his hat off and was in his shirt sleeves. He stated that this same person on the same occasion sold him a pint of whiskey for seventy-five cents. The witness says that he did not see the defendants at the time he made the purchase, but the evidence shows that both of them were actively engaged in running the business and it is not likely that they would suffer a person to go in there and serve intoxicating liquors behind the bar without their consent. The person selling the liquors and serving them had his hat off and was in his shirt sleeves. This indicated that he was employed at the place. At least the jury was warranted in finding this to be a fact and also that the defendants were interested in the sale of the intoxicating liquors.

(2) It is next contended that the court erred in permitting the station agent to testify as to the shipments of liquors to the defendants and other persons since the 1st of January, 1916. The testimony shows that on several occasions since the 1st of January, 1916, quantities of intoxicating liquors had been shipped to Vince Gage and that some had been consigned to Dal Sasso. It was also shown that liquors consigned to other persons were delivered to the defendant Gage, and that

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all these liquors were stored in a building situated near their place of business, which was controlled by them.

In a prosecution for the sale of intoxicating liquors it is held proper to admit the testimony of railroad and transfer agents to show that during the period in which a defendant is charged with selling intoxicating liquor illegally, that they at different times received and delivered to him large quantities of intoxicating liquors consigned to him or to other persons for him. *Hanlon* v. *State*, 51 Ark. 186; Joyce on Intoxicating Liquors, sec. 671. Moreover, as far as the Gage case is concerned, it may be said that no objection to the introduction of the evidence of the station agent as to the quantities of liquors received by him consigned to Gage and other persons for him was made.

The judgment in each case will be affirmed.

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## MITCHELL v. STATE.

Opinion delivered October 2, 1916.

1. INSTRUCTIONS—WEIGHT OF CERTAIN EVIDENCE.—Instructions given by the trial court, pointing out certain evidence and telling the jury that such evidence is sufficient to convict, are instructions upon the weight of the evidence and are inhibited by the constitution.
2. LARCENY—UNEXPLAINED POSSESSION OF CERTAIN PROPERTY.—Although the unexplained possession of recently stolen property constitutes evidence sufficient to warrant a conviction of larceny, an instruction that such evidence is sufficient to sustain a conviction is erroneous. (See *Sons* v. *State*, 116 Ark. 357.)

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; reversed.

*M. E. Sanderson* for appellant.

1. The court erred in giving that part of its oral instruction as follows: "Possession of recently stolen property is evidence of guilt," etc. This was an expression of opinion by the court as to the weight of evidence and is forbidden by our constitution. 81 Ark. 189; 83 *Id.* 195; 55 Ark. 244; 34 *Id.* 443; 44 *Id.* 39; 85 Ark. 138.

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2. There was no evidence that defendant, at any time, had any of the stolen property in his possession.

3. Other errors are pointed out in the court's charge and in the admission of testimony, but they are not passed on by the court.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The courts instruction as to stolen property, unexplained was correct. 34 Ark. 445; 79 *Id.* 434; 91 *Id.* 495; 92 *Id.* 590. But if not, it was defendant's duty to point out defects or errors and tender the court correct instructions. 116 Ark. 265.

2. There was no error in the admission and exclusion of testimony, nor in the court's instructions, and the evidence is sufficient.

WOOD, J. Appellant was indicted June 6, 1916, in the Miller circuit court, on a joint charge of burglary and grand larceny for entering the store of R. W. Cocke during the night of April 6, 1916. He was tried on June 15, and was acquitted of burglary and found guilty of grand larceny, and his punishment assessed at three years in the penitentiary.

The testimony tended to show that on the night alleged Cocke's store was entered and goods of the value of over ten dollars stolen. The goods consisted of flour, lard, tobacco, etc. A few days after the store was entered some of the property, which Cocke identified as goods taken from his store, was found in the possession of a negro merchant by the name of John Henderson. Henderson testified that the flour and lard in his possession alleged to have been taken by Dick Mitchell from Cocke's store were purchased by him from Dick Mitchell.

It is unnecessary to set out and discuss in detail the other evidence that was adduced at the trial. It suffices to say that there is substantial evidence to sustain the verdict.

Among others, the court gave the following instruction: "Under the law, gentlemen, possession of recently

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stolen property is evidence of guilt, and in this case, if you find from the evidence beyond a reasonable doubt that defendant in this case was found in possession of the property alleged to have been stolen, or any part thereof, and that the same had been recently stolen; and if you further find that the house from which the goods are alleged to have been stolen was broken or entered into in the night time, and that the goods were stolen in the night time, as alleged in the indictment; if you find from the evidence further that defendant was found in possession of any part of these goods, as the court has stated, and that his possession is unexplained to the satisfaction of the jury, then that is evidence upon which you may convict him of the crime of burglary, provided it convinces you of his guilt beyond a reasonable doubt.

"Upon the second count of the indictment, if you find from the evidence that defendant was found in possession of the goods as charged in the indictment, or any part thereof, and that the goods had been recently stolen, and the defendant's possession of said goods has not been explained to the satisfaction of the jury, then that is evidence upon which you may convict him of grand larceny, provided it convinces you of his guilt beyond a reasonable doubt; that is a question for the jury to determine from the evidence."

The defendant excepted to all that part of the Court's instruction which told the jury that possession of goods recently stolen is evidence of guilt of grand larceny. The ruling of the court in refusing to sustain this exception is assigned as error.

The effect of the instruction in the form to which objection was made was to tell the jury that if the defendant was found in the possession of recently stolen property, which was unexplained, that this was evidence sufficient to convict him.

(1-2) Instructions by the court pointing out certain evidence and telling the jury that such evidence is sufficient to convict, are instructions upon the weight of the evidence, and are inhibited by our constitution. Const. sec. 23, Art. 7. Such is the holding of this court in many

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recent cases. In *Sons* v. *State*, 116 Ark. 357-8, we said: "We have held in repeated decisions that unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or of the crime of knowingly receiving stolen property, but that an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury." See also, *Thomas* v. *State*, 85 Ark. 138; *Duckworth* v. *State*, 83 Ark. 192; *Blankenship* v. *State*, 55 Ark. 244.

In *Blankenship* v. *State*, *supra*, Judge Battle speaking for the court, said: "It is within the exclusive province of the jury to determine, under the instructions of the court as to the law of the case, when the evidence is sufficient to convict. The court had no right to point out what inferences may or should be drawn from particular facts in proof. All the court had a right to say to the jury in regard to the facts mentioned was, they might consider the evidence adduced to prove them in connection with the other evidence introduced, and if upon such consideration they believed that the defendant was guilty beyond a reasonable doubt they should convict."

Many other assignments of error are presented, which we have considered, but the error above pointed out in the instruction is the only reversible error we find in the record. For this error the judgment must be reversed and the cause remanded for a new trial.

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## HALL v. STATE.

Opinion delivered October 2, 1916.

1. JURORS—DISQUALIFICATION—PRESUMPTION.—Appellant and others were indicted jointly for the crime of burglary and grand larceny. Appellant sought a severance, and was tried separately. *Held.* The fact that certain jurors who were used in his trial had sat in the trial of other of the persons indicted for this crime did not of itself render them disqualified. The presumption exists that jurors are not disqualified by prejudice or otherwise, until the contrary appears.

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2. BURGLARY AND GRAND LARCENY—SUFFICIENCY.—The evidence held sufficient to warrant a conviction of the crimes of burglary and grand larceny.

3. CONFESSION—PROOF.—While it devolves on the state to show that a confession was voluntarily made, before it can be introduced in evidence, it is not necessary to establish that fact beyond a reasonable doubt, but it is sufficient to show it by a mere preponderance of the testimony.

4. APPEAL AND ERROR—EFFECT OF ERRONEOUS STATEMENT IN A REQUESTED INSTRUCTION.—It is not error to refuse to give a requested instruction which contains an erroneous statement.

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

*M. E. Sanderson*, for appellant.

1. The court erred in compelling defendant, after his peremptory challenges were exhausted, to accept as jurors persons who served as jurors on a former trial.

2. It was error to refuse instruction No. 4. The State must show *beyond a reasonable doubt* that the fear of punishment was removed before a confession of defendant is admissible in evidence against him, and not by a mere *preponderance of evidence.*

3. The evidence is insufficient. Neither the person or property were identified.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no error in the court's acceptance of the jurors. 44 Ark. 115; 58 *Id.* 353; 66 *Id.* 53; 79 *Id.* 127; 120 S. W. 419; 36 Wash. 358; 145 Pa. 451; 40 S. E. 308; 129 S. W. 141.

2. There is no error in the court's charge. 73 Ark. 497; 93 *Id.* 156; 109 *Id.* 366; 1 Rul. Case Law, 564; Underhill on Cr. Ev. § 140; 113 Iowa, 691; 121 Ga. 344; 190 Penn. St. 23; 113 Iowa 691; 107 Ark. 568; 14 *Id.* 555; 34 *Id.* 654; 122 Ark. 606.

3. The confession was authenticated by the finding of the stolen property. Wigmore on Evidence, § 856; 47 Ark. 174; 122 Ark. 606.

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MCCULLOCH, C. J. The defendant, Aubrey Hall, was indicted jointly with Roy Thomas, Bert Elliot and W. B. Walker, on the charge of burglary and grand larceny by entering the store of W. A. Benge in the City of Texarkana, and on his election to sever his cause from that of the other defendants he was put on trial and convicted on both charges.

(1) The bill of exceptions contains the brief recital of an exception to the overruling by the court of defendant's objection to the competency of certain jurors who had served as jurors in the cases against Thomas and Walker. The record does not show affirmatively that the trials in which the jurors served were upon the particular indictment involved in the present case, and the Attorney General in his brief makes the assertion that it was another charge against the same parties which the jurors had previously tried. The mere fact that the jurors had served in another case in which the defendant and others had been indicted would not disqualify them as jurors in the present case; and in order to sustain the exception, it devolved upon the defendant to show affirmatively that the jurors had served in another case which disqualified them from serving in the present case. We are of the opinion, therefore, that the recitals of the bill of exceptions do not show facts sufficient to establish prejudice in the ruling of the court in compelling the defendant to accept the jurors. The presumption is, until the contrary appears, that they were not disqualified by prejudice or otherwise.

(2) The evidence on the part of the State establishes the fact that the store of Benge was burglarized on a certain occasion, and that the defendant made a voluntary confession as to his participation in the crime. The evidence was, therefore, sufficient to sustain a conviction. Defendant contended that his confession was extorted by threats and violence, but the evidence was conflicting on that feature of the case and we feel bound by the findings of the court and jury on that issue.

(3) After hearing the evidence, the court admitted the testimony concerning the confession and also sub-

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mitted the issue to the jury as to whether or not the confession was voluntary. It is contended that the court erred in instructing the jury that the State was only bound to show by a preponderance of the evidence that the confession was voluntary. The contention is that the State should have been required to prove that fact beyond a reasonable doubt before the confession would be admissible.

"The doctrine of reasonable doubt," said this court in the case of *Lackey* v. *State*, 67 Ark. 416, "applies to the general issue of guilty or not guilty; but it does not apply to each item of testimony or to each circumstance tending to show the guilt of the defendant." In *Lasater* v. *State*, 77 Ark. 468, the court held that in the trial of a criminal case where corroboration was required, it was not essential that the State establish the corroboration beyond a reasonable doubt. These authorities are conclusive of the present question, and we hold that while it devolves on the State to show that a confession was voluntarily made before it can be introduced in evidence, it is not necessary to establish that fact beyond a reasonable doubt, but that it is sufficient to show it by a mere preponderance of the testimony.

(4) Counsel for defendant further insist that the court erred in refusing to give an instruction on the subject of the necessity for the State to prove that the confession was made without fear or coercion, but we need not pass upon the correctness of that part of the instruction for the reason that it contained an erroneous statement that it devolved upon the State to prove beyond a reasonable doubt that fear had been removed before the confession could be considered as evidence. That part of the instruction was, as before stated, erroneous, and the defendant is in no attitude to complain of the court's ruling in rejecting an instruction which contained that erroneous statement.

The record does not disclose any error which occurred at the trial, and as the evidence is sufficient to sustain the verdict the judgment must be affirmed. It is so ordered.

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## THOMAS v. STATE.

Opinion delivered October 2, 1916.

1. APPEAL AND ERROR—DISQUALIFICATION OF JURORS.—A recital in the motion for a new trial, in a criminal prosecution, set out that the trial court erred in permitting two jurors, who had sat in a previous case, and who had convicted the defendant there of the same crime with which this defendant was charged, to qualify as jurors in this case, thereby compelling this defendant to exercise his challenges or accept said persons in the trial of his case. The record did not show any objection to the action of the trial court, nor the saving of any exception, nor did it appear that he had exhausted his challenges before the jury was sworn. *Held* under the record, it was not shown that error was committed, even though the jurors were in fact, disqualified.
2. CONFESSIONS—ADMISSIBLE, WHEN.—In a criminal prosecution, evidence of a confession by the defendant, held admissible.
3. BURGLARY—GRAND LARCENY—SUFFICIENCY OF THE EVIDENCE.—In a prosecution for burglary and grand larceny, the evidence held sufficient to warrant a conviction.

Appeal from Miller Circuit Court; *Geo. R. Haynie*, Judge; affirmed.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no prejudicial error in the acceptance of the jurors, whom defendant claimed sat on the trial of Dick Mitchell. See authorities cited in *Hall* v. *State*, *ante;* Pa. Sup. Ct. 38, 65; 120 S. W. 419; 36 Wash. 358; 145 Pa. 451; 40 S. E. 308; 129 S. W. 141. His peremptory challenges were not exhausted. 91 Ark. 585; 97 *Id.* 133; 91 *Id.* 576; 45 *Id.* 165.

2. No proper exceptions were saved. 29 Ark. 99; 63 *Id.* 527. It is too late to complain after verdict. 104 Ark. 616; 93 *Id.* 31.

3. There was no error in the admission of confessions. 1 Ruling Case Law, 564; Underhill Cr. Ev. § 140; 113 Iowa, 691; 121 Ga. 344; 190 Pa. St. 23; 113 Iowa, 691; 14 Ark. 555; 34 *Id.* 654; 107 *Id.* 568; 122 Ark. 605.

4. The confession was authenticated by the findings of the stolen property. Wigmore on Ev. § 856; 47 Ark. 174; 122 Ark. 606.

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5. There is no error in the instructions. 73 Ark. 497; 93 *Id.* 156; 109 Ark. 366.

SMITH, J. (1) Appellant was tried under an indictment charging him with burglary and grand larceny, and was convicted upon both counts. The crime was alleged to have been committed by burglarizing the store of one R. W. Cocke. Appellant was indicted therefor jointly with three other men. He complains that the court erred in failing to sustain a peremptory challenge against two of the jurors called to try him, for the reason that they had been members of the jury which had just convicted one of the men jointly indicted with him. It does not appear, however, that any objection was made or exception saved to this action of the court; nor does it appear that appellant had exhausted his challenges before the jury was sworn. We find nothing upon this subject in the transcript except the recital in the motion for a new trial that the court erred in permitting two jurors who sat in the previous case to qualify as jurors in the instant case, "thereby compelling the defendant to exercise his challenges or accept said persons in the trial of the case." Under this state of the record we cannot say that error was committed, even though the jurors were, in fact, disqualified.

(2) Error is assigned in the admission of evidence of an alleged confession made by appellant, and it is urged this confession should not have been admitted because appellant had been whipped by a Mr. Strange, the chief of police of the city of Texarkana. Strange admitted whipping appellant, and he says this was done because appellant was drunk and impudent, and that this affair had no connection with the confession which was later made. This alleged confession was made in the presence of four witnesses, who detailed the circumstances under which it was made, and, according to their evidence, it was freely and voluntarily made. The trial was presided over by the same judge who presided in the case of *Shufflin* v. *State*, the report of which on the appeal is found in 122 Ark., page 606, and substantially the same

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instruction was given here as was there approved on the weight to be attached to confessions. Under this instruction the jury could have given no weight to this alleged confession without having first found that it was voluntarily made, and there was evidence to support that finding.

(3) Appellant also strongly insists that the evidence is insufficient to support the verdict. This cannot be true, however, if the confession is to be accepted. The owner of the store described the manner in which it was burglarized, and enumerated various articles which were stolen, and pursuant to appellant's confession some of these goods were located at the place where he had stated they would be found.

We conclude, therefore, that the record is free from prejudicial error and that the evidence is legally sufficient to sustain the verdict of the jury, and the judgment of the court must, therefore, be affirmed.

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## JAMES v. STATE.

Opinion delivered October 2, 1916.

1. TRIAL—CONTINUANCE—ABSENT WITNESSES.—A continuance on the ground that certain material witnesses were absent was properly refused, when the appellant failed to point out to the trial court the circumstances under which the witnesses were absent, and also failed to show the facts on which he based his claim that he could procure their attendance at a subsequent date.

2. TRIAL—CONTINUANCE—CUMULATIVE TESTIMONY—ABSENT WITNESSES.—The trial count is not required to grant a continuance on account of the absence of certain witnesses, where their testimony would be merely cumulative of other testimony offered at the trial.

3. EVIDENCE—AGE OF PROSECUTING WITNESS—ENTRIES MADE BY FAMILY PHYSICIAN.—In a prosecution for carnal abuse it was set up by way of defense that the prosecutrix was over sixteen years of age at the time the act was committed. *Held*, it was competent for a physician to testify, from records made by himself at the time, the date upon which a child was born to the parents of the prosecutrix.

4. EVIDENCE—AGE OF PROSECUTRIX—ENTRIES IN FAMILY BIBLE.—In a prosecution as stated above the father of the prosecutrix may testify concerning an entry in the family Bible as showing the age of the prosecutrix.

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5. TRIAL—ARGUMENT OF COUNSEL—CARNAL ABUSE—ACTS SHOWING AGGRAVATION.—In a prosecution for the crime of carnal abuse, it is proper for the prosecuting attorney in argument to comment upon the fact that the defendant was a married man at the time he committed the crime charged in the indictment.

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

*John Mayes*, for appellant.

1. It was error to refuse a continuance. The application was based upon sufficient and legal affidavit. 99 Ark. 394; *Ib.* 547; 110 *Id.* 409; 94 *Id.* 538; *Ib.* 169; 21 *Id.* 460; 60 *Id.* 564.

2. The testimony of Dr. Christian and Sam Fink was incompetent and prejudicial. 62 Ark. 562; 57 *Id.* 402, 416; 65 *Id.* 316; 60 *Id.* 333; 94 *Id.* 183, 190; 111 *Id.* 596; 2 Wigmore on Ev. §§ 1521-3-5-6; 66 Fed. 522; 70 N. W. 1023.

3. The remarks of counsel were improper and prejudicial.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The motion for continuance was properly overruled. The allegations were too indefinite; no diligence is shown nor the materiality of the testimony. Substantially all that appellant expected to prove was *cumulative* merely. 100 Ark. 132; 84 *Id.* 20; 77 *Id.* 146. No abuse of discretion is shown. 94 Ark. 168; 94 *Id.* 172.

2. The evidence of Dr. Christian and Fink was competent and properly admitted. 10 Rul. Case Law, 1185; 15 Ark. 604; 10 Rul. Case Law, 1137; 119 Cal. 620.

3. Improper argument is not ground for reversal where such language was provoked by counsel for adverse party. It was not prejudicial. 38 Cyc. 1501; 95 Ark 326; 74 *Id.* 256; 103 *Id.* 352.

MCCULLOCH, C. J. The defendant appeals from a judgment of conviction of the crime of carnal abuse. He did not testify in his own behalf, and the fact of his having

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had sexual intercourse with the girl named in the indictment was established by abundant testimony; but the principal defense was that the girl was not shown to be under sixteen years of age.

(1-2). Defendant moved for a postponement of the trial to a subsequent term of the court in order to enable him to procure the attendance of two witnesses by whom he expected to prove that the girl had admitted that she was more than sixteen years of age. The principal assignment of error concerns the ruling of the court in refusing to postpone the trial. It is alleged in the motion that subpoenaes had been issued for the absent witnesses, and that they could not be found by the sheriff, and were temporarily out of the State, but that their attendance could be procured at the next term. The whereabouts of the witnesses was not stated, nor was there any statement of fact upon which the assertion was based that their attendance could be procured at the next term. The motion was therefore not conclusive of the right to a postponement of the case, and we cannot say that the court abused its discretion in refusing to grant the continuance. Defendant should have pointed out to the court the circumstances under which the witnesses were absent, and shown the facts on which he based his claim that he could procure their attendance at a subsequent date. Besides that, there were other witnesses who testified to the same fact concerning the statements of the girl as to her age; and the testimony being cumulative there was no error in refusing to postpone the trial to obtain it.

(3-4) The next assignment relates to the ruling of the court in permitting a physician to testify concerning the date of the birth of the girl. The physician, Dr. Christian, produced his books which showed an entry of a charge against the girl's father for professional services on a certain day, and the entry in connection with the explanation of the physician showed that it was a case of child-birth. The physician testified that he made the entry immediately after the occurrence, probably the next day, and that he knew from the entry that a child had been born to those parents on that day. The

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entry in the book did not show whether the child was a girl or a boy, and the physician did not pretend to have any recollection on that subject, but the other testimony identified this girl as being the child that was born on that occasion. The entry, in connection with the testimony of the physician establishing its authenticity, was competent evidence tending to show the date of the birtb of the girl on whose body the defendant committed the crime. *St. Louis, Southwestern Ry. Co.* v. *White Sewing Machine Co.*, 78 Ark. 1. For the same reason, the testimony of the girl's father concerning an entry in the family Bible was competent evidence tending to show the age of the girl.

(5) There is another assignment of error concerning the alleged improper argument of the special counsel for the State. It developed in the testimony that the defendant was a married man and had a baby about two months old at the time the alleged offense was committed, and the attorney in his closing argument commented on that fact. We think that it was proper to call to the attention of the jury the fact that the defendant was a married man, in aggravation of the offense, and it was not improper for the jury to consider that fact in fixing the punishment.

Judgment affirmed.

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## GRAY v. STATE.

Opinion delivered October 2, 1916.

1. CARNAL ABUSE—SUFFICIENCY OF EVIDENCE.—The evidence held sufficient to warrant a conviction of the crime of carnal abuse.
2. CARNAL ABUSE—DEFENSE—CHARACTER OF THE PROSECUTRIX.—In a prosecution for the crime of carnal abuse, it is no defense that the prosecutrix was a person of dissolute character.
3. APPEAL AND ERROR—INVITED ERROR.—A cause will not be reversed where improper testimony has been admitted, where the error was invited by the appellant.

Appeal from Clay Circuit Court, Western District. *J. F. Gautney*, Judge; affirmed.

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*T. J. Crowder* and *C. T. Bloodworth* for appellant.

1. The verdict is contrary to the evidence. It fails to show intercourse or that the girl was under the age of sixteen years. Her own testimony shows her to be unworthy of belief—she was simply a prostitute.

2. The court erred in refusing instructions 1, 2 and 3 asked for by defendant, and in refusing to strike out the affidavit of Mrs. Gray in applying for letters of guardianship, as incompetent.

*Wallace Davis*, Attorney General and *Hamilton Moses*, Assistant, for appellee.

1. The verdict is responsive to the evidence and is ample to prove the age and the acts.

2. The instructions asked were properly refused. The petition was competent evidence and the objection came too late. 96 Ark. 52; 105 *Id.* 367.

SMITH, J. Appellant seeks by this appeal to reverse the judgment of the Clay circuit court convicting him of the crime of carnal abuse, alleged to have been committed by carnally knowing one Nellie Nelson, a female under the age of sixteen years.

He strongly insists that the verdict is not supported by the evidence in that it fails to show the act of intercourse, or that the girl was under the age of sixteen at the time of the alleged act.

(1-2) The evidence is far from satisfying, but we cannot say that it is not legally sufficient to sustain the verdict. A child was born to the prosecutrix, and while she admitted having made conflicting statements as to its paternity she testified that appellant was its father and that he had had sexual intercourse with her on numerous occasions. She admitted that appellant was not the first man who had carnally known her, and her admissions show her to be a dissolute woman. Such fact however, is no defense against the act of intercourse if the girl was in fact under the age of sixteen, and while the jury had the right to consider the character and reputation of the girl in weighing her evidence on the subject

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of her age as well as that of intercourse, the jury has passed upon her evidence, and we cannot say it is not legally sufficient to support the verdict, and if her evidence is believed she was under the age of sixteen at the time of the intercourse.

Appellant urges that the prosecutrix's own testimony shows her to have been more than sixteen, and so portions of the evidence do, for her testimony upon this subject is somewhat conflicting, but she stated her age with reference to her birthday as told her by her mother and with reference to the time when she attained the age of puberty, her testimony being that she had intercourse with a man named Boyd before attaining that period of her life, and if her evidence upon these subjects was true she had not attained the age of sixteen when she had sexual intercourse with appellant.

(3) The proof shows that the girl lived at the home of appellant's parents, and her testimony was to the effect that her step-father was unkind to her and had himself attempted to carnally know her. There was proof that appellant's mother was advised to take out letters of guardianship to prevent the girl's step-father from annoying her, and this was done, and the application therefor made by Mrs. Gray contained a statement of the age of the girl. Reference to this petition had been made during the progress of the trial, when Mr. Bloodworth, of counsel for appellant, said: "We have both been referring to this paper, Mr. Huddleston. Do you want to introduce it in evidence?" and in reply thereto the prosecuting attorney said: "Yes, sir, if Your Honor please, I want to offer this in evidence," whereupon the court directed that the paper be read in evidence, and the same was accordingly done. After the conclusion of the argument but before the final submission of the cause instructions were asked which directed the jury to disregard this writing, but the court refused to give these instructions.

Inasmuch as Mrs. Gray did not testify in the case we think the paper should not have been admitted in evidence; but if there was error in its admission it was

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invited by appellant's counsel, as he, no doubt, expected to derive some advantage from its use. Moreover, the request for its withdrawal was not made until after the conclusion of the argument, when it then probably appeared that appellant would derive no benefit from its further consideration by the jury. We conclude, therefore, that no prejudicial error was committed in the refusal of the court to so direct the jury. *St. Louis Southwestern Ry. Co.* v. *Mitchell*, 115 Ark. 339.

Upon the consideration of the whole case we are constrained to affirm the judgment of the court below, notwithstanding the misgivings we may have about the truthfulness of the story told by the prosecutrix. It is so ordered.

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## KETCHUM v. STATE.

Opinion delivered October 9, 1916.

1. LIQUOR—ILLEGAL SALE—SUFFICIENT PROOF.—The evidence held sufficient to warrant a conviction for the illegal sale of whiskey in violation of Act 30, Acts 1915.
2. LIQUOR—ILLEGAL SALE—SALES AFTER FINDING THE INDICTMENT.—In a prosecution for the illegal sale of liquor under Act 30, Acts of 1915, testimony showing sales of whiskey made at defendant's place of business subsequent to the date of the finding of the indictment held admissible, where the trial court charged the jury that a conviction could not be had for sales made after the finding of the indictment, and where such testimony as admitted might aid in showing that the transaction relied upon by the State was a sale, by proving the character of business conducted at the place where the sale was made.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

The appellant *pro se*.

Contends that the legal evidence was not sufficient to convict the defendant, and that improper and prejudicial evidence was admitted.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

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HART, J. Doc Ketchum was indicted, tried and convicted of selling intoxicating liquors contrary to the provisions of Act number 30 of the Acts of 1915. (Acts of 1915, p. 98).

J. F. Harmon testified that Doc Ketchum operated a place of business in Hot Springs, Garland County, Arkansas, after the 1st of January, 1916. That he had been into Ketchum's place of business several times since the 1st of January and prior to the 28th day of April, 1916, and had bought tobacco from him a few times and had bought whiskey from him three or four times.

Jesse Boyd first testified that he thought he had bought whiskey from the defendant at his place of business in the City of Hot Springs since the 1st day of January, 1916, and prior to the 28th day of April, 1916. Subsequently he stated that he had bought whiskey from the defendant during that time.

A. D. Littler testified that the defendant had operated a grocery store in the city of Hot Springs since the 1st day of January, 1916, and that he had bought whiskey from him at his place of business during the month of May of that year. Evidence was adduced by the defendant tending to show that he had not been engaged in the illegal sale of whiskey since the 1st day of January, 1916, and that he only operated a family grocery store. It is insisted by counsel for the defendant that the evidence is not sufficient to warrant the verdict.

(1) The witnesses for the State testified that they had bought whiskey from the defendant since the prohibition law went into effect on January 1st, 1916, and prior to the return of the indictment in this case. This testimony warranted the jury in bringing in a verdict of guilty.

The indictment was returned in this case on the 28th day of April, 1916. The witness, Littler, testified that he had not purchased whiskey from the defendant prior to the return of the indictment, but that he had purchased it from him several times during the month of May, 1916. It is insisted by counsel for the defendant that the court erred in permitting this testimony to go before the jury

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and that for this error the judgment should be reversed. In regard to the admission of this testimony the court said to the jury: "The defendant cannot be convicted in this trial for any sales made after the 28th day of April, this year, and before the jury could convict they would have to find that he made some sale prior to that time. But it occurred to me that testimony of this kind might be introduced as a circumstance in the case, where there is other evidence to go with it tending to show sales prior to the time of the filing of the indictment, that is where the evidence would tend to show that a business was carried on at one place as a regular business, and I will let the testimony go in for that purpose."

(2) As a part of his defense the defendant introduced evidence tending to show that he ran a family grocery store and that there was no appearance or indication of intoxicating liquors being sold there. It will be noted that the court admitted the evidence objected to, to show knowledge by defendant that liquor was sold on the premises and to illustrate the character of the business conducted by the defendant. The court specifically told the jury that they could not convict upon the testimony of sales made after the finding of the indictment, but that proof of such sales might aid in showing that the transaction relied on by the State was a sale by proving the business conducted at the place where the sale was made; and under the circumstances in this particular case, we hold that the evidence was admissible for the purpose stated by the court. See *Commonwealth* v. *Sinclair*, 138 Mass. 493; *Pearce* v. *State*, 40 Ala. 720; Woollen & Thornton on Intoxicating Liquors, Vol. 2, par. 931.

The judgment will be affirmed.

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## HERMAN v. STATE.

## ASBAHR v. STATE.

Opinion delivered October 2, 1916.

1. LIQUORS—ILLEGAL SALE—SUFFICIENCY OF PROOF.—The evidence held sufficient to warrant a conviction of defendant of the crime of selling intoxicating liquor in violation of Act 30, p. 98, Acts of 1915.
2. LIQUOR—ILLEGAL SALE—EVIDENCE—PRESENCE OF DRUNKEN PERSONS ON THE PREMISES.—Evidence of the presence of drunken persons on or near the premises of the defendants is admissible in a prosecution for the illegal sale of intoxicating liquors.
3. EVIDENCE—DEPOSITIONS IN CRIMINAL TRIAL.—The deposition of a witness may be read in a criminal prosecution where the witness had departed from the State, but had been present and had testified at the examining trial.
4. CRIMINAL PROCEDURE—FAILURE TO CHALLENGE WITNESS.—Appellant, in a criminal trial, cannot complain that the court did not disqualify a certain juror, where the appellant had not exhausted his own peremptory challenges.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The instructions of the court were proper and covered every instruction requested by the appellant.

2. There was no error in excluding or admitting evidence. The depositions taken in the examining trial were admissible. 29 Ark. 22; 47 *Id.* 185; 60 *Id.* 400. Evidence as to the general character of a place of business, the kind and character of patrons and the presence of drunken people is always admitted in cases like this. 8 Ruling Case Law, 205; 24 Am. Rep. 69; 1 Greenl. Ev. § 108; 23 Ark. 282.

3. There was no irregularity in the selection of the jury. Kirby's Digest, § 2348, 4510-11. Defendant had not exhausted his peremptory challenges. 91 Ark. 582; 93 *Id.* 168; 97 *Id.* 132-3. Jurors Riley and Willoughby were competent. 79 Ark. 127; 85 *Id.* 64; 84 *Id.* 241; 80 *Id.* 13; 103 *Id.* 21.

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4. The evidence sustains the verdict and conclusively establishes appellant's guilt.

HART, J. W. C. Herman and Louis Asbahr were each indicted for the crime of selling intoxicating liquors or being interested in the sale thereof under Act number 30 of the Acts of the Legislature of 1915. (See Acts of 1915, p. 98 )

The defendant in each case was convicted and from the judgment of conviction has duly prosecuted an appeal to this court. The material facts in the two cases are the same and one opinion will serve in both cases.

Prior to the 1st of January, 1916, Louis Asbahr and W. C. Herman operated a saloon at the corner of Central and Spring Streets in the City of Hot Springs, Arkansas. After the 1st of January, 1916, they operated at the same place what they called a soft drink stand, restaurant and carbaret, known as the A. & H. place.

An officer of the City of Hot Springs testified that he saw persons go in the place and come out of there in an intoxicated condition. It was also shown by other witnesses that intoxicated persons were seen there after the 1st of January, 1916. Tom Jordan was barkeeper for Asbahr and Herman prior to the 1st of January, 1916, and after that he continued to work for them at the same place.

B. W. Scott testified that he was familiar with the place and that after January 1st, 1916, he bought a pint of whiskey at the place of Asbahr & Herman, but he did not buy the whiskey from Asbahr, Herman or Tom Jordan; that he knows he bought it in their place; that he bought a pint of whiskey and gave forty cents for it; that he first asked Louis Asbahr for the whiskey and that Asbahr told him there was nothing doing; that another person came to him and sold him the whiskey.

Nellie Blair testified that during the latter part of January, 1916, she went into the A. & H. place in Hot Springs with a man named Smith; that they ordered ginger ale several times and that there was whiskey in it; that she knew the taste of whiskey and could say that

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there was whiskey in the ginger ale; that the drinks were served by a colored porter and that the money for them was paid to him; that there was dancing and music going on.

George Watts testified that he became intoxicated in the place of Asbahr & Herman sometime about the first of the year, but that he thought it was prior to the 1st day of January, 1916; that he got drunk on beer and that Dave Young, an officer, came and admonished him and his companion to keep quiet. On cross-examination he testified that he had not bought any intoxicating liquors in the place since January 1st, 1916.

Dave Young testified that he was an officer in the City of Hot Springs and knew George Watts; that in February, 1916, it was reported to him that there was a drunk man at Asbahr & Herman's place and that he went down there and found George Watts drunk; that some sporting women frequented the place; that he arrested two of them for drunkenness there.

Johnnie McKinley testified that she went to the A. & H. place after the 1st of January, 1916, and was told by one of the employees that she could get whiskey by ordering a soft drink with lemon in it; that she made that kind of an order and got a drink with what she thought had intoxicating liquors in it.

Earl Fogelson testified that he went into the A. & H. place after the first of the year and called for hot ale; that whiskey was served to him and his companion and they each had two drinks costing fifty cents in all; that Tom Jordan waited on them. It was also shown that a supply of whiskey and beer was found in a room next to the place occupied by Asbahr & Herman. The room was in the same building and was controlled by Asbahr & Herman.

(1) Each of the defendants denied his guilt and testified that he was not directly or indirectly interested in the sale of intoxicating liquors in the City of Hot Springs after the 1st of January, 1916. Evidence was also introduced tending to impeach some of the principal witnesses for the State. The above testimony was suffi-

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cient to establish the guilt of both Asbahr and Herman. They were partners engaged in the sale of intoxicating liquors in the City of Hot Springs prior to the 1st of January, 1916. They continued in business there after the first of the year without making any change whatever in their bar fixtures. They ostensibly ran a soft drink place and a cabaret. Each of the partners stayed in the place of business and helped run it. They kept their old barkeeper, Tom Jordan. The testimony this far is undisputed.

Other witnesses testified that they went into the place and ordered soft drinks and were served with drinks containing intoxicating liquors.

One of the witnesses testified that he was served with a drink mixed by Tom Jordan. Drunken people were seen in the place after they had been drinking something there. It is true defendants deny that they had any knowledge that intoxicating liquors were being sold at their place of business, but the testimony recited above was sufficient to warrant the jury in finding that intoxicating liquors were sold at their place of business and that they were interested in the sale thereof.

(2) There was no error in admitting before the jury testimony to the effect that drunken people were seen in the place. This evidence was competent as tending to show that intoxicating liquors were in the drinks that were served to the patrons of the place. Evidence of the presence of drunken persons on or near the premises of the defendants is admissible on a prosecution for the illegal sale of intoxicating liquors. Black on Intoxicating Liquors, section 497; *Commonwealth* v. *Wallace* (Mass.), 9 N. E. 5; *Commonwealth* v. *Kennedy*, 97 Mass. 224; *People* v. *Berry* (Mich.), 65 N. W. 98.

No brief was filed on behalf of the defendants but we have carefully examined the instructions given by the court and they fully and fairly submitted to the jury all the issues raised by the evidence in the case.

(3) The depositions of Johnnie McKinley and Earl Fogelson, who testified in the examining court as witnesses in each case, were read to the jury at the trial in the cir-

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cuit court. Objection was made to the reading of the depositions. The State proved that subpoenaes had been issued for these witnesses to appear in the circuit court; that the sheriff of Garland County had made diligent inquiry for them and reported that both of the witnesses had departed from the State since the trial in the justice's court. It was also shown that the witnesses lived in other States and that one of them, at the examining trial, had announced an intention of returning there. Under these circumstances there was no error in permitting the depositions to be read before the jury. *Sneed* v. *State*, 47 Ark. 185; *McNamara* v. *State*, 60 Ark. 400.

(4) In the Herman case the record shows that certain jurors were challenged for cause and the court overruled the challenge of the defendant. We need not set out the facts upon which this assignment of error is based because the defendant could have protected himself against the alleged error by peremptory challenges before the completion of the jury. The record shows that he did not exhaust all his peremptory challenges. If all the talesmen had been challenged by him, and he had been forced to accept a juror without the privilege of exercising his right of peremptory challenge, he might have cause to complain, but he has voluntarily taken his chance of acquittal at the hands of jurors whom he might have rejected and he must abide the issue. *York* v. *State*, 91 Ark. 582; *Bowman* v. *State*, 93 Ark. 168; *Johnson* v. *State*, 97 Ark. 132

The judgment in each case will be affirmed.

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## MARSH v. STATE.

Opinion delivered October 2, 1916.

LIQUOR—ILLEGAL SALE—ACTS OF DEFENDANT.—Where the evidence adduced by the defendant, at a trial for the illegal sale of liquor, showed that he entered the store where it was alleged that the illegal sales occurred, merely to take charge of the money taken in by sales of goods there, an instruction that he would be guilty of assisting in the illegal sale of liquor under Act 30, Acts of 1915, if he assisted the "parties in carrying on said business by *checking* up the cash received

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in said business," is erroneous and prejudicial, since merely checking up the cash received was not assisting in making sales. *Semble* Defendant would be guilty under said act if in checking up the cash, he also checked up the sales of liquor made, for which the cash was received, to verify the accuracy of the cash on hand, and thereby exercising a supervision over the business.

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

*C. Floyd Huff*, for appellant.

1. Defendant was not formally arraigned and did not waive nor enter a plea of guilty.

2. The court erred in admitting the testimony of Holt, Jordon, Bryant and Ed. Goff, as to conversations in the absence of defendant. There was no evidence to show a sale of liquor by defendant, or that he was interested in the sale thereof.

3. The court erred in its charge to the jury. There was no evidence upon which to base those given. Those refused correctly declare the law.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no prejudicial error in failure to formally arraign defendant; he waived by announcing ready for trial. 55 Ark. 342; 72 *Id.* 145; 86 *Id.* 362.

2. There was no error in the admission of testimony. Besides it was not prejudicial. Defendant's objection was not insisted on, nor were exceptions saved.

3. The instructions were correct. The evidence fully sustains the verdict. 109 Ark. 130; *Ib.* 138.

WOOD, J. Appellant was convicted of the crime of selling liquor in violation of Act 30 of the Acts of 1915. It could serve no useful purpose to set out the testimony upon which the State relies for conviction, nor upon which the appellant relies to establish his innocence. There was evidence to sustain the verdict.

It was contended by the State that appellant was engaged in the unlawful sale of intoxicating liquor at a certain building in the City of Hot Springs; that one Walter Wheatley was the partner of appellant, and that

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the sales were made by him and others in their employ, and that appellant was interested in these sales. It was shown on behalf of appellant that the firm of T. T. Marsh & Company, a corporation, consisting of himself, his wife and brother, had been in the whiskey business at the place designated for three years prior to the 31st of December, 1915, and that appellant went out of the business on that day and had nothing further to do with it, had no further interest in it; that Walter Wheatley from that time on occupied the premises under lease. Wheatley was appellant's brother-in-law. Wheatley and his son, Bettis, conducted the business at the building designated and a man by the name of Franklin was employed by Wheatley to work there.

Franklin testified that Wheatley and his son went away. Wheatley left him at work there, and he supposed that Wheatley still had charge of it. He was asked what connection, if any, Marsh, appellant, had with the place, whether he assumed any authority or control over the place or gave any orders after Wheatley and his sons left, and while witness was at work there; and he answered: "I went to work there two weeks ago. T. T. Marsh has charge while Mr. Wheatley is away. Mr. Wheatley pays my salary. Mr. Marsh comes over and checks up the cash register and takes the change." That is the reason witness thought Marsh had charge. "He came and got the change and I just supposed you would call it "charge." I don't know what else. He did this two nights that Bettis wasn't there. Bettis took it when he was there."

Appellant testified concerning this as follows:

"When Bettis Wheatley left, he told me to take up the cash until he came back, and give it to his mother, and I took it up twice and took the money out and gave it to her." He further stated that he never at any time since the first of January exercised any authority or ownership, or employed anybody or had anything to do with the place where it was charged that whiskey was sold.

Among other instructions the court gave the following: "If you believe from the evidence beyond a

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reasonable doubt that Walter Wheatley and Bettis Wheatley or Tom Franklin since the 1st of January, 1916, were engaged in the business of selling any of the liquors mentioned in the indictment in Garland County, or in carrying on said business said liquors were continually sold, and you further believe from the evidence beyond a reasonable doubt that defendant knew such business was being carried on and said liquors were being sold and with such knowledge went to the place where said business was being carried on and while said business was being carried on and liquors sold, assisted said parties in carrying on said business by checking up the cash received in said business, you should convict him."

The appellant contends that the ruling of the court in giving this instruction was erroneous.

Now, one of the definitions of the word "check" given by Mr. Webster is "to verify, to guard, to examine the work of a person for this purpose, as to check an account, to check off a list, to compare with an original or a counter-part in order to secure accuracy or to indicate correctness." The court used the word "check" in the instruction in the above sense, for the instruction assumes that if appellant checked up the cash he was in this manner assisting in conducting the business. This instruction, in view of the evidence on behalf of the appellant, was misleading and prejudicial, because appellant introduced testimony which would have warranted a finding that appellant did nothing more than take the money from the cash drawer as the agent or messenger for his sister. If this was all that appellant did, then he would not be guilty of assisting in the sale. If appellant acted simply as an intermediary for the purpose of receiving the cash and taking the same to his sister, as the testimony on the part of appellant tended to show, then he would not be assisting in the sale of liquor. On the other hand, if the appellant had the authority to make comparison of the cash on hand with the sales, and to verify the accuracy of the accounts as shown by the cash register and the sales that had been made, then he would be assisting in the sale.

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The vice of the instruction is that it assumes that the witness used the words "check up the cash" in the sense of making the necessary comparisons to verify the accuracy of the cash on hand with the daily sales that had been made of liquor; whereas the witness for the State explained that he supposed by taking up the cash that the appellant had charge, and the testimony of the appellant himself tends to show that he did nothing more than simply take up the cash at the request of his sister. The court used the word "check" as if it had only one meaning, implying some authority and supervision on the part of the appellant over the business; whereas, according to the testimony the word "check" did not necessarily imply that appellant had any control or interest in the business. The court should have explained to the jury the sense in which the word "check" was used; and instead of assuming that appellant assisted in the sale if he checked up the cash, the court should have submitted it to the jury to determine as to whether or not appellant's conduct in the particulars enumerated constituted an assistance in the sale, and instructed them that if they so found they should convict. The testimony was proper to be considered by the jury as a circumstance in determining whether or not appellant was guilty of the crime charged, but it was not correct to tell the jury as a matter of law, under the evidence adduced, that if appellant checked up the cash he was guilty.

The assignments of error in regard to the rulings of the court in the admission of testimony, and the giving and refusing of other prayers for instructions, have been considered, but it is unnecessary to discuss in detail these rulings. We find no reversible error in any of them. But for the error indicated the judgment must be reversed and the cause remanded for a new trial.

KIRBY, J., dissenting.

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## WILLIAMS v. STATE.

Opinion delivered July 10, 1916.

1. WITNESSES—CONVICTED FELON—CONTEMPT.—One under conviction for homicide and confined in the State penitentiary, when actually brought into the circuit court in the capacity of a witness in another trial may be compelled by the court to testify, and the court has the power to punish him for contempt for his refusal to do so.
2. APPEAL AND ERROR—JUDGMENT AND IMPRISONMENT FOR CONTEMPT.—The circuit court is without authority to set aside a former judgment of conviction of felony, which judgment is then being enforced, for the purpose of imposing punishment for contempt and enforcing that judgment.
3. CRIMINAL LAW—"SOLITARY CONFINEMENT"—UNUSUAL PUNISHMENT—CONTEMPT.—An order of a circuit judge adjudging defendant to be in contempt, and sentencing him to "solitary confinement" is void, being in violation of Art. II., § 9, Const. 1874.

Certiorari to Pulaski Circuit Court; *R. J. Lea*, Judge; reversed.

*Robert L. Rogers*, for appellant.

1. Appellant was clearly beyond the jurisdiction of the court while serving his sentence in the State penitentiary and had made no request to have his sentence set aside or modified. 110 Ark. 251; 7 A. & E. Enc. L. 36; 60 N. Y. 559; 19 Am. Rep. 211; 30 Tex. App. 566; 70 Mich. 324 79 *Id.* 320; 44 N. W. 615; 42 *Id.* 1123; 70 Mich. 320.

2. Appellant was not guilty of contempt and there is no such punishment, under our laws, as "solitary confinement." Kirby's Digest, §§ 719-725, 3134, 3121-4 and cases *supra*.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The appellant was under the complete jurisdiction of the court. 110 Ark. 251; Kirby's Digest, 3127, 3877; Act 222 Acts 1913; 50 Ark. 161; 32 *Id.* 462; 40 Cyc. 2160; 166 Fed. 74; 4 Wigmore on Ev. § 2199; 61 Pac. 961; 46 L. R. A. 707; 7 Paige, 150; 45 Ark. 245; 9 Barn. & Cress. 446; 110 Ill. 627; 51 Am. Rep. 706.

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2. The action of the court in suspending the sentence was a proper exercise of judicial power. 74 Ind. 87; 67 N. Y. 218; 110 Ga. 234; 7 Utah, 378; 65 Cal. 138; 49 Mo. 282; 124 Ky. 115; 50 Tex. Cr. Rep. 114; 61 Cal. 387; 9 Wallace, 38; Black on Judgments, § 297; 12 Cyc. 788; 106 N. Y. Supp. 925; 117 Fed. 798; 117 N. Car. 804.

3. Appellant was guilty of contempt. 185 S. W. 473; Const. Art. 7, § 26; 69 Ark. 550; 14 *Id.* 538; 16 *Id.* 384. The punishment for contempt is largely within the discretion of the court and no abuse of discretion appears.

MCCULLOCH, C. J. The appellant, Oscar Williams, has brought here for review the record of the proceedings of the circuit court of Pulaski County wherein he was adjudged by that court to be in contempt and sentenced, as a punishment for said contempt, to "solitary confinement" in the county jail of Pulaski County for a period of four months. It appears from the record that appellant was, on April 19, 1916, tried upon an indictment charging him with murder in the second degree and was convicted of that offense and sentenced to the State penitentiary for a term of five years, and on April 28th he was duly sentenced by the court and was delivered to the State penitentiary to begin his sentence.

L. B. King was indicted on the charge of being an accessory after the fact to the crime committed by appellant and was placed on trial in the Pulaski circuit court. Appellant was brought out of the penitentiary to attend the trial of King, and was by the State introduced as a witness, but he refused to testify in response to certain questions propounded to him by the prosecuting attorney, whereupon the trial court remanded appellant to the county jail until the next day. It is stated in the briefs, and not denied, that King was acquitted, though it does not appear that that fact was brought into the record in the present proceedings. At any rate, the appellant was subsequently brought out of jail upon order of the trial court, and an order was made setting aside the judgment of conviction and he was put on trial before the

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court for contempt in refusing to testify in the King trial. Certain questions were propounded to appellant by the court and by the prosecuting attorney as to his reason for refusing to testify against King, and as he gave no satisfactory excuse for such refusal the court adjudged him to be in contempt and ordered him confined in the county jail in "solitary confinement" until September 16, 1916, a period of four months from the date of judgment.

(1) It is contended in the first place that there was no statutory authority for the court to compel or to provide for the attendance of appellant as a witness, but we pass over that point without discussion as we are of the opinion that when appellant was brought into court, by whatever means that were adopted, the court had the power to compel him to testify and to punish him for contempt for his refusal. The statute (Acts, 1913, p. 961) makes a convict competent as a witness, and the court had jurisdiction over his person when he came or was brought into court.

We pass, therefore, to the more serious question whether or not the court had the power to set aside the former judgment of conviction of felony, which judgment was then being enforced, for the purpose of imposing punishment for contempt and enforcing the judgment. While the question is not entirely free from doubt, we are of the opinion that the court possessed no such power. The Attorney General relies upon the established doctrine that all courts have continuing powers over their own judgments during the terms at which they are rendered; but while that power is an undoubted one, there are limitations upon the extent to which it may be exercised. There seems to be no question about the power of the court to set aside a judgment of conviction before the convict has begun serving his sentence, nor is there any doubt that the court has the power at any time during the term to set aside a judgment for the correction of errors. Here we have a case of the court attempting to set aside a judgment, not before the term of the sentence was begun, nor for the purpose of correcting any errors, but merely

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for the purpose of imposing another sentence during the period of the suspension of the judgment.

The court in its order imposing the punishment of confinement in the jail ordered that the appellant be brought into court at the expiration of the term for further proceedings in the original cause. The law takes no account of parts of a term of sentence, which continues from beginning to end as one term. Therefore the court was without power to separate it into parts for the purpose of giving time to punish for other offenses. This does not mean, of course, that courts are without power to punish convicts for other crimes. On the contrary, we have held that a convict serving a life term may be tried and executed for a capital offense. *Bell* v. *State*, 120 Ark. 530. That is so because the lower punishment of imprisonment is merged in the higher one, the infliction of the death penalty.

There can be no higher punishment for contempt than that which had already been imposed on appellant by his conviction of a felony. A punishment by confinement in the county jail might have been imposed to run after the expiration of his other sentence, but there is no such punishment known to our law as "solitary confinement." In that sense it is an unusual punishment which is expressly prohibited by the constitution of the State, which declares that cruel and unusual punishment shall not be inflicted. Const. 1874, Art. II, Sec. 9. That provision of the constitution is directed against the cruel or unusual character of punishment, and not against the duration of the punishmnet. *Ex parte Brady*, 70 Ark. 376. And that provision applies to punishment for contempt. *Ex parte Keeler*, 45 S. Car. 537, 31 L. R. A. 678. The term "solitary confinement" is a relative one and there is no way of knowing the precise extent to which it may be carried. A prisoner may be put in a cell to himself without being entirely excluded from communication, or he may be confined in a place so remote and under circumstances so peculiar that the severity of the punishment would be augmented to a very considerable degree. Misdemeanors are punishable in this State by

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fine or imprisonment, or both, and any other character of punishment must necessarily be regarded as unusual within the prohibition of the constitution.

We conclude, therefore, that the judgment of the circuit court for the confinement of appellant in jail as a punishment for the contempt, to begin before the expiration of his term in the penitentiary, is void; and also that any judgment of confinement in any unusual manner is prohibited. It follows from this that the order of the court setting aside the judgment was without authority, and the judgment of conviction stands as if it had not been set aside, and appellant must be remanded to the keepers of the penitentiary for confinement under that judgment.

The judgment for the contempt is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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## KULBETH v. DREW COUNTY TIMBER COMPANY.

Opinion delivered September 25, 1916.

1. PROPERTY—HOMESTEAD—OCCUPANCY BY LIFE TENANT—RIGHT OF REMAINDERMAN.—A remainderman cannot claim homestead in land during the life and occupancy of the life tenant.

2. PROPERTY—LIFE ESTATE—REMAINDER—MERGER.—A widow, after remarriage, occupied her homestead with her second husband; he then purchased the interest of his step-children in the said land. *Held.* The life estate and the remainder were not thereby merged, and during the life of his wife the remainderman could not claim homestead in the said land.

3. HOMESTEAD—RIGHTS OF WIDOW AND CHILDREN.—The widow and minor children of deceased share equally in the homestead until each of the minors arrives at twenty-one years of age.

4. HOMESTEAD—CONSTRUCTION OF HOMESTEAD LAWS.—Laws pertaining to the homestead right of the widow and minor children will be construed liberally in favor of the homestead claimants.

5. HOMESTEAD—REMARRIAGE OF WIDOW.—The widow does not lose her homestead by remarrying, and her children by a second marriage cannot share in the homestead acquired from her first husband.

6. ADMINISTRATION—SALE OF LAND TO PAY DEBTS.—The probate court has jurisdiction to order an administrator to sell lands of the estate to pay the debts of the decedent.

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7. ADMINISTRATION—SALE OF LANDS—PRESUMPTION OF JURISDICTION.—Where the probate court ordered the sale of decedent's lands, but the order did not recite the necessity therefor, it will be presumed that the petition which formed the basis of the court's order and the evidence which was adduced to support the petition, showed every fact that was essential to give the court jurisdiction to make the order of sale. *Semble.*—The rule is different where the judgment of the probate court is rendered in a proceeding not in accord with its statutory jurisdiction, or according to the course of the common law, but concerning a subject matter, the jurisdiction of which is conferred by special statutes.

8. ADMINISTRATION—SALE OF LAND—PRESUMPTION AS TO JURISDICTION.—Where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction.

9. ADMINISTRATION—SALE OF LANDS—DESCRIPTION IN COURT'S ORDER.—Where the petition asks that all the lands belonging to deceased be sold to pay his debts, the sale will not be declared void, because the order of court, ordering the sale, did not describe the same.

10. ADMINISTRATION—SALE OF LANDS—REPORT OF SALE BY ADMINISTRATOR.—The report of the sale of deceased's lands, for the payment of his debts, *held*, to have been made in compliance with the statutes.

11. HOMESTEAD—PROOF OF.—One R resided with his wife, the parties living upon the homestead land of the wife, acquired through a former marriage. R acquired a tract of land immediately adjoining which he cultivated, and for a time lived upon. *Held.* R's claim of homestead in the said land was valid.

12. HOMESTEAD—SALE FOR DEBT—RIGHTS OF MINOR CHILDREN.—The sale of the homestead, to pay debts, by the administrator, during the minority of the children, is void.

13. LIMITATIONS—SALE OF HOMESTEAD—RIGHTS OF MINOR CHILDREN.—Where the homestead has been sold, the statute of limitations does not begin to run against the minor children until the youngest child becomes of age

14. JUDGMENTS—COLLATERAL ATTACK.—Errors and irregularities are not grounds for vacating a judgment by way of collateral attack. A judgment must be assailed only in a direct proceeding in the nature of a review on error.

15. CONFIRMATION OF TITLE—MATTERS BEFORE THE COURT—PRESUMPTION.—Where a party's title to land has been confirmed by proceedings under the statute, in a collateral attack upon the decree, it will be presumed that the court passed upon the question of whether there were any adverse occupants of the land or as to whether the petitioner had knowledge that any other person had an interest in the land.

Appeal from Drew Chancery Count; *Zachariah T. Wood*, Chancellor; reversed in part; affirmed in part.

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STATEMENT BY THE COURT.

This action was instituted in the chancery court by W. C. Kulbeth against the Drew County Timber Company and had for its purpose the cancellation of certain deeds to the defendants as a cloud upon the plaintiff's title. The material facts are as follows:

John Clark, Sr., died in 1890, leaving surviving him his widow, Laura J. Clark and three minor children, viz.: John Clark, Allen T. Clark and Cora Clark. At the time of his death he had a homestead in Bradley County, Arkansas, consisting of eighty acres of land. About two years after his death, his widow married A. R. Russell. After their marriage, she and her children by her first marriage and her second husband continued to occupy her homestead. A. R. Russell made a contract with his step-children for their interest in the homestead. Allen T. and Cora Clark agreed to convey to Russell, when they arrived at the age of twenty-one years, their interest in the whole eighty acres and as soon as each of them became twenty-one a deed was executed to Russell in conformity with the agreement and he paid a money consideration for the land. John Clark conveyed to Russell his interest in the north forty of said homestead, and in consideration therefor, Russell conveyed to him his interest in the south forty of said homestead. Russell only filed for record the deed from Allen T. Clark. Russell made his agreements, concerning the homestead, with his step-children in 1894 and the deeds were executed at various times from 1898 to 1900. The defendant procured quit claim deeds from John and Cora Clark and filed them for record respectively, on September 30, 1908, and October 5, 1915. In 1894 A. R. Russell while he was living with his family on his wife's homestead in Bradley County, entered from the State a quarter section of land adjoining it and after complying with the statutes in regard to residence on the land and improving the same, in 1898 received from the State a donation deed therefor. After receiving his donation deed, Russell sold all of it except fifty acres. This fifty acres was immediately west of the

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forty acres in Bradley County on which he and his family resided. There was cleared land on both tracts and it was used as one farm by Russell until his death in 1905. These two tracts of land were all that Russell had any interest in at the date of his death. His widow became administratrix of his estate and in July, 1906, procured an order of the probate court to sell the land belonging to his estate. The land was sold under orders of the probate court and W. M. Miller and H. S. Daniel became the purchasers at the sale. Mrs. Russell executed a deed to them in the ordinary form of a warranty deed, reciting that Mrs. L. J. Russell, administratrix of the estate of A. R. Russell, deceased, was the grantor in the deed. The deed is endorsed "Examined and approved. This 17th of January, 1907. J. D. Singer, Judge."

At the January term, 1907, of the probate court, the deed of the administratrix to Miller and Daniel was by the court examined and approved and an order entered of record to that effect. On September 28, 1908, Miller and Daniel conveyed the lands to the defendant, Drew County Timber Company. On June 15, 1909, the chancery court of Drew County entered a decree confirming the title of the lands in Drew County in the defendant and on August 18, 1909, a similar decree was entered in the chancery court of Bradley County in regard to the lands in that County. Both of these confirmation suits were had under the statutes and no one was made a defendant thereto. Neither plaintiff nor his vendors were aware of the suit. In November, 1912, Mrs. Laura J. Russell died. In October, 1914, the heirs of A. R. Russell, deceased, executed deeds to the plaintiff, W. C. Kulbeth, and he commenced this suit on March 24, 1915, against the Drew County Timber Company.

The chancellor was of the opinion that the lands embraced in this suit did not constitute the homestead of A. R. Russell and that the sale of them after his death by the administratrix of his estate under orders of the probate court was valid. A decree was accordingly entered of record reciting these facts and dismissing the

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complaint of the plaintiff for want of equity. The case is here on appeal.

*Henry & Harris*, for appellant.

1. The court erred in holding, as a matter of law, that neither the land in Bradley nor in Drew Counties constituted the homestead of Alva R. Russell. The tracts adjoined, constituted one farm, parts of both were in cultivation by Russell. Conceding that his wife had a homestead right in the Bradley County forty as the widow of John Clark, Sr., the fact remains that Russell at the time of his death, had already acquired the title of the heirs of Clark, and was occupying and claiming a homestead in both tracts. The homestead right of Laura J. Russell was merged into her greater homestead right as the wife of Russell. 16 Cyc. 665-6. Adjoining tracts owned separately by man and wife, one of which is occupied as a home and both not exceeding the statutory limit, comprises the homestead. 69 Miss. 67.

If Alva Russell had a homestead right, the probate sale is void, 79 Ark. 408; and limitations do not run until the youngest child is of age. 83 Ark. 196; 87 *Id.* 428; 92 *Id.* 143. Kirby's Digest, § 5060 was not plead by defendant.

2. The probate sale was void for want of jurisdiction in the court. 59 Ark. 483; 54 *Id.* 627; Kirby's Digest, § 3793; 86 Ark. 368; 89 *Id.* 284; 106 *Id.* 563; 115 Ark. 385; 116 Ark. 361.

Kirby's Digest, §§ 3793, 189, 190-1, etc., provide for a proceeding *in rem* and the lands must be described. 37 Ark. 155. No order of sale of the lands was made and Miller and Daniel acquired no title. 92 Ark. 299; 116 Ark. 361. There were no debts against the estate of Russell; the lands were not specified; no appraisement was filed; no advertisement shown nor the time for sale and there was no report. This is not a collateral but direct attack upon a judgment.

3. The confirmation decrees are ineffective as to appellant. No defendants were named; the suits were *ex parte*. 96 Ark. 540; 83 *Id.* 154; 75 *Id.* 427. Appellee

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knew of the claims of the Russell heirs and failed to make them parties. 117 Ark. 418; 99 Ark. 446. The heirs were minors and the statute did not run against them.

*Williamson & Williamson*, for appellee.

1. Neither the land in Bradley County nor Drew County ever became the homestead of A. R. Russell; but if the Drew County land ever was his homestead it was abandoned many years before his death. 57 Ark. 179; 78 *Id.* 479; 84 *Id.* 359; 89 *Id.* 506; 76 *Id.* 575; 68 *Id.* 76; 101 *Id.* 101; 104 *Id.* 316; 28 *Id.* 493; 60 *Id.* 262; 116 *Id.* 106.

The Bradley County land never became Russell's homestead because he never had the right of occupancy. Kirby's Digest, § 763; 86 Ark. 398; 44 *Id.* 153; 145 U. S. 492; 12 Sup. Ct. 892; 21 Cyc. 503-e. The doctrine of merger is not favored. 16 Cyc. 665; 10 R. C. L. 666. It is now practically extinct.

An inchoate right of dower or homestead is not an estate and there could be no merger. 98 Ark. 124; Am. Cas. 1912 D. 776; 61 Ark. 29; 53 *Id.* 400. A wife is entitled to a homestead in her separate estate. 54 Ark. 9; 21 Cyc. 507. A living homestead claimant must have actual residence on the land, 28 Ark. 493; 116 *Id.* 103. But as to the vested estate of homestead the widow and minors do not have to occupy the homestead at all. 183 S. W. 205. There can not be two vested homestead rights in the same land at the same time. 73 Ark. 268.

2. The defendant plead the statute of limitations.

3. The probate sale was not void. This was a collateral attack. 121 Ark. 474; 118 Ark. 449; 92 Ark. 611. The records of the probate court are not before this court; the presumption of regularity is against the appellant. 103 Ark. 574; 92 *Id.* 616. The judgment of the probate court settled the necessity for the sale and it cannot be collaterally attacked. 102 Ark. 114; 103 *Id.* 574; 92 *Id.* 611; 122 Ark. 590. Every presumption is in favor of the regularity of the proceedings. 90 Ark. 167; 92 *Id.* 616; 78 *Id.* 481; 105 *Id.* 265; 118 Ark. 533; 75 Ark. 176, 180-1.

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4. There was no proof of title in appellant. 38 Ark. 181, 278. Unrecorded deeds do not prove title. 40 *Id.* 238.

5. Plaintiff and the Russell heirs are barred by laches. 87 Ark. 233; 55 *Id.* 95; etc. Also by the five years statute, 76 Ark. 150; 46 *Id.* 37; 39 *Id.* 158.

HART, J. (after stating the facts). The chancellor held that A. R. Russell did not have any homestead right either in the land situated in Bradley County or that situated in Drew County.

(1-5) Counsel for the plaintiff earnestly insist that the conclusions of law reached by the chancellor are erroneous. Under the facts presented by the record and in view of the conclusion we have reached, it will be necessary to discuss the Bradley County land and the Drew County land separately. It will be remembered that John Clark, Sr., died owning a homestead of eighty acres in Bradley County. He left surviving him his widow and three minor children. In about two years after his death his wife married A. R. Russell and she and her husband and her children by her first husband continued to reside on the homestead. Russell purchased the interest of his step-children in the homestead and as each of them arrived at the age of twenty-one years, a deed was executed to him therefor. Thus it will be seen that Mrs. Russell owned a life estate in the land and her husband the remainder. There is nothing in the record to show that Mrs. Russell abandoned her homestead right or attempted to convey the same to her husband. After her marriage to Russell she permitted him to occupy her homestead with her. This could not in any event merge the life estate and remainder and we have held that a remainderman cannot claim homestead in the land during the life and occupancy of the life tenant. *Brooks* v. *Goodwin*, 123 Ark. 607. Moreover, under our constitution the widow and minor children share equally in the homestead until each of the minors arrive at twenty-one years of age. Article 9, section 6, of the Constitution of 1874. Our constitution gives the homestead to the widow and

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children without restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants. The homestead is for the benefit of both the widow and children of the decedent. The widow does not lose her homestead by remarrying. Neither could her children by her second husband share in the homestead acquired from her first husband. *Colum* v. *Thornton* 122 Ark. 287, 183 S. W. 205. This shows that the homestead is an indivisible estate and incapable of merger under the facts of this case as contended by counsel for the plaintiffs. Even if the homestead acquired from the first husband was capable of merger with the contingent homestead of the second husband, the right of homestead in the land of her first husband, which had already become vested in the widow by his death, would be the greater estate and her right to the homestead as the wife of her second husband would be merged in it. For these reasons we think the chancellor was right in holding that A. R. Russell did not have any homestead interest in the Bradley County land. This makes it necessary for us to consider whether or not the probate sale of the Bradley County land was valid.

(6-8) After A. R. Russell died his widow became administratrix of his estate and sold both the Bradley and the Drew County lands under orders of the probate court. It is contended that the order of sale did not contain a recital showing the necessity therefor and for that reason the sale is void. The probate court under our statutes had jurisdiction to order the administratrix to sell the lands to pay the debts of decedent. The probate court is a court of superior jurisdiction and was in its jurisdictional limits. Its judgments import absolute verity. We therefore, must apply the rule that where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be presumed that the court acted within its jurisdiction. In other words, we must presume that the petition which formed the basis of the court's order and the evidence which was adduced to support the petition showed every fact that was essential

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to give the court jurisdiction to make the order of sale. The rule is different where the judgment of the probate court is rendered in a proceeding not in accord with its statutory jurisdiction, or according to the course of the common law, but concerning a subject matter the jurisdiction of which is conferred upon it by special statutes. In such cases no presumption can be indulged in favor of the court's jurisdiction, but every fact essential to give the court jurisdiction and to substantially meet the requirements of the statute under which the court is proceeding must appear of record. This is the rule stated in *Massey* v. *Doke*, 123 Ark. 211. See also, *Flowers* v. *Reece*, 92 Ark. 611; *Long* v. *Hoffman*, 103 Ark. 574; *Hoshall* v. *Brown*, 102 Ark. 114; *Green* v. *Holzer*, 118 Ark. 533.

(9) Again it is contended that the sale is void because the order of court did not describe the land to be sold. Counsel cites *Mays* v. *Rogers*, 37 Ark. 155 and *Bouldin* v. *Jennings*, 92 Ark. 299. We do not think the cases sustain the contention of counsel. The first case merely holds that it is error for the probate court to order more land to be sold for the payment of debts than is prayed for in the petition. The second case holds that if the proceedings for the sale of the tract of land all proceed with a void description of the land the sale is a nullity. In the instant case all the lands owned by the decedent were asked to be sold in the petition and were sold under proper orders of the court.

(10) Again it is contended that the sale is void because the administratrix did not make a report thereof in compliance with the statute. Kirby's Digest, Section 3793, provides that all probate sales of real estate made pursuant to proceedings not in substantial compliance with the statutory provisions, shall be voidable. In the case of *Mobbs* v. *Millard*, 106 Ark. 563, we held that the word voidable as used in the statute means void.

In the instant case the deed executed by the administratrix contains an endorsement that it was examined and approved by the probate judge. The deed recites the names of the purchasers and the amount of the purchase

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price. The endorsement of the probate judge shows that he read the deed. There is also in the record an order of the probate court to the effect that the court approved the deed and confirmed the sale. This is in effect a substantial compliance with the statute within the rule announced in *Landreth* v. *Henson*, 116 Ark. 361, and other decisions of this court.

(11) We now come to the consideration of the Drew County land. In regard to it we think the chancellor erred in holding that A. R. Russell did not have a homestead right in it. The Drew County tract which A. R. Russell claimed as a homestead comprised fifty acres and adjoined the tract in Bradley County on which Mr. Russell and his wife resided and which was her homestead by virtue of the death of her first husband. Mr. Russell entered the land in Drew County and received a donation deed from the State after complying with the statutes of the State in regard to residence on the land and clearing and improving the same. It is true the house which he had erected on the land had fallen somewhat into decay, but it was still habitable and a part of the land was cleared and in cultivation. It is also true that Mr. Russell resided on the homestead of his wife at the time of his death, but the land claimed by him as his own homestead was adjoining this and was cultivated by himself every year. The fact that Mr. Russell left the Drew County land sometime after he received his donation deed from the State and went back to reside with his wife on her homestead, did not under the circumstances work an abandonment or forfeiture of his own homestead right in the land in Drew County. Mr. Russell claimed the Drew County land as his homestead and exercised such acts of ownership over it as tended to establish this fact.

(12-13) We think under all the facts and circumstances of this case that Mr. Russell had a homestead interest in the Drew County land. The sale of this land was ordered by the probate court during the minority of his children. It is the settled law of this State that the sale of the homestead to pay debts by the adminis-

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trator during the minority of the children of the person owning the homestead is void. *Martin* v. *Conner*, 115 Ark. 359; *Jarrett* v. *Jarrett*, 113 Ark. 135. But it is sought to uphold the finding of the chancellor on the ground that the plaintiff is barred of relief by the statute of limitations. In regard to this contention but little need be said. As we have already seen the land was the homestead of Mr. Russell and the statute of limitations did not begin to run until his youngest child became of age. Two of his children did not become twenty-one years of age until about the time this suit was brought. Hence the statute of limitations is not available as a defense to the action.

(14-15) Another ground for upholding the decision of the chancellor is based upon the confirmation decree. The sale under orders of the probate court was made in 1906 and the sale confirmed and the deed executed to the purchasers and approved by the court in 1907. In 1908 Miller and Daniel, the purchasers at the probate sale conveyed the land to the defendant. The defendant instituted proceedings under Kirby's Digest, section 649, *et seq.*, to confirm its title to the land. A decree of confirmation was entered by the chancery court of Drew County in the summer of 1909. Section 650 of Kirby's Digest provides, that the petitioner seeking confirmation of title shall file in the chancery clerk's office his petition stating facts which show a *prima facie* right and title to the land in himself and that there is no adverse occupancy thereof. The section also provides that if the petitioner has knowledge of any other person who claims an interest in the land, the petitioner shall so state and that such persons shall be summoned as defendants in the case. It is claimed that the agents of the defendant knew of the adverse claims of the heirs of A. R. Russell, deceased, at the time the confirmation proceedings were had. It is true the heirs of A. R. Russell, deceased, were not made parties to the confirmation proceedings. This, however, is a collateral attack on the decree of confirmation and as the court which rendered it was a superior court of general jurisdiction, the presumptions are in

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favor of its decree. Mere errors and irregularities are not grounds for vacating a judgment by way of collateral attack. A judgment must be assailed only in a direct proceeding in the nature of a review on error. We must presume that the chancery court passed upon the question as to whether there were any adverse occupants of the land or as to whether the petitioner had knowledge that any other person had an interest in the land. *Porter* v. *Dooley*, 66 Ark. 1; *Ingram* v. *Sherwood*, 75 Ark. 176; *Cassady* v. *Norris*, 118 Ark. 449. Section 657 of Kirby's Digest provides that every person under the disability of infancy, lunacy, idiocy, married women under the disability of coverture and those claiming under them may set aside the decree any time within three years after the removal of such disability.

Mrs. Hayes was a married woman at the time the confirmation decree was rendered and is still a married woman. Two of the heirs of A. R. Russell, deceased, were minors at the time the confirmation decree was entered of record and one became twenty-one years of age about the time of the institution of this suit. This suit was instituted in less than three years after they became of age. The statute in express terms provides that they or the persons claiming under them may bring suit. The present action was instituted in the chancery court where the confirmation proceedings were had. Therefore, under the views we have above expressed, the plaintiff was entitled to relief as to the interest he purchased from the married woman and from the infant heirs of A. R. Russell, deceased. It also results from the views we have expressed that he is barred of relief as to the interest purchased from the adult heirs of A. R. Russell, deceased. It follows that the decision of the chancellor dismissing the complaint of the plaintiff was correct so far as the Bradley County land was concerned and also was correct so far as the interest of the adult heirs in the Drew County land; but his decision was wrong in regard to the interest purchased from Mrs. Hayes, the married woman, and from Cal. Nichols and Will Russell, the two minors.

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The chancellor granted the relief pleaded for by the plaintiff as to a very small part of the land in Drew County and from this portion of the decree the defendant has prayed a cross-appeal. In regard to this, it is sufficient to say that an examination of the deeds from the heirs of A. R. Russell, deceased, does not show that they conveyed this part of the land to the plaintiff. He does not show title in it from any other source and is therefore, not entitled to recover this small portion of the tract and the chancellor erred in entering a decree in his favor therefor.

For the errors committed as indicated in the opinion, the decree will be reversed and the cause remanded with directions to enter a decree in conformity with this opinion.

HART, J., on rehearing. Counsel for appellant in his motion for a rehearing earnestly insists that A. R. Russell never acquired any homestead right in the Drew county land. We did not say nor did we mean to hold in the original opinion that the mere fact that Russell donated the land from the State and received a donation deed therefor was conclusive evidence that he acquired a homestead right in it. Article 9, section 4 of the Constitution of 1874, provides that the homestead outside any city, town or village, owned and occupied as a residence shall consist of not exceeding 160 acres of land, etc. Both the Bradley county and the Drew county lands attempted to be impressed with the homestead character by Russell, did not amount to 160 acres. The record shows that Russell established his personal residence on the land in Drew County when he made application for donation. He occupied the land and made the improvements and performed all the acts required of him and made proof thereof to the regular established authorities. After making the proof, he received a donation deed from the State and there is nothing whatever to show that it was procured by fraud. On the contrary practically the undisputed evidence shows that Russell intended to impress this land and the Bradley county land upon

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which his wife's residence was situated, with the homestead character. In short he *bona fide* attempted to establish his own homestead on both the Bradley and Drew county lands and we hold that he acquired a right of homestead in the Drew county land. We also adhere to our original opinion that he has not acquired any homestead in the Bradley county lands for the reason therein given.

It is next insisted by counsel for appellant that if Russell acquired a homestead right in the Drew County land he lost it by abandonment. They contend that he left the Drew county land and went to reside with his wife on the Bradley county land and never intended to return to the Drew county land. This is true in a qualified sense only. It will be remembered that the lands in Bradley county and in Drew county adjoined. Russell purchased the interests of the heirs of the first husband of his wife and on that account thought that he had acquired a homestead interest in that land. As we have already seen Russell was entitled to a rural homestead of 160 acres and he might acquire additional land as a homestead to that already acquired in Drew county. He was not required to reside on any particular portion of it. A homestead necessarily includes the idea of a house for a residence, but it also includes that part of a man's landed property which is contiguous to his dwelling house. We have held that Russell did not acquire any homestead right to the Bradley county land because his wife already had a homestead in it which she did not lose by marrying him. We do not think that because Russell failed to acquire a homestead interest in the Bradley county land is any good reason why he should lose his homestead right in the Drew county land.

There is nothing whatever in the record tending to show that he intended to abandon his homestead right in the Drew county land. He had a right to enlarge his homestead by acquiring other lands contiguous thereto. He did not succeed but because he did not succeed in enlarging his homestead is no reason for holding that he abandoned that which he had already acquired. There is

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no evidence whatever in the record tending to show that he intended to abandon his homestead in the Drew county land but on the contrary the practically undisputed testimony tends to show that he endeavored to enlarge it by adding thereto the Bradley county land.

As we have already seen this land was contiguous to the land already owned by him as a homestead and that both tracts did not amount to as much as he was allowed under our statute. Therefore, but for his wife, already having a homestead in the Bradley county land, Russell by purchase from the heirs, would have acquired that tract as a part of his homestead and could have added it to the Drew county land and held and occupied both tracts as his homestead.

The record shows that he only intended to live on the Bradley county land because it was a part of his homestead. He regarded both it and the Drew county land as his homestead and there is nothing in the record tending to show that he abandoned his homestead in Drew county.

The motion for a rehearing will be denied.

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## BAUCUM v. WATERS.

### Opinion delivered October 2, 1916.

1. APPEAL AND ERROR—FAILURE TO PASS UPON MOTION FOR NEW TRIAL.—Where a motion for a new trial was filed but was not acted upon by the court, the case stands as if no motion for a new trial had been filed.
2. APPEAL AND ERROR—MOTION FOR NEW TRIAL NOT NECESSARY, WHEN.—A motion for a new trial is not necessary where there is an error of law which is apparent from the face of the record.
3. APPEAL AND ERROR—TRIAL BEFORE COURT—ERRORS MANIFEST FROM THE FACE OF THE JUDGMENT.—The Supreme Court can review for errors manifest from the face of the jugdment, where the judgment contains a recital of the facts upon which it is based.
4. CONTRACTS—ABSENCE OF CONSIDERATION.—A left a mirror with B, agreeing that B might keep the same until A decided to sell it, when B might have the option to purchase the mirror at the best price any one else should offer for it. *Held.* The evidence failing to show any obligation upon B to buy, or any agreement to buy, that the contract was unenforcible for lack of consideration.

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Appeal from Pulaski Circuit Court, 2nd Division; *Guy Fulk*, Judge; affirmed.

*Fred A. Snodgress*, for appellants.

1. No motion for a new trial was necessary, as all errors appear on the face of the record. 46 Ark. 17, 21; 111 *Id.* 468, 474.

2. If the contract was ever within the statute of frauds, it was taken out by acts of the parties. Kirby's Digest, § 3656; 15 L. R. A. (N. S.) 654; 125 Am. St. 397; 77 Ark. 364. The contract might have been performed within one year. 93 Ark. 1; 111 *Id.* 598; 138 A. S. R. 588.

3. The statute of frauds must be specially pleaded. 96 Ark. 189; 105 *Id.* 638; 71 *Id.* 302; 96 *Id.* 505.

4. The contract was binding and appellee cannot make out his case by breaching the contract. That would be a fraud. Bishop on Contracts (Enlarged ed.) No. 1237; 69 Ark. 513, 516; 24 *Id.* 371. Appellee could not sell to another in violation of his agreement. No writing was necessary. 35 Ark. 365, 376.

*Hal L. Norwood*, for appellee.

1. No motion for new trial was filed and this court will not review. 95 Ark. 62; 33 *Id.* 745; 37 *Id.* 37. There is nothing before this court to adjudicate. 13 Ark. 344; 21 *Id.* 401; 22 *Id.* 547; 46 *Id.* 21; 95 *Id.* 63; 36 *Id.* 495.

2. If the alleged option to buy was an enforcible contract it is within the statute of frauds. There was no binding agreement between the parties—nothing given in earnest to bind the bargain or as part payment. 108 Mass. 54; 11 Am. Rep. 306; 1 Saund. 319; 16 Mees & W. 302; 100 Ind. 501; 128 S. W. 285; 130 N. W. 208.

3. There was no acceptance of the mirror under the alleged option to buy. 112 N. W. 1081; 48 So. 213; 93 N. W. 804; 56 Atl. 562; 43 *Id.* 599; 42 S. E. 366.

4. The answer does not allege facts that amounted to a contract. It alleged no agreement to buy at *any* price—if anything it was only a proposition by one party

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without acceptance by the other. 102 Ark. 621; 100 *Id.* 514; 96 *Id.* 184; 30 *Id.* 194; 6 Rul. Case Law, 603.

HART, J. This is an action of replevin instituted by John Waters against Mrs. G. F. Baucum, Miss Margaret Baucum, et al, to recover a mirror of the alleged value of $200.00. The defendants filed an answer in which they denied that plaintiff was the owner or entitled to the possession of the mirror and also set up as a defense a state of facts substantially as follows:

The mirror formerly belonged to Mrs. B. D. Williams, who in 1907 delivered it to the defendants with the request that they keep it and take care of it for her. Mrs. Williams died in 1911, leaving the plaintiff as her sole heir at law. Soon after her death it was agreed between the plaintiff and defendants that the latter should retain the mirror in their residence in Little Rock and keep, preserve and protect it for the plaintiff; that in consideration therefor, the defendants should have the option to purchase the mirror from the plaintiff, if he ever decided to sell it at the best price anyone should offer him for it. Pursuant to this oral agreement, the defendants had the mirror, which was a very large French mirror, eight feet and three inches high, and six feet and nine inches wide, erected in one of the bed rooms of their residence, by letting it into the wall and attaching it thereto so as to become a part of the wall, and have carefully protected and preserved it, as they agreed to do. In 1913 or 1914, the plaintiff again made the same verbal agreement with the defendants. In 1915, the plaintiff sold the mirror to Dr. J. H. Lenow for the sum of $150. On learning this the defendants demanded of the plaintiff the right to purchase the mirror and tendered him the sum of $160, which was more than had been offered him by anyone else. The plaintiff declined to accept this sum and refused to sell the mirror to them. The defendants brought the sum of $160 into court and offered to pay it into the registry of the court for the use and benefit of the plaintiff in order to make good their tender. The plaintiff filed a demurrer to the answer of the defendants. The court sitting as a

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jury heard the evidence introduced. At the conclusion of the evidence the court rendered a judgment in which it sustained the demurrer and also made a finding of fact substantially as above stated which was recited in the judgment. The defendants filed a motion for a new trial, which was never acted upon by the court, and from the judgment rendered against them, the defendants have duly prosecuted an appeal to this court.

(1-2) The record shows that the court sustained the demurrer to the answer of the defendants and also rendered judgment upon the facts which were recited in the judgment. Hence in reviewing here for errors we must test the correctness of the judgment rendered by the court after hearing the facts. *Polk* v. *Road Imp. Dist. No. 2 Lincoln Co.* 123 Ark. 334, 185 S. W. 453. A motion for a new trial was filed by the defendants which was never acted upon by the court. Hence the record stands as if no motion for a new trial had been filed. This court has repeatedly held that no motion for a new trial is necessary where there is an error of law which is apparent from the face of the record. *Anthony* v. *Sills*, 111 Ark. 468, and cases cited.

(3) The facts upon which the judgment of the court is based are recited in the judgment and this brings before us the question, whether or not we can review for error manifest from the face of the judgment where the judgment contains a recital of the facts upon which it is based. The question has been answered in the affirmative in several decisions by this court. *Union County* v. *Smith*, 34 Ark. 684; *Webb* v. *Kelsey*, 66 Ark. 180; *Russell* v. *May*, 77 Ark. 89.

(4) The recital of facts in the judgment is substantially the same as the allegations of the answer. It appears that Mrs. Williams in her lifetime delivered the mirror into the possession of the defendants to keep for her. After her death John Waters, who was her sole heir at law made an oral agreement with the defendants whereby they should retain the mirror and keep it for him and in consideration of their services, he agreed that if he should ever decide to sell it that the defendants

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should have the option to purchase it at the best price anyone else should offer for it.

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The assent of both parties is essential to the formation of a contract. The agreement under consideration never became a completed contract. There is nothing to show that the defendants ever agreed that they would buy the mirror at any price. The terms of the so called agreement were never binding upon them. *Bagnell Timber Co.* v. *Spann*, 102 Ark. 621; *Eustice* v. *Meytrott*, 100 Ark. 514; *El Dorado Ice & Planing Mill Co.* v. *Kinard*, 96 Ark. 184; *Turner* v. *Baker*, 30 Ark. 194; 6 R. C. L. 603.

Therefore, the judgment of the circuit court was correct and must be affirmed.

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## EX PARTE HALL.

Opinion delivered October 2, 1916.

1. DIVORCE—ALIMONY—REMEDY TO ENFORCE PAYMENT.—After a decree has been rendered for permanent alimony, payment thereof may be enforced by attachments or orders committing for contempt.
2. DIVORCE—FAILURE TO PAY ALIMONY—CONTEMPT—PRACTICE.—Where defendant, with admitted ability to pay alimony adjudged due his former wife, refused to obey the court's order to pay the same, under the bona fide belief that he had more than paid the amount adjudged against him, the chancery court should set aside a reasonable time in which he may pay the same before committing him for contempt, and should not commit him immediately upon his refusal to pay.

Certiorari to Garland Chancery Court; *Geo. P. Whittington*, Special Chancellor; affirmed.

### STATEMENT BY THE COURT.

This is a proceeding to review the decree of the chancery court, committing J. H. Hall to prison for contempt in refusing to perform the decree of the court for the payment of alimony to his divorced wife, Eliza V. Hall.

The decree for divorce recites, "And it appearing to the court that the defendant in his cross-complaint prays that a reasonable allowance be made for the main-

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tenance of the plaintiff, Eliza V. Hall, during her life; it is ordered, adjudged and decreed, etc. that said J. H. Hall shall pay to her the sum of $10.00 per month, which said sum shall be used for actual living expenses and for no other purpose."

Petitioner answered the citation to show cause why he should not be adjudged guilty of contempt for refusal to perform the judgment, alleging that he had more than paid the amount of the judgment to his said former wife.

It appears from the testimony that he paid the first three monthly installments into court and she expressly declined and refused to take the money, stating that she would never do so and that she did not regard that she was divorced from him nor intend to respect the decree. He made no further payments to the clerk but permitted his former wife to occupy a house belonging to him, the rental value of which was from $6.00 to $10.00 per month; gave orders to certain merchants that she be supplied with groceries and paid the bills therefor and for other supplies, amounting altogether, he claimed, to more than the sum that would have been due under the decree of the court.

The testimony is in conflict as to the amount of goods and supplies furnished, the value of the premises occupied by Eliza V. Hall, and also tends to show that petitioner collected the rents during the time Eliza V. Hall occupied his house without payment of rent, upon two small cottages that had been set aside for her in the decree of divorce.

The chancellor found that petitioner was due under the decree after giving him proper credit for all supplies and rents, $160.00, and ordered its payment. Petitioner admitted in court his ability to pay the amount adjudged to be due and refused to do so, whereupon the court committed him for contempt.

*Davies & Davies*, for petitioner.

1 Kirby's Digest, § 2682, provides for the manner of enforcing orders to pay alimony. Petitioner was able to pay and did pay all he thought was due. He was

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willing to pay and made *bona fide* efforts to do so. He never was guilty of contempt, or willful disobedience of the court's order. Kirby's Digest, § 720. Contempt proceedings cannot be used to collect debts. *Id.*, § 724. There is no warrant for the present proceedings under any of our statutes. 45 Ark. 177. If contempt at all, and our contention under the evidence is that it was not, it was *civil* contempt, or failure to obey an order of court. 9 Cyc. p. 9. Such a failure is not punishable by imprisonment. No demand was made—there was no refusal to obey and a disavowal of any intention to commit contempt. Under the evidence there was no contempt. 9 Cyc. 35-6; 108 Ill. 120; 120 Cal. 421; 133 Ind. 122; 88 Ark. 302; 81 *Id.* 504; Kirby's Digest, § 2679, 2682; 81 Ark. 504.

2. The Special Chancellor was without jurisdiction. 16 Ark. 384, 396.

3. Where a person tries to obey the order of court, but fails through the acts of others he is not in contempt. 80 Ark. 579; 98 S. W. 378. An opportunity should be given always for the party to comply with the order of court. 101 Ark. 516. The violation of a void order is not contempt. 100 Ark. 419; 93 *Id.* 307.

4. The complaint is stale and barred. 39 Ark. 158; 98 *Id.* 193.

5. An honest effort was made to comply with the court's order and a reasonable time and opportunity, at least, should have been given to petitioner to obey. Cases *supra*.

*A. J. Murphy*, for respondent.

1. The evidence warrants the findings of the Chancellor. They were really too favorable to the petitioner. No petition for bail was made until after court adjourned for the term and all powers of the Special Chancellor had ceased.

2. The petitioner is guilty of contempt. 1 Ruling Case Law, § 103, p. 960; 38 Ark. 477; 81 *Id.* 140; 88 *Id.* 302; 81 *Id.* 504; 101 *Id.* 416.

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KIRBY, J. (after stating the facts). The testimony is in conflict, but we are unable to say that the chancellor's finding that petitioner had failed to perform the judgment of the court and was due the sum of $160.00 thereunder is clearly against the preponderance of the testimony.

Petitioner insists that so long as he was making a *bona fide* contention that he had paid the judgment of the court for alimony, supported by substantial testimony, that the chancellor was without authority to commit him for contempt. He knew the court's order and judgment against him for the payment of alimony and that demand had been made therefor, and answered the citation, alleging that he had complied with the decree and was in no wise in default or contempt.

The court after hearing the matter found that he had failed to comply with the decree for payment of the alimony and that he owed $160.00 under the terms of it, which he declared he was able to pay, but declined to do so.

(1) It is well recognized that after a decree has been rendered for permanent alimony, payment thereof may be enforced by attachments or orders committing for contempt.

"Even after the expiration of the term at which a decree for permanent alimony was granted, payment thereof may be enforced by an order committing the husband for contempt of court, owing to the fact that alimony does not constitute a debt within the meaning of that term as used in the usual constitutional inhibition against imprisonment for debt. * * * Although statutes frequently provide for enforcing the payment of alimony by attachment for contempt, nevertheless a court has inherent authority to do so even in the absence of statute." 1 R. C. L. 960.

Cyc says: "The right to enforce payment of permanent alimony by contempt proceedings belongs inherently to the courts having jurisdiction in divorce suits, or is conferred upon them by statute as a necessary incident to the execution of such jurisdiction; nor does the imprisonment of the husband as a result of contempt proceedings violate a constitutional provision against imprisonment

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for debt." 14 Cyc. 799. See, also, *Staples* v. *Staples*, 24 L. R. A. 433, and note, and note to 137 A. S. R. 875, for a collection of cases upon the subject.

Our statutes recognize proceedings for contempt as an appropriate remedy for enforcement of orders and decrees for payment of alimony *pendente lite* and our decisions indicate that it may be resorted to for the collection of permanent alimony upon a decree rendered therefor. Sec. 2682, Kirby's Digest; *Pryor* v. *Pryor*, 88 Ark. 310; *Casteel* v. *Casteel*, 38 Ark. 477; *Shirey* v. *Hill*, 81 Ark. 137.

(2) The petitioner's failure to pay the alimony in accordance with the decree of the court therefor, appears to have resulted from a *bona fide* belief that he had more than paid the amount thereof in rents and supplies acceptable to Eliza Hall, and not from a contumacious disregard of the court's decree or in wilful disobedience of it. The court having heard the matter upon his answer to the citation and found that he had failed to comply with the order and was still due a balance of $160.00 in accordance with its terms, should have fixed a short day for the payment thereof and not have committed petitioner to jail immediately until it was paid, thus giving him an opportunity to take steps for a review of the judgment before being committed to prison.

Since the judgment has been suspended, however, upon the writ issued from this court, which has affirmed it as to the amount due, and the petitioner, who admits his ability to pay will have 15 days from this time in which to comply with the order of the court below, its judgment is affirmed.

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## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO. *v.* HAIRSTON.

Opinion delivered October 2, 1916.

1. APPEAL AND ERROR—TESTIMONY OF UNSWORN WITNESS.—A cause will not be reversed because a witness was not sworn before being permitted to testify, where the omission was a mere inattention, and where appellant raised the question for the first time after verdict.

2. TRIAL—PERSONAL INJURY ACTION—IMPROPER ARGUMENT—In an action against a railroad company for damages for personal injuries, it is improper and prejudicial for counsel for the plaintiff to state in argument to the jury that the defendant railroad company never admitted injury and liability in the same case, and was not honest in its defense.

Appeal from Pope Circuit Court; *M. L. Davis*, Judge; reversed.

*Thos. B. Pryor* and *W. P. Strait*, for appellant.

1. The verdict in this case is so greviously wrong as to shock one's sense of justice. 70 Ark. 386; 34 *Id.* 632; 10 *Id.* 492. Hairston's evidence was evidently false and untrue as shown by all the evidence in the case.

2. The verdict in this case was the result of the improper and prejudicial remarks and argument of counsel. The admonition of the court did not cure the error or remove the prejudice, nor did the withdrawal of the improper remarks do so. The transgression was flagrant and the effect of the remarks were not removed by the admonition of the court or retraction by counsel. 70 Ark. 308; 76 N. W. 462; 103 Ill. 333; 74 Ark. 259; 100 *Id.* 459; 77 *Id.* 238; 65 *Id.* 625; 75 *Id.* 468; 63 *Id.* 174; 74 *Id.* 210; *Id.* 239; 76 *Id.* 276; 65 *Id.* 389; 70 *Id.* 179; 76 *Id.* 370; 89 *Id.* 58; 87 *Id.* 461; 87 *Id.* 515; 81 *Id.* 25.

3. The court erred in refusing instructions Nos. 8 and 9 asked for by appellant. The master is not liable for the independent acts of his servant, done outside the scope of his employment. 93 Ark. 397; 101 *Id.* 586; 58 *Id.* 381; 77 *Id.* 606; etc.

4. Appellee was a trespasser and the company owed no duty except not to injure him wantonly or will-

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fully or by gross negligence after his peril was discovered, etc. 45 Ark. 246.

5. Dr. Smith, a witness was not sworn. 30 A. & E. Enc. of L. 910-911; 92 Ark. 150; 14 *Id.* 502; 22 *Id.* 86.

*Hays & Ward*, for appellee.

1. The evidence in this case is conflicting, but the jury evidently and rightly believed the testimony for the plaintiff as to how the injury occurred, and this court will not disturb the finding, where there is any substantial evidence to sustain it. 102 Ark. 200; 101 *Id.* 121; 98 *Id.* 259; 94 *Id.* 165; 92 *Id.* 200; 91 *Id.* 425; 78 *Id.* 1, and others. A verdict is final on review of facts. 89 Ark. 111; 90 *Id.* 100; 146 S. W. 855.

2. It was within the scope of employment for a brakeman to see that persons other than the train crew did not ride on the cars. It was the brakeman's duty to enforce this rule of the company and eject trespassers. This was properly submitted to the jury. 100 Ark. 314; 90 *Id.* 19; 89 *Id.* 92; 146 S. W. 482; 75 Ark. 579; 58 *Id.* 381; 48 *Id.* 177; 42 *Id.* 542.

3. Railway companies have been held liable for injuries to trespassers, resulting from threatening language which caused them to lose their presence of mind and fall from trains. 14 Pac. 172; 40 S. W. 932; 77 Am. St. 829.

4. The remarks of counsel were but an expression of opinion; were promptly withdrawn and excluded by the court from consideration by the jury. There could be no prejudicial effect upon the jury. 100 Ark. 437; 98 Ark. 87; 34 *Id.* 658; 20 *Id.* 619; 104 *Id.* 528; 89 *Id.* 92; 92 *Id.* 48; 90 *Id.* 406; 82 *Id.* 64; 73 *Id.* 73; 71 *Id.* 435; 48 *Id.* 123.

As to the remarks of Mr. Hays, made in answer to Judge Bullock's argument, it was a clear case of *invited error*. 122 Ark. 509; 112 Ark. 261; 104 *Id.* 528.

5. The instructions properly presented the case to the jury. 100 Ark. 214. They correctly define the measure of damages. 65 Ark. 619; 87 *Id.* 641; 81 *Id.* 187. Those refused were mere repetitions of those given. 104 Ark. 489; 97 *Id.* 405; 23 *Id.* 282; 16 *Id.* 184.

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6. The facts testified to by Dr. Smith were undisputed and amply proven. His failure to be sworn was a mere oversight and his testimony was not material nor untrue. 98 *Id.* 228; 111 Ark. 159.

SMITH, J. Suits were brought for Benjamin Hairston, a minor about eighteen years old, by his father as his next friend, and by his father on his own account, to recover damages to compensate a personal injury caused by a freight car of appellant's train running over and crushing one of the boy's feet. The suits were consolidated and tried together, and judgments for substantial sums—which, however, appellant does not complain against as excessive—were rendered in both cases.

The evidence in the case is sharply conflicting, and no attempt is made to reconcile it. According to the boy, his injury occurred under circumstances which warrant a finding of liability against the railroad company; while, according to the evidence of the company, there was no liability whatever. The cause appears to have been submitted to the jury under proper instructions, and under the well established rule that we do not pass upon questions of mere preponderance of the evidence, we would affirm the judgment of the court below as being sustained by legally sufficient evidence if only the question of the sufficiency of the evidence was involved. Seven witnesses testify as to the circumstances under which young Hairston was injured. According to his own testimony he had beaten his way on a freight train from his home in Morrilton to Russellville, and was returning home from Russellville in a box car, with two companions, all of whom were "beating their way." Two brakemen, who were stationed in the caboose about fifteen cars behind the box car in which appellee and his companions took passage, observed their presence there, and one of these brakemen, a man named Young, went to this car and ordered Hairston and his companions out of it. That this command was given him after he had told the brakeman that he had no money to pay him, but the brakeman, with profane language and menacing threats, compelled

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him to climb out of the door of the car, and while he was so doing the brakeman threw some object at him which struck him on the forehead and rendered him unconscious, and when he regained consciousness he found that he had fallen under the train and that his foot had been crushed. He admitted that he had at first explained his injury by stating that the brakeman had kicked him in the face and caused him to fall. The almost physical impossibility of this last statement is apparent when the relative situations of the parties is considered, the brakeman being on top of the car while Hairston was climbing out of the side door. Hairston made no attempt to reconcile his conflicting statements except to say that when he made his first explanation he was only talking; while at the trial he was "swearing now."

According to the evidence of his two companions, Hairston debarked from the car in safety, and was injured as he attempted to catch another car. That Hairston was an expert in catching trains and had been seen frequently to catch trains running faster than this train was going at the time of his injury. These companions of Hairston are substantially corroborated by the brakemen, and also by a farmer and his son who witnessed the injury from their field where they were at work.

Some conflict appears in the evidence of witnesses for appellant as to whether Young's head was lying towards the north or the south as he looked into the car where the boys were riding, and much importance is attached to this discrepancy by counsel, who insists that because of it the jury disregarded most of the evidence which was in conflict with that of Hairston.

(2) It is urged that error was committed in permitting a doctor who had examined Hairston's injuries to testify without having been sworn. This question was raised for the first time after the verdict had been returned. Counsel explained the failure to raise the question earlier by stating that they were not advised of the fact sooner. The integrity of the trial cannot be thus defeated. The case does not present the question of a witness who was permitted to testify after refusing to be sworn or of

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the grant of permission to a witness to testify without having first taken the oath prescribed by law. It is a mere case of inattention for which, no doubt, appellant is as much responsible as the appellee. At any rate, the error is one which appellant could easily have avoided, and it is, therefore, one of which it is now in no position to complain. Similar questions have been raised in regard to jurors who have been permitted to serve who did not possess the qualifications required by law, and in such cases it has been uniformly held that where no imposition was practiced, whereby the juror was permitted to serve, that complaint would not thereafter be heard when no effort had been made to elicit from the juror the facts from which his incompetency would have appeared. *Brown* v. *St. L. I. M. & S. R. Co.*, 52 Ark. 120; *James* v. *State*, 68 Ark. 464; *Casat* v. *State*, 40 Ark. 515. We must so hold in regard to this witness.

(2) The record contains the following recital: "In his closing argument to the jury, A. S. Hays, one of the attorneys for the plaintiff, stated to the jury: 'Gentlemen, Judge Bullock said we should all be honest. Yes, we ought to be. But I state to you that the defendant is not honest in this case and is trying to avoid payment of its just liability. Now, in the Burriss case the railway company admitted its liability but denied the plaintiff was injured. In this case, it admits the injury but denies the liability. No, gentlemen, the railway company don't admit liability and injury both in the same case.'" Whereupon the attorney for the appellant objected to the above statement, when Mr. Hays said: "I am making this statement in answer to Judge Bullock's remarks a while ago about honesty of the parties." An objection was thereupon overruled by the court. Whereupon Mr. Hays turned to the attorney for the defendant company and in a loud voice so that the jury could hear his remarks said: "Write it out; put it in the record. I stand upon the statement." Counsel for appellant at the time objected to this statement and asked the court to exclude it, which request was by the court overruled, and exceptions were duly saved. The Burriss case to which reference

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was made was a personal injury case against the appellant company, and at the time the remarks quoted were made the jury in that case was still engaged in their deliberations.

Counsel for appellant insists that this improper argument was responsible for the verdict of the jury, and because of it the jury did not decide the case in accordance with the overwhelming preponderance of the evidence. No question arises oftener upon appeals to this court than that of some alleged improper argument. We have frequently announced the correct policy to be pursued by the trial courts in such cases, and have also frequently stated our own policy in such matters. The difficulty does not lie in defining the rule to be pursued in such cases, but is found in applying that rule to the facts and circumstances of the particular case. In 2 R. C. L. 425, it is said:

"It is the unquestionable privilege of counsel to indulge in all fair argument in favor of the contention of his client. But he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. An advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, *dehors* the very case he has to try. The fullest freedom of speech within the duty of his profession should be accorded to counsel, but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. * * * * * * Where the admonition of the court does not prove sufficient to prevent improper and dangerous appeals to the prejudice of jurors, it becomes necessary rigidly to enforce the general rule that requires a reversal whenever the error is raised by a proper exception."

A very clear statement of the duty of the appellate court when reviewing the proceedings in the trial court is found in the opinion in the case of *Kansas City Sou. Ry.*

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*Co.* v. *Murphy*, 74 Ark. 259, where Chief Justice Hill, speaking for the court, said:

"When the ruling of the court is presented to the appellate court in proper manner, then it is the duty of the appellate court to look to the remarks, and weigh their probable effect upon the issues; then to the action of the trial court in dealing with them; and if the trial court has not properly eliminated their sinister effect, and they seem to have created prejudice, and likely produce a verdict not otherwise obtainable, then the appellate court should reverse. 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. There is, however, a class of cases which present argument and remarks so flagrantly prejudicial, or counsel may be so persistent in their impropriety, that the commendable efforts of the trial judge to eradicate the evil effects of them will be unavailing. In such event, then, a new trial is the only way to remove the prejudice, notwithstanding the judge may have reprimanded, or even fined, the offending attorney, and positively and emphatically instructed the jury to disregard the prejudicial statements. In the final analysis, the reversal rests upon an undue advantage having been secured by argument which has worked a prejudice to the losing party not warranted by the law and facts of the case. In the one class of cases the reversal rests upon the abuse of the discretion of the trial judge in not confining the argument within its legitimate channel, and not properly instructing upon it or sufficiently reprimanding or punishing the offending attorney; and in the other or exceptional class rests upon the extremely harmful nature of the remarks which cannot be cured other than in a new trial upon the merits of the case freed of extraneous prejudice."

The rule thus stated has since been frequently approved and reversals or affirmances have followed accord-

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ing to the effect of its application to the particular cases to which it was applied.

Appellees attempt to justify the argument of Mr. Hays upon the ground that it was invited error. It is said that Judge Bullock, in his argument for appellant, had erroneously injected into the case the question of Hairston's good faith and honesty, and that the argument was not, therefore, prejudicial, even though it was erroneous. But we do not agree that this is a case of invited error. The good faith and honesty of Hairston was raised by the evidence and was a proper subject to be considered by the jury in determining the weight to be given his evidence. By his own admission he had beaten his way to Russellville and was beating his way back on his return. He had testified to the material circumstances under which he sustained his injury and had admitted that his sworn statement conflicted with his previous unsworn explanation. The counsel was, therefore, within the record in recounting these circumstances as bearing on the witness' credibility. And this argument did not warrant counsel in stating that railroads never admitted injury and liability in the same case, and are not honest in their defense of claims and suits against them. The statement was not a proper one to make, even though it was true, and we know from official reports that the railroads do admit liability in many cases against them and that a considerable portion of the operating expenses of the railroads of the country is incurred in discharging claims of various kinds, some with and others without litigation. The finding of the jury in this case on the question of the preponderance of the evidence should not have been influenced by any consideration of the general policy of the railroad company in regard to other claims, yet the objection to the argument was overruled and counsel was permitted to say that he stood upon that argument.

It was improper, and in view of the closeness of the case, may have turned the scale in appellee's favor. And we, therefore, reverse the judgment.

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MCCULLOCH, C. J. (dissenting.) I conceive it to be my duty, in reviewing the ruling of a trial court concerning an alleged improper argument of counsel to proceed on the assumption that the judge has endeavored with perfect impartiality to conduct the trial in such manner that both sides may receive fair treatment, and that he is in better situation than we are to determine how far, if at all, such argument has prejudiced the rights of the parties and what steps are necessary to eliminate such prejudice. A very large degree of discretion must necessarily rest with the trial judge in such matters, and I assume that he has endeavored to fairly exercise it so as to preserve the integrity of the trial.

Of course, it is our duty, as reviewing judges, to correct a manifest abuse of such discretion by ordering a new trial. But unless it is manifest that prejudice resulted from an improper argument, and that the trial judge has failed to do all that he could to eliminate the possibility of prejudicial effect, we should not reverse the judgment, however much we may be disposed to condemn the argument. If we adopt the rule of reversing judgments merely because improper remarks have been made in the progress of the trials, we will increase very materially the number of reversals.

Now, the remark of Mr. Ward was withdrawn, and if it was calculated to prejudice the rights of appellant I fail to see the force of the criticism of his method of withdrawal. What he said was, in effect, that he desired to commit no error to the prejudice of his adversary. The original remark concerning the decisions of this court in other cases constituted merely his opinion, which could not, it seems to me, have prejudiced appellant's cause in the minds of an intelligent jury.

The argument of Mr. Hays was improper in that it constituted a criticism of appellant's conduct in other litigation, but it was not such an argument as was calculated to inflame the minds of the jury and induce them to render an improper verdict on the facts. It is hard for me to believe that twelve fair-minded and intelligent men would be induced by such an argument as that, being

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merely the counsel's own estimate of what constitutes honest dealing, to depart from their convictions concerning the effect of the testimony in the case and the law and to render a verdict which was unauthorized. We should not reverse a case merely because an error was committed, unless it appears reasonably probable that prejudice resulted.

Mr. Justice KIRBY concurs.

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## BOARD OF ASSESSORS OF WATERWORKS IMPROVEMENT DISTRICT NO. 22, OF TEXARKANA, v. TEXARKANA WATER CORPORATION.

Opinion delivered October 2, 1916.

IMPROVEMENT DISTRICTS—RIGHT OF BOARD OF ASSESSORS TO APPEAL FROM DECREE OF CHANCERY COURT.—The members of the board of assessors of an improvement district, are without authority to appeal from decrees of the chancery court cancelling certain assessments, and declaring the organization of the district invalid.

Appeal from Miller Chancery Court; *Jas. D. Shaver*, Chancellor; dismissed.

*Per Curiam.* The members of the board of assessors of Water Works Improvement District No. 2 of Texarkana, an improvement district formed in the city of Texarkana for the purpose of constructing water works for public use, are appellants in each of three cases instituted in the chancery court against the board of improvement of said district and the board of assessors and the collector. Two of the suits were brought for the purpose of cancelling the assessments on the ground that they were not made on the correct basis or in the proper manner, and the last suit was for that purpose and also to have the organization of the district declared invalid.

The record in each of the cases recites that on the day on which the cases came on for trial all of the defendants withdrew their defenses and decrees were entered in favor of the appellees (plaintiffs below) declaring the organization of the district to be void, as well as the assessments

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made by the board of assessors. There has been no appeal taken by the board of improvement nor anyone else except the members of the board of assessors. Motions have been filed by appellees in each of the cases to dismiss the appeals on the ground that appellants have no interest in the controversy which authorizes them to appeal from the decrees. The conclusion is reached by this court that the contention of appellees is sound and that the motions to dismiss the appeals should be sustained.

Appellees were not necessary nor even proper parties to the litigation. The assessments made by them had been reported to the city council and were subject to attack in the manner in which they are attacked in these actions. The board of improvement is the controlling power of the district and the assessors have no authority except that conferred by the statute to make assessments of benefits and report the same to the city council. They have no interest whatever in maintaining the integrity of the district itself. The fact that the members of the board of assessors were improperly joined as parties to the action, and are enjoined by the decrees from performing any other duties with respect to the assessment, does not give them the right to appeal from a decree in which they have no interest officially and are not shown to be interested as taxpayers. If appellants should be allowed to prosecute their appeals and secure reversals of the decrees, it would avail them nothing, because the decrees would still remain in force as against the board of improvement, there being no such community of interest which would justify appellants in compelling the board of improvement to join in the appeal.

Nor does the fact that there were decrees for costs against appellants and the other defendants below justify them in appealing where they have no other interest. *Pearson* v. *Quinn*, 113 Ark. 24.

The appeal in each of the cases is therefore dismissed.

KIRBY, J., not participating.

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## CONWAY *v.* MILLER COUNTY HIGHWAY & BRIDGE DISTRICT

Opinion delivered October 2, 1916.

IMPROVEMENT DISTRICTS—HIGHWAY AND BRIDGE DISTRICT IN MILLER COUNTY.—Act 153, p. 617, Acts of 1915, approved March 5, 1915, laying off and establishing a part of Miller County into a public Highway and Bridge District for the construction of public highways from the city of Texarkana to certain localities in the county and for the construction of a public bridge across Red River, *held* valid; that said district was not invalidated because it provided for the construction of several roads, since the same emanated from a common point and connected in the city of Texarkana, nor because it provided for the construction of a bridge across Red River into Hempstead County.

Appeal from Miller Chancery Court; *Jas. D. Shaver*, Chancellor; affirmed.

*William H. Arnold*, for appellant.

1. The legislature has attempted to give jurisdiction and control to the commissioners over such public roads as they may select not exceeding 60 miles in length, etc. This attempt is in conflict with § 28, Art. 7, Constitution. It is an usurpation of the jurisdiction of the County Courts. 89 Ark. 513; 118 *Id.* 294.

2. The five roads and bridges do not constitute a single improvement. No such "roving" commission can be created legally. 118 Ark. 294; 118 Ark. 119. See also the former decision in 120 Ark. 510.

3. Treating the act as constituting a single district the cost including the bridges, exceeds 15 per cent. of the assessed value of real property in the district. 120 Ark. 510.

4. The act is unconstitutional because it gives the commissioners power to lay out roads, condemn right of way and build a bridge beyond the center of the channel of Red River, or in Hempstead County. Further, the act forbids the opening, paying out and construction of any roads that shall not be taken over by Miller County Court, when a part at least is in Hempstead County, and is an attempt to take away the constitutional rights of said county over its own roads and bridges.

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*Rose, Hemingway, Cantrell, Loughborough & Miles*, also for appellant.

1. Two or more roads, having no connection with one another and serving entirely different territory, cannot be combined into one improvement. 118 Ark. 294; 176 S. W. 676.

2. All property directly benefited must be embraced within the district. 48 Ark. 251, 370; 119 *Id.* 203.

*M. E. Sanderson*, for appellee.

1. The act is not unconstitutional. 92 Ark. 93; 96 *Id.* 416; 103 *Id.* 533; 104 *Id.* 425.

2. The five roads connect and form a single district. 97 Ark. 330; 108 *Id.* 419. It does not invade the jurisdiction of the county courts. 96 Ark. 417; 104 *Id.* 427; 50 Minn. 248; 52 N. W. 858.

3. Counties and towns are but subdivisions of the State. The legislature is supreme, subject only to the limitations of the constitution. 28 Ark. 329; 33 *Id.* 497; 37 *Id.* 339; 56 *Id.* 138; 99 *Id.* 103; 118 *Id.* 304.

4. It was lawful for the legislature to give authority to the commissioners to go beyond the confines of the district and extend the bridge into another county, as an outlet. 103 Ark. 272.

5. In reply to points made in brief of Rose, Hemingway, Cantrell, Loughborough & Miles cites 114 Ark. 328; 59 *Id.* 528; 96 *Id.* 410; 52 *Id.* 107; 67 *Id.* 37; 110 U. S. 558; 102 *Id.* 69; 23 Conn. 416; 130 Mass. 528; 68 Conn. 131.

MCCULLOCH, C. J. This suit involves an attack on the validity of a special statute enacted by the General Assembly of 1915 (Act No. 153, Session of 1915, page 617) creating an improvement district known as the Miller County Highway & Bridge District, and it also calls in question the validity of the proceedings under said statute. The same case was here on a former appeal, where we held that the improvements of the highways and the construction of the bridge mentioned in the statute constituted a single improvement, so as to fall within the limitation to

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the effect that the cost of the improvement shall not exceed fifteen per centum of the assessed valuation of real property in the district. That question was raised by demurrer to the complaint, and we reversed the decree with directions to overrule the demurrer. 120 Ark. 510.

When the case was remanded, an answer was filed which raised an issue concerning the point decided here on the former appeal, and on the final hearing of the cause the chancellor found that the cost of the whole improvement, treating as a unit the cost of improving the highways and construction of the bridge, would not exceed the percentage of assessed value mentioned in the statute. Another appeal has been prosecuted to this court, and after reviewing the evidence we are of the opinion that the chancellor was correct in his findings. There are however, other questions raised on the appeal.

Section 2 of the statute, which prescribed the powers of the district, reads in part as follows: "Said district shall have the power to construct and maintain sixty (60) miles of free public highways of such material as it may deem best, leading from the City of Texarkana to such point on the Red River between Fulton and Index, at which it may deem desirable and suitable to construct a bridge over and across said Red River in connection with the plan and system of such highways, and at such point so selected on Red River, said district shall have power to construct and maintain a free public bridge in connection with said highways over and across said Red River, and within the boundaries of the territory constituting said district in Miller County, and said district shall have the power to construct and maintain other free public highways in connection with the highway leading to said bridge, in the territory of said district, of such material as it may deem best, leading from the City of Texarkana to such other points and localities in said territory to which it may deem desirable and best calculated to serve the best interests of the people as a whole in said territory, but not to exceed in the aggregate in connection with the highway to said bridge, sixty (60) miles in length."

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The statute described the boundaries of the district, which constitutes about one-third of the territory of the county, and it appears from the pleadings and proof that plans have been made by the board of commissioners to construct roads not exceeding sixty miles in length, the principal road being one running East from the city of Texarkana to the location of the bridge on Red River, which forms the boundary between Miller and Hempstead counties. Another branch of the road runs North from Texarkana to the river, and there are other roads running out from these two main stems.

It is contended that the authority conferred by the statute upon the board of commissioners constitutes an encroachment upon the jurisdiction of the county court as held by this court in the case of *Swepston* v. *Avery*, 118 Ark. 294. The distinction between the statute condemned in *Swepston* v. *Avery* and the statute now under consideration is obvious, and the decision in that case is not controlling in the present. That statute constituted substantially the whole of Crittenden County into a road district, and authorized the board of commissioners to improve any road or roads in the county which they might select, and imposed the cost thereof upon the lands in the district in proportion to the assessed value. It did not provide for assessment of benefits to arise from the construction of any particular road, but constituted a legislative determination that the benefits from any road would accrue to all the lands in the district in the same proportion. We said that the statute attempted to confer an authority which constituted an invasion of the jurisdiction of the county court, and that it was necessarily an erroneous determination concerning the accrual of benefits.

The statute now before us is not nearly so comprehensive in its terms as the one dealt with in the former case. In the first place, the Miller County District only includes about one-third of the county, and the statute provides for an actual assessment of the benefits to accrue from the improvement of any of the roads which the board may select to improve. The act does not attempt to determine the ratio of benefits that will accrue, but on

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the contrary authorizes a proceeding to ascertain the actual benefits.

Nor does the statute fall within the objections sustained by this court in the recent case of *Cox* v. *Road Imp. Dist. No. 8 of Lonoke County*, 118 Ark. 119, as contended by counsel for appellant. Counsel assail that portion of the statute which authorizes the board of improvement to select the roads to be improved, and say that this gives a roving commission which was condemned in the case just referred to. An examination of the opinion in that case discloses the fact that we were dealing with a statute which authorized the county court, on the petition of property owners, to form improvement districts, and in construing that statute we said that it was contemplated that the petition of the property owners should specify the roads to be improved, and that the petition in that case was void because it contained no such specification. The statute now being considered, however, creates a district and confers upon the board the authority to select the route to be adopted. Therefore it does not fall within the objection made in the Cox case. It was not beyond the power of the legislature to delegate to the board authority to select a particular road to be improved. *Nall* v. *Kelley*, 120 Ark. 277. Nor does it attempt to take away from the county court any of the jurisdiction conferred by the constitution. *Parkview Land Co.* v. *Road Imp. Dist. No. 1*, 92 Ark. 93.

It is also contended very earnestly that the road selected by the board of commissioners to improve does not constitute a single improvement. In answer to that contention we say, in the first place, that much deference should be paid to the judgment of the Legislature in prescribing the boundaries of the district, and to that of the board of commissioners in exercising the authority conferred upon it in selecting the roads to be improved; and, bearing that in mind, we are unable to say that the roads are not sufficiently connected to form a single project. The roads are in fact connected with each other, one of the principal roads running East from Texarkana and the other running North. The other roads are merely

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laterals running out from those two. In *Nall* v. *Kelley*, *supra*, we upheld a district which authorized the construction of a road running entirely through Grant County, and we see no distinction in the present case because the roads, instead of forming a continuous line, form an angle at the city of Texarkana. These roads traverse the same section of the county and run to the common center at the city of Texarkana. It will doubtless be found, when it comes to the assessment of benefits, that all the lands in the district are not benefited by these roads in the same proportion, but it does not necessarily follow on that account that the roads are not sufficiently joined together to constitute a single improvement. We cannot, therefore, say that the chancellor was not correct in finding that these roads did in fact constitute a single improvement so as to come under the authority conferred by the statute.

The last objection urged to the validity of the proceedings is that the bridge to be built spans a river which constitutes the boundary between two counties, and that the lands in Hempstead County which may be benefited are not included in the district. It is contended that the failure to include the lands in Hempstead County constitutes a discrimination against the owners of land in Miller County, and thus destroys the uniformity of the assessment to defray the cost of the improvement. In the very nature of things there must be a limit to the boundaries of a district, and some authority must be conferred to determine where those limits shall be. For instance, in a street paving district, while it is known that there is some benefit not only to the property beyond the limits of the district but also to the public at large, yet the cost is assessed upon the property contiguous thereto, which enjoys a peculiar and special benefit. *Little Rock* v. *Katzenstein*, 52 Ark. 107; *Washer* v. *Bullitt County*, 110 U. S. 558.

The Legislature necessarily determined, in passing this statute, that there was not sufficient benefit to accrue to the lands of Hempstead County to justify the taxation of those lands for the cost of building the bridge, and we are unable to say that that determination is so far outside

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of the range of real facts that it should be ignored. The fact that the bridge spans the boundary line of the county does not make an invasion of the jurisdiction of the county courts of either of the counties. The provision of the general statute providing for county line bridges to be built by the two counties places no restraint upon the power of the Legislature to create an improvement district for the construction of bridges of that kind. *Shibley* v. *Ft. Smith & Van Buren District*, 96 Ark. 410; *Board of Directors of Jefferson County Bridge District* v. *Collier*, 104 Ark. 425.

There is a section of the statute which provides that the county court of Miller County may take over the highways and bridge constructed by the district and maintain the same in the future. We do not undertake to decide whether this provision is valid so far as concerns that part of the bridge which extends into Hempstead County, as the question does not arise now and it does not affect the validity of the statute as a whole. It is left entirely optional with the county court of Miller County and the board of commissioners whether the authority thus conferred upon the county to take over the improvement shall be exercised. For that reason, this particular provision of the statute is not essential to the validity of the other provisions of the statute as a whole.

We conclude that the several attacks upon the validity of the proceedings are without foundation, and that the chancery court was correct in upholding the statute and the proceedings of the commissioners thereunder.

The decree is therefore affirmed.

HART and KIRBY, JJ., dissent.

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## PENIX *v.* PUMPHREY.

Opinion delivered October 2, 1916.

1. DAMAGES—CUTTING TIMBER WRONGFULLY.—Where appellee cut timber on land belonging to appellant, the measure of appellant's damage is the value of the timber itself which was cut and appropriated by the appellee, and the actual damage to the appellant's land as a consequence of the cutting of this timber.

2. ACTIONS—PRESUMPTION AS TO JURISDICTION.—An action for damages for the wrongful cutting of timber was brought in equity, but should have been brought at law; *held*, the parties failing to raise the question of jurisdiction, and having voluntarily submitted the issue to the chancery court, the cause will be treated as cognizable in that court.

3. COSTS—EQUITY RULE.—In equity the allowance of costs rests in the sound discretion of the court, but its decree will be reviewed and corrected where a manifest error has been committed.

4. COSTS—RULE.—Where the party bringing an action against another either in law or in equity is shown to be in the right and the other party is shown to be entirely wrong, costs will be assessed against the party held to be in the wrong.

Appeal from Boone Chancery Court; *T. H. Humphreys*, Chancellor; reversed.

STATEMENT BY THE COURT.

The appellants, plaintiffs below, instituted this suit against the appellee to enjoin him from trespassing upon an acre of land which appellants claim to own, and to quiet and confirm appellants' title. They prayed judgment against the appellee for damages on account of alleged trespasses. Appellants alleged that they were the owners of one acre, more or less, being all that part of the Northeast quarter of the Northwest quarter of Section 31, Township 21 North, Range 18 West, lying North of the main channel of the Carrolton Hollow Branch, such channel being the Eastern line of said one acre. They alleged that the appellee was the owner of lands adjacent on the South of the main channel of Carrolton Hollow Branch. That appellee had cut and removed the timber from the land described, which timber had not only a marketable value but served as a protection to other land

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of the appellants by preventing the creek from cutting same away.

The appellee answered, denying that appellants were the owners and in possession of the land described in the complaint; alleged that he was in the possession; set up that he was the owner by virtue of certain deeds of conveyance, and denied the alleged acts of trespass; and prayed that appellants' complaint be dismissed and that he have judgment for costs.

The court, after considering the pleadings and exhibits and certain depositions then on file, found that it was necessary, before the respective interests of the parties could be properly adjudicated, that a survey of the land be made, and directed the surveyor of Carroll County to make the survey according to specific directions set forth in the order. The cause was continued for the report of the surveyor and the taking of further proof. Upon the final hearing the court entered a decree in favor of appellants, adjudging that they were the owners of the land described in the complaint and quieting their title; and enjoined appellee from the further cutting of timber or exercising any acts of ownership over the lands; but dismissed the appellant's complaint for damages and adjudged that appellants and appellee each pay one-half of the surveyor's costs; that each party pay his own witness fees and the costs of taking depositions, and that the plaintiffs (appellants) pay all the court costs.

From the judgment dismissing appellants' complaint for damages, and adjudging costs against them in any sum, this appeal has been duly prosecuted.

*E. G. Mitchell*, for appellant.

The court erred in not awarding damages to plaintiffs, at least $100.00, and in adjudging any of the costs against plaintiffs. There was no fraud and no mutual mistake. The court properly found that plaintiffs were the owners of the land and quited their title, but erred in not giving damages and in the awarding of costs. The decree should be modified and damages awarded here and judgment entered for all costs against the appellees. 74 Ark. 336;

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85 S. W. 770; 71 Ark. 614; 77 S. W. 54; 4 Hayw. Tenn. 36; 54 Ark. 165.

*J. M. Shinn*, for appellee.

1. The findings of the chancellor that plaintiffs suffered no damages are sustained by the evidence and this court will not reverse 112 Ark. 341.

2. There was no abuse of discretion in the awarding of costs. 36 Ark. 383; 86 *Id.* 259, 280; 18 *Id.* 202-7; 19 *Id.* 148. Costs are within the discretion of the chancellor. 86 Ark. 608, 614; 11 Cyc. 32, 33, 36-7; 10 Conn. 121; 9 Dana, 261; 4 Stew. & Port. 138.

WOOD, J. (after stating the facts). 1. On the issue of damages, the father of appellants testified that he had operated the land in question for about twelve years; that the effect of the cutting of the timber by the appellee was to continually wear the bank off there and destroy the bottom land below; that the piece of land in controversy was protection to the other bottom land belonging to appellants; that appellee had cut timber off of the land in controversy over his protest. He was asked what the timber was worth and replied: "I would not want it cut at all. It was a protection to my place and I would not have had it cut. I would not have had it cut for $100.00. I would say that." Another witness, the former owner from whom the appellants deraign title, stated that he would not have had the timber cut, as it was done by the appellee, for less than $400.00 or $500.00. Another witness stated that, taking into consideration the value of the timber and the damage to the farm, he considered that adequate damages would not be less than $100.00.

It was shown that the land in controversy had on it walnut, hickory, ash and oak trees, some six, eight, ten and twelve inches in diameter. The appellants' testimony tended to prove that the land itself in controversy was of no value for agricultural purposes; that the only value it had was the timber and the protection that this timber afforded against the floods to other lower lands of the appellants, keeping the water from washing same away.

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There is no testimony to show, specifically, how much the lands of appellants had deteriorated in value by reason of the cutting of this timber; nor was there any testimony to show what was the value, specifically, of the trees that were cut. This evidence does not furnish a basis for estimating the amount of damages that the appellants sustained by reason of appellee's trespass in cutting the timber from the lands of the appellants. While one witness testifies that he would not want it cut at all, because he wanted it as a protection to the place and would not have had it cut for a hundred dollars, he does not testify that the land was damaged to the extent of $100.00, and does not testify that the timber cut had that value. Another witness testified that he would not have had the timber cut for less than $400.00 or $500.00; but the testimony of this witness, likewise, does not show that the land was damaged by reason of the cutting of the timber in that sum, nor does he specify the value of the timber cut.

Now, the measure of appellants' damage was the value of the timber itself which was cut and appropriated by the appellee, and the actual damage to the appellants' land as a consequence of the cutting of this timber. No witness testified what the deterioration in the value of the land was or would be. The fact that witnesses would not have had the timber cut for certain amounts, if the land had belonged to them, furnished no definite and accurate standard for estimating the value of the land after the timber had been removed from it. These two witnesses, it will be observed, had widely divergent views as to what effect the cutting of the timber would have upon the land, so far as the value of their individual preferences were expressed; but it is not what any particular individual would have preferred or desired had he owned the lands, nor the value of such estimated desires or preferences, of which the law takes notice. In measuring damages of the character under consideration, the law requires that the actual damage to the lands should be definitely stated and a value placed upon such damage. It would have been impossible for the court to have fixed an accurate amount of damages from the indefinite manner in which these

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witnesses expressed the value of what their desires with reference to the land would have been had they been the owners thereof.

The third witness, however, does furnish a definite standard for estimating the damages, and his testimony is nowhere disputed. He says that "taking into consideration the value of the timber and the damage to the farm, he considered that adequate damages would not be less than $100.00." His testimony, taken in connection with the other testimony on behalf of the appellants showing that appellee had cut the timber, and that the cutting of the timber would damage the land, furnished a definite basis for ascertaining the amount of appellants' damage. The appellee himself admitted that he cut the timber, and from all this testimony, which the trial court could not arbitrarily ignore, it was shown that appellants had been damaged by reason of the trespasses of the appellee in the sum of at least $100.00, and judgment should have been rendered in favor of the appellants for that amount.

2. The next question is whether or not the court erred in adjudging that the appellants should pay costs.

On the issue as to the ownership of the parcel of land in controversy the testimony was somewhat conflicting. The testimony on this issue is voluminous and it could serve no useful purpose as a precedent to set it out. Suffice it to say, a decided preponderance of the evidence shows that the appellants were the owners, and the decree of the court in so holding was therefore correct.

It was in evidence that when the appellants first discovered that the appellee was cutting the timber from the land in controversy they disputed his right to do so. Even though appellee cut the timber under a *bona fide* claim of ownership he had notice from the appellants that they also claimed to own the land. They protested against his cutting their timber, and he persisted in doing so over their protest.

Appellee himself testified concerning this as follows:

"Q. Now, I will ask you if he (Charley Penix) did not dispute your right to cut wood there?

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A. Yes, I believe the first time he talked he says it was his.

Q. Did he not ask you to stop?

A. He asked me to quit until we found out whose land it was.

Q. I will ask you if he didn't say to you: 'Here, I think I have got a deed to it and you think you have got a deed to it and let us get some one to settle it and have them to settle it?'

A. I believe that was the last time we talked about it."

He further testifies: "I suppose Charley claimed under the deed. He came down there and tried to settle it." It appears, therefore, that appellee refused to settle the issue between himself and the appellants out of court, and that he persisted in cutting the timber upon and exercising acts of ownership over appellants' land, and they were thus compelled to resort to the courts in order to have their rights ascertained and to restrain appellee from doing further damage to their land.

It is nowhere alleged in the complaint that the appellee was insolvent, and therefore the appellants' cause of action for damages for the trespasses alleged was adequate at law. *Davis* v. *Davis*, 93 Ark. 93-101, and cases cited. There the action should have been brought and tried, in which case, upon appellants being adjudged the owners of the land, the judgment for costs would necessarily have been in their favor. The appellee did not, however, challenge the sufficiency of the complaint, and neither party asked that the cause be transferred to the law court. The parties litigant have raised no question as to the jurisdiction, and have voluntarily submitted the issue to a court of chancery, and we therefore treat the cause as cognizable in that court.

In *Blaisdell* v. *Sumpter*, 66 Ark. 7, we said: "In equity, the costs are not necessarily adjudged, as at law, against the losing party; but, on the contrary, the chancellor possesses a large discretion in the matter, and, when the facts warrant it, may distribute the costs upon equitable principles, without regard to the facts of the decree

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in the case being otherwise for the one party or the other. But this discretion should be exercised upon well-known principles only, and in cases where the successful defendant is not without fault himself."

3. We have often ruled that in equity the allowance of costs rests in the sound discretion of the court. See *State, use Burton* v. *Fort*, 18 Ark. 202; *Temple* v. *Lawson*, 19 Ark. 148; *Jones* v. *Graham*, 36 Ark. 383; *Johnson* v. *Meyer*, 54 Ark. 442; *Williams* v. *Buchanan*, 86 Ark. 259; *Mt. Nebo Anthracite Coal Co.* v. *Martin*, 86 Ark. 608.

In *Temple* v. *Lawson*, *supra*, after stating the general rule "that the giving of costs in equity is entirely discretionary," we further said, in explanation of the rule: "But when it is said that the giving of costs in courts of equity, is entirely discretionary, it must not be supposed that these courts are not governed by definite principles in their decisions relative to the costs of proceedings before them; all that is meant, it is said, by the *dictum*, is, that these courts are not like ordinary courts held inflexibly to the rule of giving costs of the suit to the successful party, but that they will, in awarding costs, take into their consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise their discretion with reference to these points."

While the chancery court has a broad discretion in the matter of adjudging costs, yet the chancellor's discretion in this respect is not absolute, and his judgment will be reviewed and corrected where there is a manifest error in the exercise of such discretion. The law is correctly stated in 11 Cyc. 32, as follows: "In courts of equitable jurisdiction it is a rule of universal application that the allowance of costs is within the court's discretion, and that the action of the trial court cannot be reviewed or interfered with, unless such discretion has been manifestly abused. Costs are awarded or refused according to the justice of each particular case, but his discretion is not arbitrary. It is a judicial discretion calling for sound judgment upon all the facts and circumstances of the case and must not be so exercised as to result in injustice or oppression. In case the court's discretion is improperly

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exercised, its action may be reviewed and its decree in respect to costs reversed or modified." See also page 37.

4. When one is compelled to resort to a court of justice to obtain redress for an injury which he has sustained at the hands of another, if he is held to be right in his claim and the other party is shown to be entirely in the wrong, then the party who is adjudged to be in the right should not be required to pay the costs. This is a sound principle which must be applied in equity as well as at law, and which was recognized by us in the case of *Greenhaw* v. *Coombs*, 74 Ark. 336.

The principle is applicable to the case at bar. Appellee, as shown by the clear preponderance of the evidence, was not the owner of the land in controversy; yet he persisted in asserting control over the same and compelled the appel'ants to resort to the courts in order to obtain a redress of their grievances. Although the court dismissed appellant's complaint as to the damages, the uncontroverted testimony showed that appellants, being the owners, were entitled to damages in the sum of at least one hundred dollars. The appellants were right in their contention throughout the entire litigation, and they should not in equity be required to pay any of the costs thereof.

The judgment is therefore reversed and the cause will be remanded with directions to the chancery court to enter judgment in favor of appellants in the sum of $100.00 and to retax the costs and to adjudge all of the same against the appellee.

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## STINSON v. STATE

Opinion delivered October 2, 1916.

1. CARNAL ABUSE—PROOF OF MORE THAN ONE CRIMINAL ACT.—Where an indictment charged but one offense of carnal abuse, proof of the act of carnal abuse at any time within the period of limitation for the prosecution of such offenses (three years) is admissible and will sustain the charge.
2. EVIDENCE—CARNAL ABUSE—QUESTIONS PROPOUNDED TO PROSECUTRIX.—In a prosecution for the crime of carnal abuse, questions asked the prosecuting witness as to the details of the alleged crime, *held* admissible.

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3. APPEAL AND ERROR—IMPROPER TESTIMONY ELICITED ON CROSS-EXAMINATION—INVITED ERROR.—Where counsel for appellant, on cross-examination of one of appellee's witnesses asked questions eliciting incompetent testimony, it is not prejudicial error for the trial court to permit counsel for appellee to interrogate the witness further upon the matter, and place the whole transaction before the jury.

4. EVIDENCE—IDENTIFICATION OF LETTERS—JURY QUESTION—In a prosecution for carnal abuse, where the prosecutrix identified certain letters as having been sent by the appellant to her, and the appellant denied their genuineness, a question is made for the determination of the jury.

5. EVIDENCE—CRIMINAL PROSECUTION—EVIDENCE OF COMPROMISE.—In a prosecution for the crime of carnal abuse, testimony offered by the appellant that the father of the prosecutrix offered to drop the prosecution for a certain money consideration, is irrelevant and inadmissible.

6. APPEAL AND ERROR—ARGUMENT OF COUNSEL—FAILURE TO OBJECT.—It is too late to object to improper argument of counsel, for the first time, after the jury has retired to consider their verdict.

7. CRIMINAL LAW—VERDICT—DUTY OF JURY.—In a criminal prosecution it is the duty of the jury merely, if they find the defendant guilty, to so state, and to assess the punishment, and if they cannot agree on the latter, they may leave its assessment to the court.

Appeal from Prairie Circuit Court; *Thos. C. Trimble*, Judge; affirmed.

*C. B.* and *Cooper Thweat* and *Manning, Emerson & Morris*, for appellant.

1. The court erred in admitting evidence of an offense other than that charged in the indictment. 12 Cyc. 405; 2 Ark. 229; 39 *Id.* 278; 52 *Id.* 303; 111 *Id.* 457, 465; 85 Atl. 797; 107 Mich. 357; 65 N. W. 206; 2 Green. on Ev. (15 ed.) § 47; 73 S. W. 399; 73 S. W. 401; 79 *Id.* 810; 82 Pac. 586; 157 S. W. 307; 90 N. W. 852; 30 So. 840; 84 N. Y. S. 401.

2. The court erred in asking and permitting to be asked leading questions. Also in rejecting proper and in admitting improper evidence.

3. The evidence is not sufficient to support the verdict. The prosecutrix's story is too improbable. 61 S. W. 900.

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*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The evidence of sexual intercourse at a different time was properly admitted. Kirby's Digest, §2234; 32 Ark. 205; 52 *Id.* 269; 103 *Id.* 70; 93 *Id.* 275; 131 Pac. 733; 6 Am. Dig. of Cr. L. § 369; 48 L. R. A. (N. S.), 236-7; 68 Kans. 360; 85 *Id.* 418, etc.

2. There was no error in the court asking and permitting to be asked, leading questions. This is a matter within the sound discretion of the court—no abuse is shown.

3. There is no error in the exclusion or admission of evidence. 95 Ark. 310; 104 *Id.* 162; 94 *Id.* 165; 59 *Id.* 431; 103 *Id.* 123; 83 *Id.* 272. As to improper remarks of the court to counsel see 83 Ark. 379; 84 *Id.* 87. No objections were made. 103 Ark. 165, 171. The court properly amended the verdict.

4. The verdict is responsive to the evidence and amply supported thereby.

WOOD, J. 1. Appellant was convicted of the crime of carnal abuse and appeals to this court. The indictment charges that on the 10th of December, 1915, appellant did unlawfully, feloniously and carnally know and abuse one Mabel McCoy, the said Mabel McCoy being a female under the age of sixteen.

Mabel McCoy testified that she was of age January 3, 1916; that appellant had sexual intercourse with her on Friday, December 10, 1915. She was asked by counsel for the State if she had had intercourse with him "at any other time besides that." The appellant objected to the question as leading and the court sustained the objection. Counsel for the State then proceeded to examine the witness concerning the alleged occurrence of December 10.

On cross-examination, while the prosecutrix was being examined by counsel for appellant, he asked her the following question: "Notwithstanding your resistance and your sitting back in the seat as though you were riding along he accomplished the act as you have stated?" and answered, "Yes, sir." Thereupon the court interposed the following

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question: "Is that the only time that he had intercourse with you?" Counsel for appellant objected, stating that the State had charged one offense and had attempted to prove one, and the defendant objected to being tried for another offense. Whereupon the court remarked, "They can prove it at any time within three years before the finding of the indictment."

The court then, over the objection of appellant, repeated the question, and the prosecutrix answered that appellant had had intercourse with her one time about December 17. She then proceeded to testify, over appellant's objections, that the second act of intercourse was on Friday night about the 17th of December, 1915. She stated that she had a party at her house; it was raining that night and there were only three there, and she and appellant were standing on the porch talking when he pulled her off the porch and had sexual intercourse with her, lying on the ground between the summer house and the dwelling.

Appellant contends that the ruling of the court permitting the testimony as to the second act of intercourse was reversible error, as that was an offense other than that charged in the indictment. This contention is not sound. Section 2234, of Kirby's Digest, provides: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense."

In *Williams* v. *State*, 103 Ark. 70, we held that, on a charge of carnal abuse "a conviction will be sustained by proof that the crime was committed by defendant at any time within three years next before the finding of the indictment."

Under the above statute, although the offense was alleged to have been committed on December 10, 1915, evidence that the offense was committed on that or on any other date within three years before the finding of the indictment would sustain the conviction.

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The indictment charged but one offense of carnal abuse, and proof of the act of carnal abuse at any time within the period of limitation for the prosecution of such offenses (three years) would sustain the charge. The State did not single out and elect to prosecute for the alleged occurrence on December 10, 1915. This will be shown by the questions propounded to the witness as to whether she had had sexual intercourse with the appellant at any time besides that date. Nor did the appellant demand that the State be required to elect. Counsel for appellant objected to the questions propounded above "as leading." But appellant did not ask that the State be required to prosecute for any one particular act of sexual intercourse, and the questions propounded by counsel for the State, as well as the court, show that it was intended to extend the investigation to any act of intercourse that might have occurred within the period of the statute of limitations for the prosecution of such offences.

The prosecutrix testified that the second act of sexual intercourse occurred at her house, and she testified that she lived in the Southern District of Prairie County. The venue as to the alleged act of intercourse on the 17th of December was clearly established.

Having decided that there was no error in permitting the testimony as to the alleged acts of intercourse of December 10 and 17, and that either or both of these acts would sustain a conviction under the indictment, it is unnecessary here to decide the question so exhaustively argued by counsel that testimony of an offense other than that charged in the indictment would not be competent, for, as we have shown, the case we have under review is not of that character.

11. Counsel urge that the court erred in asking and permitting counsel for the State to ask the prosecuting witness leading questions. The course which the examination of witnesses must take and the form of the questions asked them to properly develop cases and elicit the truth concerning the subject matter of the inquiry must necessarily be left largely to the sound discretion of the trial judge. He has the opportunity to see and hear the wit-

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nesses and can best judge from their manner and appearance on the witness stand as to their ignorance or intelligence, candor or lack of it, etc. Since the ultimate object of all trials is to discover the truth and to do justice according to law, the trial judge is given a wide discretion in the matter of determining the form of questions that shall be propounded in order to attain the ends in view.

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While leading questions should be avoided as far as possible, because they are often calculated to deceive and to conceal the truth rather than to discover it, yet, when they are permitted by the trial court, this court will not reverse its ruling in that respect unless it appears that there has been a palpable abuse of discretion, resulting in prejudice to the litigant who has challenged the ruling.

We have carefully examined the questions objected to, and considering the age of the prosecuting witness, the delicacy of the subject matter of the investigation, and the answers which the witness had already made to proper questions, we conclude that the court did not abuse its discretion in the questions propounded by it, and in permitting those propounded by counsel for the State. One of the questions objected to as asked by the court is: "Did he have sexual intercourse with you at that time?" This question was asked after the witness had related the circumstances of the night of the 17th of December, as set out above, and had stated that appellant had pulled her off of the porch. She was asked by counsel for the State what occurred then, and answered: "He got to do what he wanted to." It was then that the court asked the question above to which objection was made.

A young girl, called to testify upon a charge of this nature, on public trial, might naturally be more or less embarrassed by the surroundings, and diffident in the presence of curious onlookers who usually crowd the court room during such trials. Therefore, she might be reluctant or unable to express and describe in blunt words the act constituting the offense. Hence, it was not prejudicial error for the court, after she had related the circumstances, to ask the direct questions as to whether appellant had

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sexual intercourse with her. The questions asked by the court were no doubt deemed necessary, under the circumstances, to determine whether or not the appellant actually had sexual intercourse with the prosecutrix. Since there had to be actual sexual connection to constitute the offense it was necessary doubtless to ask the witness the direct question, "Did he put his privates in yours?" The court could see and know from the appearance of the witness and her intelligence as to whether or not she could express the act in any other way. The prosecuting witness had testified with reference to the occurrence of December 10th, that she and her mother had visited appellant's home and he was taking her home in a buggy, and he put his arm on the back of the buggy and told her what he was going to do, and did it.

The court then permitted the prosecuting attorney to ask her "what he did," and, "did he have sexual intercourse with you," to which she replied in the affirmative.

On cross-examination, counsel for appellant elicited the fact that the act took place while she was sitting on the buggy seat as she was when she was riding and that appellant was on his knees in front of her.

It was after this testimony was developed that the counsel for the State, on redirect examination, asked the witness to explain further what position they were in when the act of sexual intercourse took place, and asked her the questions: "Did he open your limbs, or did he pull your limbs apart?" and "state whether or not he at any time pulled you up to him?" There was no prejudicial error in permitting these questions to be propounded as they were all asked in an obvious endeavor to have the prosecutrix explain how the act of sexual intercourse could take place in the seemingly impossible position which she had described in answer to questions propounded by counsel for the appellant. In view of the testimony as it had been developed on cross-examination, it was not improper, at least not prejudicial, for the court to further permit counsel for the State to ask the prosecutrix, on redirect examination, the above questions and to permit her to further explain her attitude and that of appellant while

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the alleged act of sexual intercourse was being performed.

III. Witness George W. McCoy, father of the prosecutrix, testified on direct examination as to the age of his daughter, showing that she was under sixteen years of age at the time of the alleged acts of sexual intercourse. He further testified to a conversation that he had with the appellant, in which the appellant intimated that he had had sexual intercourse with witness's daughter, the prosecutrix. On cross-examination of this witness appellant's counsel asked him if he had talked to his daughter about the matter, and witness replied that he did that evening as quick as he went home, and that when he asked her about it she broke down and cried and stated that she could not help it.

Witness was then asked if he talked to appellant's father about the matter afterward, and answered that he did. Thereupon counsel for appellant propounded to witness the following question: "You proposed to him if he would give you three hundred dollars you would drop the whole matter?" Witness answered that he did not. Counsel then asked, "What did you say to him about the matter? What passed between you about this matter?" Witness replied as follows: "He asked me if I would go to town with him the next day, and we came to town, and on the way up here he says, 'cannot we settle this matter without going into court?' and I said, 'I don't know, I am ignorant about law.' And he said, 'Have you got any proposition to make?' and I said, 'There is one thing about it; it will take $300.00 to settle my debts and take me out of the country.'"

Counsel for the appellant, on cross-examination, further elicited the fact that McCoy had instituted a civil action against appellant on account of the offense alleged for $5,000.00.

Counsel for the State, on redirect examination, asked the witness to state what appellant's father, in the conversation about the proposed settlement, had stated in regard to their being friends, and the witness answered: "He said, 'we have always been friends,' and I said, 'Yes, and I would like to remain so.' I said, 'You have done me

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a favor; you have given me work when I could not get any; you seemed to be sorry for me and my family, and I tried to be friends to the boy and you would not let me be,' and he said, 'I see where I have made one grand mistake in the way I have raised Lee.'" Appellant's counsel objected to the testimony stating this conversation. The court overruled the objection, and appellant now urges that the court erred in permitting the witness to state that appellant's father said to him, "I see where I have made one grand mistake in the way I have raised Lee."

Counsel for the appellant, on cross-examination of the witness, McCoy, elicited the fact that he had instituted a civil action against the appellant for damages growing out of the alleged carnal abuse of his daughter, and that the father of the appellant had had a conversation with McCoy in regard to a settlement of the matter out of court. This testimony was not responsive to the examination of witness McCoy in chief. Appellant having elicited the testimony on cross-examinaton to the effect that there had been a conversation in regard to a proposed settlement, it was not improper to permit the counsel for the State to examine the witness further in regard to this conversation and to have the witness state all of the conversation. The excerpt set forth, to which counsel for appellant specifically urge an objection is shown to have been but a part of the same conversation between McCoy and the father of appellant in regard to the settlement. The testimony of course, standing alone, would have been wholly incompetent and prejudicial to the rights of appellant. But, since appellant's counsel first adduced evidence of the conversation in regard to the proposed settlement and elicited a part of that conversation, he is in no attitude to complain because the court permitted counsel for the State to put before the jury the entire conversation. The error was one invited by the appellant and of which he cannot now complain.

IV. The appellant was introduced as a witness, and on being shown a certain letter, he testified that he received a similar letter, but did not know whether that was

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the one. This letter was identified by the prosecutrix as a letter that she had written to appellant. Another letter was identified by the prosecutrix as one that she had received from the appellant. These letters were introduced in evidence, over the objection of appellant. Appellant denied that he had written the letter which the prosecutrix identified as the one she had received from him, and testified that it was the practice and habit of a number of persons in the community where appellant lived to write letters purporting to be from other persons, and offered to show by a witness that such was the custom.

It was a question for the jury under the evidence as to whether or not the letter identified by the prosecutrix as the one received from appellant had been written by him. She testified that the letter was a letter which she had received from him, and it and the other letter, which was her reply, went to the jury in connection with his testimony admitting that it had received a similar letter to that identified as her letter, and also with his denial that he had written the letter which she identified as one received from him. The question of the genuineness of the letter, under the evidence, was for the jury, and the letters themselves were competent, in connection with this evidence, to go to the jury, as showing the intimate relations between the parties. The letters were full of protestations of love from one to the other. The letter which the prosecutrix identified as the letter of appellant contained, among other things, the following proposition for a secret meeting with the prosecutrix: "Darling, do you sleep in a room by yourself? If so, after all the folks have gone to bed I can come and talk to you. Just anyway, darling, to be with you."

The court did not err in refusing to permit appellant to prove that it was the custom in the community for persons to write letters in such a manner as to lead the recipient to believe it was from some other party. There was no offer to prove the nature of the contents of these anonymous letters. Such testimony was of a collateral nature and wholly irrelevant to the issue involved.

V. Appellant offered to show by his father, H. L.

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Stinson, that the father of the prosecutrix came to him and told him that he wanted $300.00 and that if he would give him that amount it would settle the whole matter and he would drop the prosecution. The court refused to permit this testimony and appellant assigns this as error.

The ruling of the court was correct. The above testimony was likewise collateral and irrelevant to any issue on trial. The court, as we have observed, permitted the appellant to elicit testimony on cross-examination as to a proposed settlement. This testimony was irrelevant and incompetent, but appellant is not in an attitude to complain of the error because he had invited it. The testimony which appellant offered along this line was objected to at the time and the court ruled correctly in excluding it.

VI. During the closing argument of Judge Lankford, of counsel for the State, he stated to the jury that it would be a good thing for the boy to send him to the reform school. After the jury had retired to consider its verdict, the appellant asked that they be recalled and instructed not to consider the remarks of counsel. Even if the remarks were improper and prejudicial, there was no objection to them at the time they were uttered, and the request to have them excluded came too late.

VII. The jury, after considering the verdict for a time, returned into court and asked the following question: "The jury wants to know if he is convicted will he be sentenced to the reform school or to the penitentiary?" and the court replied: "You don't sentence him to either one. If you find him guilty just say so by your verdict and assess the punishment, and if you cannot agree you may leave that to the court."

The court correctly answered the question propounded by the jury. Their only duty, if they found the appellant guilty, was to assess the punishment. The court, in its instructions, had already told the jury that the form of their verdict, in the event they found the defendant guilty, would be, "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at not less than one year nor more than

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twenty-one years in the penitentiary." The only province of the jury in case of conviction was clearly and correctly set forth in the court's instruction and in its answer to the question. The jury returned the following verdict: "We, the jury, find the defendant guilty and assess his punishment at two years." The court amended this verdict by adding the words "in the penitentiary." The jury were then polled and answered affirmatively that such was their verdict. There was no error in the court's adding the amendment.

VIII. The last contention of appellant is that the verdict was not responsive to the evidence. It would unnecessarily lengthen this opinion to set out in detail and discuss the evidence. It suffices to say there was evidence to sustain the verdict.

There is no reversible error in the record, and the judgment is therefore affirmed.

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## FORT SMITH DISTRICT OF SEBASTIAN COUNTY *v.* EBERLE.

Opinion delivered October 2, 1916.

1. CONSTITUTIONAL LAW—CREATION OF PERMANENT OFFICE—STATE BOARD OF HEALTH AND BUREAU OF VITAL STATISTICS.—Act 96, p. 352, Acts of 1913, creating the State Board of Health and Bureau of Vital Statistics, *held* not invalid as creating a permanent office, in violation of the State Constitution.

   STATE BOARD OF HEALTH—TERMS OF OFFICE.—The State Board of Health and Bureau of Vital Statistics was created by Act 96, Acts of 1913, p. 352, and the members thereof are authorized to be appointed by the governor, and the board is to be continued by the appointment of other members upon the expiration of the terms of those first appointed.

3. STATE BOARD OF HEALTH—LOCAL REGISTRAR—STATE OFFICER.—Local registrars, appointed under Act 96, p. 352, Acts of 1913, creating the State Board of Health and Bureau of Vital Statistics, *held* to be State and not county officers.

Appeal from Sebastian Circuit Court; *Paul Little*, Judge; reversed.

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*Geo. W. Dodd*, for appellant.

1. The act is unconstitutional and void. It delegates legislative powers to the board as well as *police power* and creates permanent State officers. 29 Cyc. 1370; 72 Ark. 195; 6 Rul. Case Law, p. 164, § 165; *Ib.* 70 to 74; 135 Cal. 466; 52 L. R. A. 287; 26 *Id.* 715 28 *Id.* 609; 40 Md. 273; 50 Fed. 406; 63 Cal. 21; 156 Pa. St. 539; 51 S. W. 1126; 77. N. E. 321; 74 Pac. 598.

2. Sec. 10 providing for payment of the local registrar by the county is clearly unconstitutional. Art 7, § 28 Constitution. County courts have *exclusive* jurisdiction as to the disbursement of money for county purposes. The Bureau is not a county concern. The county gets no benefit and it has nothing in common with county government. The financial affairs of counties are administered by the county courts. Kirby's Dig., § 1499, 1500. There is a limit to the taxing powers of counties and the Legislature cannot impose burdens beyond the limit. This Bureau is a State board and its affairs are administered by State officers. The county is not liable for his salary or fees. See 178 S. W. 930; 175 *Id.* 37; 28 Ark. 317; 27 *Id.* 603; 32 *Id.* 676; 37 *Id.* 649. Even if § 10 be stricken out of the Act, leaving the balance of the Act to stand, the county court is left helpless and without power to limit or restrain expenditures under the Act. The Act is unreasonable, dictatorial, injurious, improper, incomplete, indefinite and void. Cases *supra;* 114 Ark. 217. The latter case did not present a clear case of violation of the constitutional prohibition, but this case does. 6 R. C. L. 70, 74.

*Wallace Davis*, Attorney General, *Hamilton Moses*, Assistant, and *Oglesby, Cravens & Oglesby*, for appellee.

1. The act is not unconstitutional. The courts resolve all doubts in favor of the constitutionality of an Act. There must be a clear abuse of legislative power. 93 Ark. 612; 102 *Id.* 166. The Governor is only granted power to appoint the State Board of Health, but has nothing to do with the management or control. 86 Ark. 555. None of the cases cited by appellant support his

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contention that the Act is void because it delegates police powers or other powers to a board. The legislature may create administrative boards to carry out the legislative will. 6 Ruling Case Law, 179, 181; Ann. Cas. 112 A. (100 and note;) *Ib.* 1913; D. 52 and note, 218; *Ib.* 1913 B. 218. Especially is this true of the police power.

2. The case of *Green* v. *Bank*, 114 Ark. 212 settles the question that the board is temporary merely and not permanent.

3. Courts are not concerned in the expediency, wisdom or justice of legislative acts. 58 Ark. 407. There is nothing in the constitution prohibiting county judges from paying the salary of the registrar, and unless inhibited by the constitution the legislature has full power over all matters of taxation and disbursement of taxes. 103 Ark. 529; 1 Cooley on Taxation, p. 4-6; 28 Ark. 317.

KIRBY, J. This appeal comes from a judgment of allowance by the circuit court on appeal from the county court, of a claim against the county by appellee, as compensation for services as Local Registrar of Vital Statistics.

A certificate of the State Registrar to the County Treasurer, of the amount due was filed with the affidavit required by the statute to authenticate claims against the county, made by appellee, and upon the claim being disallowed, an appeal was taken to the circuit court.

It is conceded that appellee rendered the services charged for under the provisions of the law creating the State Board of Health and Bureau of Vital Statistics, Act 96 of Acts 1913, p. 352.

It is contended that said law is unconstitutional as creating permanent offices, contrary to the provisions of the constitution and in providing for payment out of the county treasury for the services of the local registrar, which is claimed to be a district and State office and in the method of drawing the money from the county treasury.

(1) The majority is of opinion that the first contention has been decided adversely in the case of *Greer* v. *Merchants and Mechanics Bank*, 114 Ark. 217, by which this case is ruled. A like contention was made there

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that the act creating the State Bank Department for a period of 12 years was unconstitutional. The court held otherwise and said of these provisions of the Constitution, Sec. 9, Article 19: "We are of opinion that this command is one necessarily addressed to the Legislature itself and that that branch of the government must determine how far it can exercise its powers without disobeying that command. We attach little, if any, importance to the provision of the statute limiting the time to twelve years, for we think the Legislature has the power to determine whether an office to be created is permanent or temporary, whether expressly declared in the act or not. If it is created as a temporary office, we must assume that the Legislature found it to be such. The creation of the office implies a determination that it is temporary, and not permanent. There can be no irrepealable laws which depend for existence entirely upon the legislative will, and any office created by the Legislature is temporary in the sense that it is subject to the legislative will, and may be abolished at any time."

There is no provision in this act limiting the existence of the boards to any period of time and the writer and Mr. Justice Hart think this furnishes a ground for distinguishing the cases and that a department and offices created by a law, which does not provide for the termination thereof, can in no wise be regarded otherwise than permanent, within the meaning of the Constitution which provided for and designated all permanent offices regarded necessary for the conduct and management of the State's affairs and expressly prohibited the creation of others.

(2) The objection that no provision is made for appointment of members of the board at the expiration of the terms of those first appointed, is without merit. The board is created by law and the members are authorized to be appointed by the Governor and the language used indicates that it should be continued by the appointment of other members upon the expiration of the terms of those first appointed and authorizes such appointment.

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(3) A decision of this case does not require that we shall determine whether the manner of payment of the local registrar out of the county funds upon the certificate of the State Registrar that the amount is due is in conflict with the provisions of the Constitution granting powers and jurisdiction to the county court, since the method followed in this instance is that prescribed by law for the collection of all claims against the county. The court is of opinion however, that the local registrar is a State rather than a county officer, since by the terms of the act the State Registrar is required to "divide the State into registration districts, designating the boundaries thereof and appointing local registrars in each district. Each registration district shall have at least one county therein." The local registrar is appointed by the State Registrar, without the consent or approval of county authority, to whom only he reports the certificates and statistics of births and deaths which are not reported to the county at all, except by the State Registrar to the county treasurer for the sole purpose of determining the amount to be paid the local registrar and his services cannot properly be regarded a county purpose within the meaning of the constitutional provision, giving the county court exclusive jurisdiction in all matters relating to * * * the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties * * * Article 7, Sec. 28, Constitution. *Cotham* v. *Coffman*, 111 Ark. 115.

That part of the act relating to the payment for the services of the local registrar out of the county treasury, can be stricken out without affecting its validity otherwise, since it is easily apparent that the Legislature would have passed the act without that provision in it. *Cotham* v. *Coffman*, *supra*.

It follows that the judgment of the circuit court is erroneous, and it is reversed and the cause dismissed.

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## LARGENT v. ARKANSAS NORTHWESTERN RAILROAD COMPANY.

Opinion delivered October 9, 1916.

RAILROADS—FAILURE TO PAY WAGES—PENALTY.—Defendant railway company gave to appellant, an employee, a check in payment of wages due, with a notation thereon that it was in full for all amounts due. Appellant cashed the check, but sued for a balance due and penalty under the statute. The jury found a verdict for a small sum due appellant, but refused to assess a penalty against defendant company. *Held*, under the facts that appellant had failed to show a demand by appellant and a refusal by the defendant company to pay, and that no penalty could be recovered.

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

*Lindsey & Lindsey*, for appellant.

1. The jury found by their verdict that appellant was entitled to recover for a part of his wages, hence he was entitled to the penalty, as the company discharged him without payment in full. He made demand and the demand was refused. Kirby's Digest, § 6649; 74 Ark. 290; Acts 1905, pp. 537-8; 66 Ark. 409.

2. The check was not received as payment in full. 74 Ark. 286. Appellant began his suit within the time prescribed by the Act and is entitled to the penalty. 64 Ark. 83; Act Mch. 25, 1889.

*Rice & Dickson*, for appellee.

The jury found against the appellant as to the penalty. 82 Ark. 377; 96 *Id.* 634-7. He received the check in full payment, without objection or comment. 96 Ark. 637. It is only for the non-payment of earned wages that the statute authorizes a penalty. His claim is without merit and the jury properly found against him.

MCCULLOCH, C. J. Appellant instituted this action before a justice of the peace against appellee, a railway corporation, to recover the sum of $104.39 alleged to be due as balance on wages earned by appellant as an employee of appellee, and also to recover a penalty alleged to be due for failure to pay the wages when appellant

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was discharged from service. The case was appealed to the circuit court and on a trial there the jury found in appellant's favor in the sum of $10.00. The court submitted to the jury the question of appellant's right to recover a penalty. The jury made an express finding against the allowance of a penalty. After the verdict was rendered, appellant filed his motion to the court asking an assessment of the penalty prescribed by statute in case of discharged employees of railroad corporations, and said motion was by the court overruled.

The contention here is that the jury having found in appellant's favor for a part of his claim for wages, it follows necessarily that he was entitled to a judgment for the penalty. The contention is unsound for the reason that there may be a just claim for unpaid wages without the right to recover a penalty. The statute (Kirby's Digest, § 6649, as amended by Act of April 24, 1905, p. 537), provides that a discharged employee may recover a penalty of full wages until date of payment, but that he must make request for payment, and unless such demand is made the penalty is not incurred. *Wisconsin & Arkansas Lumber Co.* v. *Reaves*, 82 Ark. 377.

It appears from the testimony in this case that appellant had been working in the service of appellee as motorman prior to September 7, 1914, at a monthly wage of $75.00, and that on that day an agreement was made to reduce the salaries of motormen to $65.00 a month. Appellant continued to work in appellee's service until February 8, 1915, when he was discharged, and an itemized statement of his account was furnished showing a balance due him of $34.31, for which a check was given containing on its face the words "paid in full." Appellant accepted the check and collected the amount. He testified that he did not notice at the time he received the check that it contained the statement quoted above, and that when the account was delivered to him he stated to the manager that he would examine it and would come back the next day and report if he found that it was not correct. He testified further that he did come back and assert his claim for the additional amount.

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The court properly left it to the jury to determine whether or not there was a demand and a refusal to pay. No objections are urged here to the instructions of the court on that subject, and we are of the opinion that under the evidence adduced there was sufficient to warrant the jury in finding that there was no refusal to pay, notwithstanding the fact that there was still a small part of the wages unpaid as found by the jury. Appellant accepted the itemized statement, accompanied by a check for the amount shown to be due containing a recital that the amount was received in full payment, and this raised an issue of fact as to whether or not appellant's acceptance was conditional, and whether he subsequently made a demand for payment of a larger sum. It was incumbent on him under those circumstances to point out the errors and omissions in the account, and having failed to do so he is not entitled to the penalty, even though it was found that appellee owed $10.00 in addition to what had been paid. *Hall* v. *C. R. I. & P. Ry. Co.*, 96 Ark. 634.

We are therefore of the opinion that the issues of fact as to appellant's right to recover the penalty have been decided against him by the jury upon legally sufficient evidence, and that the judgment should be affirmed. It is so ordered.

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## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *v.* STEVENSON.

Opinion delivered October 9, 1916.

RAILROADS—GRANT OF RIGHT-OF-WAY—LAND OCCUPIED BY THE RAILROAD COMPANY.—One B. granted the appellant railroad company a right-of-way over certain lands owned by him, without specifying the width of the right-of-way granted. The railroad company occupied a right-of-way about thirty feet in width, and some time thereafter sought to extend its right-of-way to the statutory limit. (Kirby's Digest, § § 2939–2940.) *Held,* the railroad company could not extend the limits of its right-of-way beyond the territory already occupied by it without a new grant from the owner of the land.

Appeal from Lee Circuit Court; *J. M. Jackson,* Judge; affirmed.

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*Troy Pace* and *W. R. Satterfield*, for appellant.

1. Brandon and his successors are charged with full knowledge of all the rights the grantee in the deed and his successors had thereunder. Actual possession is notice. 76 Ark. 25-27; 107 Ark. 319. The deed vested the right of way, fixed by statute at six rods. 99 Ark. 61; Kirby's Digest, § 2903. A right of way is fixed by statute at six rods wide. *Id.* § 2940, 65-72; 69 Ark. 104; 99 *Id.* 61. Hence the company had a right of way 99 feet wide and had the right to take and use a strip that wide at any time. 69 Ark. 104; 80 *Id.* 503; 84 *Id.* 366; 87 *Id.* 121. The conclusion follows that Brandon could not have maintained, and plaintiff cannot now maintain, ejectment for any of the lands except *in excess* of six rods in width. The defendant succeeded to all of Brandon's rights. Words & Phrases, Vol. 4, p. 593; 81 C. C. A., 643; 138 U. S. 1; 172 *Id.* 171; 98 Ill. 350.

2. Possession of Premises. Neither the plaintiff nor his predecessors have ever had the actual or manual possession of the right of way in controversy—it has never *been fenced nor enclosed.* 69 Ark. 562-5-6; 108 *Id.* 569; 102 *Id.* 442; 2 L. R. A. (N. S.) 272.

3. The action is barred by limitation. 51 Ark. 233; 67 *Id.* 84.

4. Defendant and its predecessor in title have been in possession since 1881 and plaintiff is estopped. 51 Ark. 491; 80 *Id.* 503; 102 *Id.* 451.

*D. S. Plummer, Daggett & Daggett* and *Mann, Bussey & Mann*, for appellee.

1. The deed not having been acknowledged or recorded it was not notice to subsequent purchasers. The cases cited for appellant were those where the conveyances gave definite boundaries. Here the case is different. The only description is the phrase "Right of way." Appellant had the right under the statute to condemn a strip 6 rods wide, but it did not and the statutes are a mere limitation on the right to take more than 99 feet, but imposes no obligation to take that much. 108 Ark. 569. As to the meaning of right of way see

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5 N. W. 482; Words & Phrases, p. 6230 *et seq.;* 34 Cyc. 1767.

2. Appellant has not had adverse possession, for the full period of time, of the full strip. 69 Ark. 562; 90 *Id.* 182; 84 *Id.* 52; 85 *Id.* 520. These cases settle the question against the contention of the appellant.

MCCULLOCH, C. J. This is an action instituted by appellee against appellant to recover damages to the extent of the alleged value of land taken by appellant, a railway corporation, as a part of its right-of-way. The court, sitting as a jury, found in appellee's favor and awarded damages in the sum of $100.00, the amount stipulated by the parties to be the value of the land in controversy.

The facts are undisputed, being set forth in an agreed statement. It appears that many years ago the railroad was constructed by appellant's predecessor, the Iron Mountain & Helena Railway Company, through lands then owned by J. B. Brandon, who subsequently conveyed to appellee. Brandon's deed to said railroad company, dated March 22, 1870, recited the consideration that the railroad was to be built through and over the lands of the grantors, and granted a right-of-way "through and over said lands situated as aforesaid," without specifying the width of the right-of-way so granted; nor does the deed describe any particular land, but merely gives the right-of-way over the lands of the several grantors who signed the deed, situated in Phillips and St. Francis counties. The deed has never been recorded.

Said railway company, in constructing its road over the land in controversy, built an embankment or dump thirty feet in width, and in doing so dug pits in excavating earth four feet in width and situated a distance of ten feet on each side of the dump. The dump itself and the pits, counting from the outer edges, occupied a strip fifty feet in width. Said company also constructed and continuously maintained a telegraph line, consisting of poles and wires strung thereon, along the east side of the track forty feet distant from the center of the track. The

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grantor, Brandon, continued to cultivate the lands up to the edge of the borrow pits, and appellee, his grantee, continued so to cultivate the land until the year 1912, when appellant, having succeeded to the rights of the Iron Mountain & Helena Railway Company, undertook to fence its right of way and constructed fences on each side of the track fifty feet from the center of the track. Appellee immediately instituted this action to recover as damages, the value of the land between the edges of the pits on each side of the track and the fences, treating this new occupancy as a fresh taking of the land not embraced in the original occupancy under the grant from Brandon.

The contention of appellant is that the deed of Brandon to appellant's predecessor constituted a grant of the right of way of the full width of six rods authorized by the statute, and that the occupancy of any portion of the strip constituted an occupancy of the whole. The statute in question authorizes a railroad company "to purchase, and by voluntary grants and donations receive and take, and * * * enter upon and take possession of and hold and use, all such lands and real estate and other property as may be necessary for the construction and maintenance of its railroad, etc." And to "lay out its road, not exceeding six rods wide, and to construct the same, and for the purpose of cuttings, embankments and procuring stone and gravel may take as much more land, within the limits of its charter, * * * as may be necessary for the proper construction and security of the road." Kirby's Digest, sections 2939, 2940.

This court has held that the statute in question prescribes the maximum width of the right-of-way for the purpose of laying out a railroad. *McKennon* v. *St. L., I. M. & S. Ry. Co.*, 69 Ark. 104; *St. L., I. M. & S. Ry. Co.* v. *Faisst*, 99 Ark. 61. The right of way deed, even without specification of the width, conferred upon the grantee the right to occupy a strip of the full width specified in the statute, but it did not constitute an absolute conveyance of a strip of land of that width. It gave, in other words, the right to locate the railroad, and in doing so to use a strip as wide as that specified in the statute.

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But having once appropriately designated the location, the rights under that deed were exhausted, and any additional lands within the maximum amount prescribed by statute, or the right to occupy the same, must be re-acquired by a new grant or by condemnation.

The case of *Vicksburg & M. R. R. Co.* v. *Barrett*, 67 Miss. 579, is directly in point. The deed under consideration in that case was one conveying to the railroad company a right of way 100 feet in width across certain lands, but the full width of the strip was not actually occupied in locating the road. Many years afterwards, when the original grantor of the right of way had conveyed the lands to others, the railroad company, as in this case, sought to take the remainder of the hundred foot strip described in the deed. The Supreme Court of Mississippi decided against the contention of the railroad company, and in disposing of the case said:

"The conveyance from Cohea did not grant a right of way to the company one hundred feet wide. The right granted was of a way '*not to exceed in width one hundred feet*,' within which limit the officers of the company were to '*use so much land as they may deem necessary*.' The way granted was not fixed by the deed as to place, quantity, or direction. It was, until located, a floating right, exercisable over any portion of the land within the limit of width specified. Action was required by the company to indicate and fix the way granted, and though it may be true, as contended by counsel for the company, that ordinarily or universally the road-bed of railroads is laid along the centre of the right of way, such custom cannot control where the conduct of the parties touching the particular right claimed is shown to have been otherwise. * * * * * The claim here is to extend a grant, the limits of which have been fixed by the parties, so as to include lands which might have been, but were not deemed 'necessary' by the officers of the company when it located its way under the grant. We find nothing in the conveyance by which authority to locate the way might be exercised more than once, and by the location then fixed the company must be concluded."

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Another decision to the same effect is *Fort Wayne, C. & L. Ry. Co.* v. *Sherry*, 126 Ind. 334, 10 L. R. A. 48. The statute under consideration in that case, as in the present one, described the maximum of six rods for the width of a railroad location, and there was a conveyance of a right of way without specifying the width of the way granted. The court said: "The contention of the appellant's counsel is in effect that, as the statute provides that a railroad company may acquire land six rods in width, the grantee did, by force of the conveyance, acquire that quantity of land. The appellee's counsel insist that the deed does not necessarily vest in the appellant the quantity of land claimed, but that the quantity actually taken and used by the grantee determines its rights. The law is with the appellee. The deed does not designate, nor profess to designate, the quantity of land conveyed, and the quantity conveyed can only be ascertained by the aid of extrinsic evidence. The fact that the statute provides that a railroad company may acquire a right of way six rods in width does not definitely fix the rights of the parties. A railroad company is not bound to purchase a strip six rods in width, nor can it be implied from such deed as the one before us that it obtains, by gift or by purchase, a right to that quantity of land."

This court decided in the case of *Board of Directors of St. Francis Levee District* v. *Bowen*, 80 Ark. 80, that the grant of a way over which to construct a levee was exhausted by the exercise of the right in the location of the levee, and that an extension of the power must be obtained through a new grant.

The principles thus announced, we think, are conclusive of the present case so far as relate to the point now under discussion, and we are of the opinion that the railroad company, while the authority conferred was to take so much of the land that was necessary within the maximum specified by the statute, by the location of the railroad and the occupancy of a narrower strip exhausted the right, and that neither the grantee nor its successors had the right to subsequently extend the occupancy without obtaining a new grant or condemnation. We

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think the occupancy extended to the edge of the borrow pits on one side of the track and to the outer edge of the telegraph line on the other side, it being shown that the poles and wires were placed and have been continuously maintained as a part of the operation of the railroad. It therefore extended the occupancy of the premises to the outer edge of the line of poles, the same as if the company had staked off or otherwise marked the extent of its occupancy. *Hargis* v. *Kansas City, C. & S. Ry. Co.*, 100 Mo. 210.

We do not deem it necessary to determine the question of the statute of limitation raised concerning the continued occupancy by the original owner of the land between the line of telegraph poles and the edge of the borrow pits, which constituted a strip fifteen feet in width. We therefore leave undecided the question whether the continued cultivation of that land, and nothing more, constituted such hostile possession as would give a title to the original owner and his grantees against the railroad company thus occupying by the use of its telegraph lines. If there was no re-acquisition of title to that strip by the original owner or his grantee, then the court was in error in including the strip in his assessment of damages, but the parties selected the point of controversy by stipulating concerning the valuation of the lands in controversy, and did not treat it as important to separate the valuation of the fifteen foot strip between the telegraph poles and the edges of the borrow pits. We therefore decide the controversy here on the grounds selected by the parties themselves, and determine the point at issue, whether the railroad company acquired the right to take and occupy at any time a way of the full width of six rods.

The conclusion we have reached on that point being against the contention of appellant, it follows that the judgment should be affirmed, and it is so ordered.

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## BOONE v. WILSON.

Opinion delivered October 9, 1916.

1. WATER COURSES—ARTIFICIAL CHANNEL.—A stream of water will remain a natural water course, although it flows through a ditch constituting an artificial channel.

2. WATER COURSES—OBSTRUCTION—OVERFLOW OF ADJACENT LANDS.—An adjacent land owner may recover for damages caused by the overflow of his lands occasioned by the obstruction of a water course on lands of an adjacent owner, and it is immaterial that the plaintiff is not a riparian owner.

3. OBSTRUCTION OF WATER COURSE—SUFFICIENCY OF THE EVIDENCE.—The evidence held insufficient to support the allegations of plaintiff's complaint, that defendant had permitted a water course upon his land to become obstructed causing damage to plaintiff's land by overflow.

Appeal from Washington Chancery Court; *F. G. Lindsey*, Special Chancellor; affirmed.

*Homer L. Pearson* and *Hill, Fitzhugh & Brizzolara*, for appellants.

1. This is a chancery case and is before this court for a *trial de novo*. 98 Ark. 459; 104 *Id.* 475; 99 *Id.* 128; 4 Crawford 150; 85 Ark. 101; 101 Ark. 493; 73 Ark. 187.

2. A natural water course was diverted. The testimony is clear. 197 Mass. 568; 45 Mich. 335; 11 A. & E. 571; 93 Penn. St. 400; 56 Wisc. 73; 93 Ark. 46; 95 *Id.* 242. Wilson obstructed the branch at the point of drift and may be restrained by injunction. 2 Farnham on Waters, etc., §§ 566 a, b, and c, 567, 586.

3. The established facts are: (1) The creek was a natural water course, in continuous service for over twenty-five years. (2) The drift obstructs the flow of the branch and caused the overflow. (3) There is serious and irreparable injury caused thereby and Wilson is responsible for the injury.

*Tillman & Tillman* and *E. P. Watson*, for appellees.

1. The decision of the Chancellor is not against the preponderance of the evidence and in such cases this court will not reverse. The burden is on appellant to show

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this and they have failed. All the evidence is not before this court. 95 Ark. 244. The cases cited for appellant as to a *trial de novo* are not applicable. The decision and decree is correct under the evidence and is in accordance with the law.

2. Under the allegations of the complaint and the legal evidence applicable thereto, plaintiffs have failed to make a case which would warrant a court of equity to grant the relief prayed for and the Chancellor properly so found and held. Neither of the plaintiffs have shown themselves to be riparian owners of land on this water course. 40 Cyc. 559; Washburn on Easements, p. 286, note 2; 22 Pick. 333, 335; 13 A. & E. Enc. Law (2 ed.), p. 687-688; 24 *Id.* (1 ed.), 903. If plaintiffs are injured it is because of the overflow of the stream at certain points on the land of Wilson and they so allege. Their injury is by virtue of surface water and not from obstructing the channel as charged in their complaint. The *allegata* and *probata* do not agree. 40 Cyc. 579.

3. Defendants did not obstruct the channel of this water course and there is no evidence to that effect.

4. The rights of plaintiffs and defendants as to control of surface water are not involved in this suit. The appellants raise a new issue in this court for the first time. The case of *Jackson* v. *Keller*, 95 Ark., relied on by appellants was a suit for obstructing the flow of surface water. Wilson is not charged in the complaint with any such acts and there is no proof that he did or has attempted to do this. The decree is right and should be affirmed.

WOOD, J. The appellants brought this suit against the appellees, alleging, in substance, that on the lands of appellee there was a natural and well established water course which flows from the west and southwest in an easterly direction through the lands of the appellees to White River; that said water course had a deep and well defined channel, sufficient to hold the water and to deliver the same into White River; that the water, in its natural and accustomed course, did not flow upon or across the

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land of appellants; that appellees, desiring to divert the flow of water so that it might not run through their own lands, and desiring to divert the course of the water so as to make it flow through, across and upon the lands of the appellants, knowingly and purposely permitted the accumulation of drift, mud, weeds and other matter in such water course and caused such water course to be so dammed for the sole purpose of diverting the flow of water upon the appellants; that if appellees had not permitted this drift to accumulate appellants' lands would have been free from any overflow or damage on account of the water course; but that the presence of the drift had made appellants' lands wet, boggy and unfit for cultivation and forced appellants' lands to grow up in weeds, grass and other wild growth; that the lands of appellee J. B. Wilson are higher than the lands of appellants and is infected with a growth of Johnson grass, which is pernicious and detrimental to farming lands; that appellees, by permitting the water course to become filled and dammed had caused appellants' lands also to become infected with Johnson grass. Appellants alleged that their damage occasioned by the overflow was great and irreparable, and that they had no adequate remedy at law. Appellants prayed that the appellees be enjoined from maintaining, causing or permitting the water course to become filled and dammed upon appellees' premises, and that they be ordered to open the water course and abate the nuisance so that the water would not flow upon, across and over the lands of the appellants. There was also a general prayer for all equitable and proper relief.

The appellees answered admitting that the land of appellee Wilson was higher than the adjacent lands, but denied all material allegations as to the injuries alleged to have been caused by appellees as to the overflow. Appellees alleged that there was a natural water course running across the lands of appellants which discharged its waters into White River. Appellees alleged that some years ago appellee J. B. Wilson and one Ed Boone, who at that time owned the farm now owned by Hugh Boone, one of the appellants, agreed to dig a ditch as an experi-

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ment with a view to diverting, if possible, the waters flowing onto and over appellee's farm. Appellees alleged that the land of the appellee J. B. Wilson was upon higher ground than the appellants; that White River flowed near both of these lands in a general direction from south to north; that the water flowing over the lands of appellee J. B. Wilson, flows on his land from the land south and above his lands, and flows naturally from his lands on and across the lands of appellants which are north and below the lands of J. B. Wilson. They further alleged that there was a natural and well established water course running across the land of appellee J. B. Wilson, and that this identical water course continues running on and across the lands of appellants in a natural and well defined channel or water course, and discharges itself into White River; that some years ago, in a spirit of neighborliness J. B. Wilson and one Ed Boone, who at that timed owned the farm now owned by appellant Hugh Boone, agreed to dig a ditch as an experiment with a view of diverting, if possible, the water flowing onto and over J. B. Wilson's farm, thence onto and over the farm north of and below Wilson's; that in pursuance of this agreement they did dig the ditch; that J. B. Wilson incurred all expense incident to the digging and maintenance of the ditch; that, inasmuch as there is a sharp and continuous rise or elevation of three feet from the place where the water complained of naturally flows onto and over the lands of appellants to the place where the appellants seek to compel the appellees to discharge said water into a stream that flows down hill, it has proved impossible to compel this water to flow uphill along the ditch so dug as an experiment, as above mentioned; that appellee J. B. Wilson, at great expense and in good faith, built a dam, and did everything in his power to cause the water complained of to flow along the ditch dug as aforesaid, but that the water had continued to flow in its natural channel and according to the natural configuration of the land.

The chancellor made a general finding that upon the pleadings and the evidence adduced the appellants

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were not entitled to the relief prayed and entered a decree dismissing their complaint for want of equity.

We find it impracticable to bring into this opinion the maps and plats that were used by the witnesses of the respective parties while testifying as to the location of the lands and water course and the points where it was alleged that the same was obstructed and diverted by the appellee Wilson, and showing the direction and location of the various branches and ditches referred to by the witnesses in their testimony. We have examined the testimony of each witness in the record, with these plats and maps before us.

It could serve no useful purpose as a precedent to set out and discuss in detail the testimony of these witnesses, nor indeed could it be done intelligently without the use of the maps and plats which the witnesses had before them. We shall, therefore, discuss the testimony only in a general way and state the conclusions of fact which we have drawn from it and announce the principles of law applicable thereto.

A water course is defined by the Supreme Court of Idaho as "A stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes. There must be substantial indications of the existence of a stream, which is ordinarily a moving body of water." *Hutchinson* v. *Watson Slough D. Co.*, 16 Idaho, 484.

In *Sanguinetti* v. *Pock*, 136 Cal. 466-471, it is said: "A water course is defined to be a running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes." See 1 Water

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Rights Western States, sec. 332 et seq. 336; Angell on Water Courses, sec. 4.

We will designate, for convenience, the lands of the appellees as the Wilson lands and the lands of appellants as the Boone lands.

(1) Applying the above definition of "water course" to the testimony adduced at the trial, a preponderance of the evidence shows that there was a water course running through the Wilson lands to a certain point, and thence in a southeasterly direction to a certain other point, and thence in a northeasterly direction, where it empties into White River. The general course of the stream from its source to its confluence with White River was in a northeasterly direction, though at one point on the lands there was a turn from this direction in a southeasterly direction to a certain point, and then another turn in a northeasterly direction. The water course is designated in the record by the witnesses under the various names of "Price branch," "Lewis ditch," and "Wilson branch," these names representing the names of the persons who successively owned the lands through which the water course runs and in the order of their ownership.

Moses Lewis, a former owner of the Wilson lands, dug a ditch from the point where the channel first turns in a southeasterly direction to the point where it again turns in a northeasterly direction. But this ditch did not, according to a preponderance of the testimony, change the general direction of the water course. It was only constructed to straighten out the channel and to facilitate the flow of water.

There is some testimony tending to show that the old or Price branch, from the point where it first entered the Wilson lands, flowed in a general northeasterly direction through the Wilson lands and on through the Boone lands and into White River without making any divergence whatever in its course to a southeasterly direction. One of the plats introduced in evidence, and some of the testimony, shows this old branch as running in a general northeasterly direction from the place where it first enters the Wilson lands to its confluence with White River,

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without making any sharp turn to the southeast. And testimony of some of the witnesses tends to show that Lewis diverted the flow of this old channel by a ditch cut by him so as to make it flow in a southeasterly direction; and, as one of the witnesses states, for the purpose of turning the water off of the Boone lands. But as already stated, a preponderance of the evidence shows that Lewis dug the ditch for the purpose of straightening out the channel, and that the general direction of the stream was not changed. The fact that Lewis dug this ditch for the purpose of straightening out the channel, without changing the natural and general course of the water, and that the water took the course of this ditch instead of being confined in the former banks of the channel did not make it any the less a natural water course. It was still a natural water course though flowing, after the construction of this ditch, in artificial channels. See *St. L. I. M. & Sou. R. Co.* v. *Magness*, *supra*; *Stimson* v. *Inhabitants of Brookline*, 197 Mass. 568; *Freeman* v. *Weeks*, 45 Mich. 335. The testimony is undisputed that the water usually flowing through the channel of the old branch or water course had continued for years after the cutting of the Lewis ditch to flow through that ditch, as far as it extended, and then on in its natural and regular course to where it emptied into White River, so that when Wilson purchased the lands of Lewis he acquired them with this water course, a part of which was the Lewis ditch, already established.

(2) The testimony shows that the Boone lands were not adjacent to the water course, being some nine hundred feet distant therefrom. Appellee's counsel contend that inasmuch as the appellants were not riparian owners they could not recover for the obstruction of this water course because the water, after its diversion from the main channel, became surface water. This contention of appellee is unsound. The preponderance of the evidence shows that the obstruction of the water course and the diversion thereby of water from this water course on to the Boone lands had the effect of flooding those lands. In other words, the obstruction of the

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stream and the diversion of the water caused the Boone lands to be overflowed in such a manner as to greatly injure the same, to the damage of appellants.

It is wholly immaterial whether the appellants were riparian owners or not. They are entitled to recover any damages they sustained caused directly and proximately by the obstruction and diversion of the water course.

In *St. Louis, I. M. & S. R. Co.* v. *Magness*, 93 Ark. 46-53, we said: "Many cases of this court recognize the doctrine that the waters of a stream in their natural flow cannot be obstructed or diverted so as to damage the lands of another. One who does so is liable for the damage thus wrought. Even if these waters had been nothing more than surface waters, appellant could not gather them into a ditch and cast them upon the lands of appellees."

(3) This principle is applicable to the facts in this record. Appellants would be entitled to any damages that resulted directly and proximately from the act of another in obstructing and diverting the waters of a water course upon their lands in such manner as to greatly damage them.

But, appellee J. B. Wilson insists that they did not obstruct the channel of this water course, as alleged in the complaint. This is purely a question of fact. The burden was upon the appellants, plaintiffs below, to show by a preponderance of the evidence that appellees had "caused the channel of said water course at a certain point upon the land of Wilson to become dammed with drift, mud, trash, weeds, and other matter, and had knowingly and purposely permitted the accumulation of such drift, etc., in the water course for the sole purpose of diverting the same from its natural and established course across and upon the lands of the plaintiffs," as alleged in their complaint.

We will not undertake to set out in detail the evidence adduced on this issue. A careful consideration of it convinces us that appellants have failed to show by a preponderance that the drift, which obstructed the water course and diverted the waters on to the Boone lands, was caused by any act of commission or any failure on the

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part of appellee, J. B. Wilson, to discharge any legal duty he owed to appellants. A preponderance of the evidence shows that the drift complained of was produced by the natural flow of the waters of the stream at high tide, which carried down the logs, brush, weeds, cornstalks, etc., and that on account of the rather sharp turn or angle in the stream these were lodged against the banks and the flow of water was thus gradually obstructed, resulting in the drift and overflow of which appellants complain; that Wilson could not have prevented this obstruction except by an unreasonable consumption of time and expenditure of money which were not required of him.

Appellants are not entitled here under their general prayer to have appellee enjoined from interfering with them should they desire to go upon the land of Wilson to remove the drift complained of, because no such issue was raised by the pleadings, and the undisputed testimony shows that appellants made no request of the appellees before the institution of the suit to allow them the privilege of going upon the Wilson lands to remove the drift. We therefore do not decide whether or not appellants would have the right, after request or demand upon appellees, to go upon the lands of the latter and remove the obstruction to the water course which is causing damage to their land.

Chancery causes are tried here *de novo*, and upon such a consideration of the entire case we find that the decree is correct, and the same is therefore affirmed.

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## THE MUTUAL LIFE INSURANCE CO. *v.* HENLEY, GUARDIAN.

Opinion delivered October 9, 1916.

LIFE INSURANCE—FORFEITURE OF POLICY—DUTY OF COMPANY TO APPLY ACCRUED DIVIDEND.—Deceased owned a policy of life insurance in appellant company. Premiums were payable annually, semi-annually or quarterly, the annual premium falling due on December 8. Deceased failed to pay on December 8, but her husband remitted the amount of the premium due, less an accrued dividend, on January 18 following. Deceased died on March 17 next. *Held*, the appellant company would not under the facts be permitted to declare the policy forfeited.

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Appeal from Monroe Circuit Court; *Thos. C. Trimble*, Judge; affirmed.

STATEMENT BY THE COURT.

J. B. Henley, guardian for J. B. Henley, Jr., sued the Mutual Life Insurance Company of New York to recover $3,000.00, the amount of an insurance policy issued by it to Addie L. Henley, payable to J. D. Henley, Jr., her minor child. The policy was issued on the 8th day of March, 1909, and Addie L. Henley died on the 17th day of March, 1915. The premium was $46 98-100 payable in advance on December 8th of each year. The husband of the insured paid the premium every year and always remitted to the Company the amount of the premium less the dividend. The defendant was a mutual life insurance company and the dividends on the policy earned in 1914 were on December 8th, $13.02. The Company gave the insured notice of the date of the payment of the annual premium. The policy contained a clause which gave the insured thirty days of grace within which to pay the annual premium. On January 4, 1915, the defendant wrote a letter addressed to Mrs. Addie Henley at her home at Brinkley, Arkansas, in which it notified her that the thirty days of grace allowed within which to make payment under her policy would expire on January 8, 1915. The letter continued as follows:

"The amount due on that date is as follows:

| | |
|---|---|
| Premium | $46.98 |
| Less Dividend | 13.02 |
| | $33.96 |
| Interest on total for 30 days at 5 per cent | .15 |
| Total | $34.11 |

Kindly send check to cover."

On the 18th day of January, 1915, the husband of the insured mailed a check for the $33.96 to the insurance company. The insurance company collected the check

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and deposited it to what they called a suspense account. That is to say that did not apply the check in payment of the annual premium but wrote to the insured that her policy could be re-instated upon her submitting to a medical examination and sending the proper health certificate. In the meantime they retained the check for the premium and also the dividend. Other letters were sent to her and her husband urging her to submit to an examination and send in a health certificate for the purpose of re-instating her policy which the agent of the company claimed had been forfeited because the premium had not been paid prior to the 8th day of January, 1915. During the pendency of the negotiations Mrs. Henley was in the State of Texas on a visit, and died on March 17, 1915. The insurance company was notified of the death of Mrs. Henley. It then returned to her husband the amount of the check which he had sent to them on January 18th in payment of the annual premium on her policy. About a week later the husband received a check for $13.02 for the dividend. The insurance policy also contained the following: "Payment of Premiums:

"The company will accept payment of premiums at other times than as stated above, as follows:

"$24 42-100 ½ annually on each 8th day of December and June or

"$12 45-00 ¼ annually on each 8th day of December, March, June and September, provided such change is made on any anniversary of the date of this policy."

One of the agents of the insurance company testified that it had been the custom of Mrs. Henley, since she had taken out the policy sued on to apply her dividends on the payment of the annual premiums. He also testified that Mrs. Henley never asked to change the date of the payment of her premium. The case was tried before the court sitting as a jury. The court found the issues in favor of the plaintiff and a judgment was entered accordingly. The defendant has appealed.

*Rose, Hemingway, Cantrell, Loughborough & Miles, Frederick L. Allen* and *Lee & Moore*, for appellant.

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1. The court's finding of facts is not supported by the evidence.

2. The court's finding of law is incorrect. The court found that the dividend of $13.02 should have been applied to the payment of the premium due on Dec. 8, 1914, and in order to make this application the court found that the premium could have been paid in quarterly payments. The premium was payable annually. The dividend could not be applied to the payment of the premium until directed by the insured and voucher signed. 104 Ark. 288.

2. Courts cannot make contracts for parties but it is their duty to enforce them as the parties have made them. There was no direction to apply the dividend to the premium and the company had no right to so apply it. 104 Ark. 288.

3. When did the policy lapse? The premium was due on Dec. 8, 1914, and the 30 days grace expired Jan. 8, 1915; hence the policy lapsed on that day. 25 Cyc. 284; 112 Ark. 178; Cooley Briefs on Ins., Vol. 3, p. 2277. In this case due notice was given.

4. There is *one* case decided by this court holding that the company must apply dividends to the payment of insurance *on loans*. Here there was no stipulation. 68 Ark. 505. The policy expressly provided that the only option the company had was to pay the dividends in cash unless an election was made by the insured otherwise. 104 Ark. 288. The premium was not paid until 10 days after forfeiture, and notice was given and the money placed in the suspense fund.

5. To constitute a waiver the acceptance of a premium after due must be unconditional. 25 Cyc. 869, 871; 57 S. W. 678. No agent can modify the terms of the contract or waive conditions. 231 U. S. 560; 35 N. E. 420.

*G. Otis Bogle* and *C. F. Greenlee*, for appellee.

1. The court's finding that the policy had not lapsed was based upon positive proof. Appellant had at all times in its hands sufficient funds of the insured to keep

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the policy in force. The dividends should have been applied to prevent a forfeiture. 68 Ark. 522-3-4. Appellant was a purely mutual company, and the dividends were available as payment of premiums. As long as the company had money in its hands available to pay premiums, it could not declare the policy void. 111 Ark. 514, 518. See also 25 Cyc. 841, 843, 870; 47 S. W. 546. The policy *never lapsed.*

HART, J. (after stating the facts). The principle of law governing cases of this character is stated in the case of the *Union Central Life Insurance Co.* v. *Caldwell*, 68 Ark. 505, as follows:

"The proof showed that the assured had the right to have the dividends applied otherwise. In the absence of any stipulation in the policy, and of any directions otherwise by the assured as to the application of dividends which have been declared, it is the duty of a mutual company to apply such dividends to the payment of interest on loans made on the policy, when by so doing a forfeiture of all rights and benefits under the policy will be prevented. This is the rule in the case of premiums to keep the policy in force from year to year, and, of course, would be for the payment of interest on an ordinary loan, which prevents a sale of the policy."

The court said that the doctrine had its origin in that fundamental principle of justice which will compel one who has funds in his hands belonging to another, which may be used, to use such funds, if at all, for the benfit, and not to the injury, of the owner; for his consent to the one, and dissent to the other, will be presumed. Forfeitures are not favored either at law or in equity and so far as is reasonable contracts are to be construed so as to avoid a forfeiture. Policy holders' in a mutual insurance company are members of the corporation, and are entitled to have the officers and agents give just and reasonable protection to their rights. Insurance contracts are written on printed forms carefully prepared by experts of the company and it is not necessary to cite authorities to sustain the proposition that forfeitures are only en-

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forced when it appears that this is the plain meaning of the contract.

In the instant case the premiums were payable annually on the 8th day of December and the policy contained a provision allowing thirty days of grace within which to pay the premium. The policy also contained a provision that the premium might be paid semi-annually or quarterly. Quarterly on the 8th day of December, March, June and September, in the sum of $12.45 for each quarter. The company had in its hands a dividend to the credit of the assured in the sum of $13.02. This was more than sufficient to pay the premium for the first quarter. But it is urged on the part of the insurance company that the assured had not elected to pay the premium in quarterly installments and that in the absence of such election the company was not required to apply the dividends to the payment of the premium because there was not sufficient amount on hand to pay the whole annual premium. We do not agree with counsel for the insurance company. In the application of the rule announced in the case above cited, we think the consent of the assured to the appropriation of the dividend to the payment of the first quarterly installment may be presumed. The assured contracted with the insurance company to pay her a stated sum at her death. She became a member of a mutual insurance company, the duty of whose officers, as we have already seen, is to give just and reasonable protection to the rights of the members. Hence it is not to be supposed that a member and policy holder would object to the company applying the dividend in its hands to the payment of the quarterly installment of his premium and thereby forfeit his policy and thus defeat the end sought to be accomplished by him in making the contract of insurance. The amount of dividends in the hands of the company belonging to the assured was $13.02. On the 18th of January, 1915, the husband of the assured sent his check to the company for $33.96, the balance of the annual premium. It had been the custom of the company to apply the dividend towards the payment of the annual premium.

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When all the facts are considered in the light of the principles of law above stated, we think the court was right in holding there was no forfeiture of the policy and its judgment must be affirmed.

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## ROARK v. MATTHEWS.

Opinion delivered October 9, 1916.

1. SUBROGATION—MORTGAGE—PRIOR VALID SECURITY.—One who surrenders a prior valid mortgage upon his debtor's homestead, for another which proved to be invalid because not properly acknowledged by the debtor's wife, is entitled to be subrogated to the lien of the prior valid mortgage.
2. SUBROGATION—MORTGAGE—LIMITATIONS.—A right to enforce a mortgage lien acquired by the right of subrogation, will not be barred where the debt has been kept alive by a new note executed by the debtor.

Appeal from Carroll Chancery Court; *T. H. Humphreys*, Chancellor; affirmed.

*Charles D. James*, for appellant.

1. The mere fact that appellee paid off the debt to Wenzel, does not entitle him to subrogation, unless there was an agreement to that effect. 56 Ark. 480; 44 *Id.* 507; 47 *Id.* 111; 25 *Id.* 129. The testimony fails to show this agreement, either express or implied. The moving consideration for the loan was selling certain lots and getting security for an old store account.

2. The fact that Matthews kept the old notes and mortgage is no evidence that he looked to the Wenzel notes and mortgage for subrogation. 50 Ark. 112; 44 *Id.* 507.

3. The cause of action is barred. 86 Ark. 368, 393; 44 *Id.* 504, 507. Subrogation is a derivative right, and the action must be brought within the period of limitation allowed to the original holder of the lien. The facts of this case do not fall within the rule in 84 Ark. 277, or 81 *Id.* 253.

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*J. V. Walker*, for appellee.

1. The case of *Davies* v. *Pugh*, 81 Ark. 253, settles this case. The cases cited for appellants do not apply.

2. The claim was not barred as a new note was given. *Ib.*

3. See also 108 Ark. 155.

SMITH, J. This suit was brought by appellants, who are husband and wife, to cancel a mortgage given by them upon their homestead to appellee upon the ground that the wife had not properly acknowledged the mortgage.

There was an answer and cross-complaint in which it was alleged that the mortgage had been properly executed, and in an amendment to the cross-complaint, it was alleged that prior to June 14, 1911, appellants were indebted to one Wenzel in the sum of $500.00, and as security therefor had executed a mortgage upon the premises mentioned in the complaint. That this mortgage had been duly acknowledged, delivered and recorded, and that the indebtedness there secured had matured and appellants were unable to pay, whereupon they applied to appellee for a loan of money with which to pay Wenzel and certain indebtedness already due appellee. That with $652.75 of this money appellee took up appellants' note and mortgage from Wenzel and held the same as security for repayment to him of the amount so paid to Wenzel until appellants should execute to him a mortgage and new notes, and pursuant to this agreement appellee held said Wenzel notes and mortgage until the execution and delivery to him of the mortgage here sought to be cancelled. Appellee prayed that he be subrogated to the rights of the first mortgage if his own mortgage was cancelled. Appellants answered the cross-complaint and alleged the fact to be that the transaction was a mere loan and that the mortgage was given to secure this loan and the antecedent debt.

All of the parties testified in support of the allegations of their respective pleadings. Appellants point out certain alleged inconsistencies in the testimony of appellee, but the court made a finding of fact sustaining the alle-

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gations of the cross-complaint; and we are unable to say that this finding is clearly against the preponderance of the evidence. The court found that the second mortgage was not properly acknowledged and cancelled it, but decreed that appellee was entitled to be subrogated to the rights of Wenzel under the first mortgage to the extent of the debt there secured and the interest thereon, and this appeal questions only that portion of the decree which awards subrogation.

The notes to Wenzel were three in number and were all dated January 15, 1909, and were due in two, three and four years from date, respectively, and the mortgage securing them provided that upon failure to pay any of them at maturity the entire debt should become due and the mortgage subject to immediate foreclosure. It is now urged that all these notes are barred by the statute of limitations, inasmuch as the cross-complaint praying subrogation was not filed until January 19, 1916.

A very similar case and one involving both the questions here raised is that of *Davies* v. *Pugh*, 81 Ark. 253, and we quote the following language from the syllabi in that case:

"1. Subrogation—Prior Valid Security.—One who surrenders a prior valid mortgage upon his debtor's homestead for another which proves to be invalid because the signature of the debtor's wife thereto was forged is entitled to be subrogated to the lien of the prior valid mortgage.

"2. Agreement to Hold Prior Security—When Implied.—From proof that plaintiff took up an outstanding note and mortgage which had been executed by defendant, and held them until defendant executed to him a new note, and mortgage, an agreement will be inferred that he should hold the old mortgage as security until a new one should be executed, although the old mortgage was not assigned to him, and there was no express agreement with defendant that he should hold the old mortgage as security."

The case cited also disposes of the question of limitation raised here in the following language:

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"3. Subrogation—Limitation.—If the statute of limitations applicable to mortgage foreclosures applies to a suit to enforce the right to be subrogated to a mortgage, such a suit will not be barred where the debt has been kept alive by a new note executed by the debtor."

A recent case which gives full support to the finding of the court below is that of *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.*, 108 Ark. 555.

The decree is, therefore, affirmed.

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## IN RE ESTATE OF R. A. CLARKSON, DECEASED.

Opinion delivered October 9, 1916.

1. INHERITANCE TAX—STOCK OF RESIDENT DECEDENT IN FOREIGN CORPORATION—CONFLICT OF LAWS.—The probate court in Arkansas may consider shares of stock in a foreign corporation owned by deceased, a resident of Arkansas, at the time of his death, as property of the estate in computing the inheritance tax upon the estate of deceased, and may tax the transfer of the same when made by will, under Act 197, p. 826, Acts of 1913.

2. INHERITANCE TAX—NATURE OF—MAY BE LEVIED UPON WHAT PROPERTY.—The inheritance tax is a tax upon the right of succession, and it may be levied upon all property which passes from one person to another under the laws of this State, whether under the laws regulating descent and distribution, or the devolution of property by will, or otherwise.

Appeal from Sebastian Circuit Court; *Paul Little*, Judge; affirmed.

*Warner & Warner*, for appellant.

1. The lower court erred in holding that the shares of stock in the Oklahoma corporation were subject to inheritance tax in Arkansas. These shares are not within the terms and provisions of the Act 1913, p. 826. The intangible property must be within the State and possessed by a citizen of this State or resident thereof. These certificates of shares are in a foreign corporation and are in possession of the administrator in Oklahoma and the tax has been paid on them in that State.

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The certificates are mere evidences of ownership of property in Oklahoma. A certificate of stock is different from an ordinary chattel. It is only evidence of ownership of stock held by the Oklahoma corporation for the benefit of the owner and cannot be within the purview of the law of this State. 117 U. S. 1, 44 S. Ed., 647, 651; 25 L. R. A. (N. S.) 384. The stock and corporation are physically outside this State. It is necessary that two things exist in order that the statute may apply. (1) The certificates must be "intangible property," and (2) that the property or stock is "within the State of Arkansas." But the stock is in possession of the Oklahoma administrator and the laws of that State govern.

2. A fictitious *situs* cannot prevail over the actual *situs* located by the decedent himself. 150 N. Y. 1. The fiction of "*mobilia sequuntur personam*" is not applicable. 80 Ark. 138; 23 N. Y. 224, 228; Story Confl. of Laws, § 550; 141 U. S. 18, 22; 51 U. S. L. Ed., 853; 51 *Id.* 1106.

3. The Oklahoma tax is valid and has been paid. 25 L. R. A. (N. S.) 384; 47 U. S. L. Ed., 439, 444. Statutes imposing this tax are strictly construed against the government and all doubts resolved in favor of the taxpayer. 85 Pac. 1129; 161 N. Y. 211; 140 *Id.* 306; 46 U. S. (L. Ed.) 697; 37 Cal. 283. 56 Atl. 281, is a similar case and reaches the correct conclusion. The reasoning is conclusive. See also 25 So. 229; 87 Am. St. 90; 25 S. W. 202; 2 Beach Priv. Corp., § 633.

4. No inheritance tax can be imposed. 5 Pa. St. 144; 81 N. W. 603; 55 N. C. 51; 15 Can. S. C. 469; 97 Pa. St. 179; Ror. Int. St. Law 205. The actual situs of the property and not the domicile of the owner is the criterion. 81 N. W. 603.

*G. C.* and *Joe Hardin*, for appellee.

1. This is "intangible property" under the Act and clearly subject to the tax. The property was transferred by will. This is *not* a tax upon property but a tax upon the transfer of property. Acts Ark. No. 197, 1913, § 2; 100 Ark. 175; 120 Ark. 295.

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2. The question involved here as to the power of probate courts of the testator's domicile to compute shares of stock owned by the decedent at death in a foreign corporation in arriving at the inheritance tax due is well settled. 83 N. E. 881; 26 Atl. 728; *Id.* 27; 28 *Id.* 137; 38 N. E. 961; 36 *Id.* 505; 32 *Id.* 1096; 81 N. W. 603.

3. Any intangible property of a resident of this State, wherever situated is subject to the tax. 32 N. E. 1096; *Ib.* 1091; 83 *Id.* 881; 55 *Id.* 623; 26 Atl. 728; 49 Pa. St. 519; 81 N. W. 603; 25 So. 259; 100 Ark. 175; 179 S. W. 491; Dos Passos on Int. Tax, Ch. 4, § 46; Cent. Dig. 45 Taxation, 1685-1688; Blakemore & Bancroff on Inher. Tax, §§ 192-3, and many others. The Act works no hardships and only fixes a transfer tax on property clearly within the jurisdiction of the State.

SMITH, J. R. A. Clarkson was a citizen of Fort Smith at the time of his death, and was then the owner of $20,000.00 of the capital stock of an Oklahoma corporation in addition to certain real estate and personal property in this State. All of this property was disposed of by will, but there was an ancillary administration in Oklahoma whereby this corporate stock was administered upon. The inheritance tax upon all the property in this State has been paid and it is now sought to subject this stock to the payment of the tax.

The question at issue is stated in one of the excellent briefs in the case as follows:

"Has the probate court in Arkansas authority to consider said shares of stock in a foreign corporation as property of the estate in computing the inheritance tax upon said estate and to tax the transfer of same when made by the will of a resident testator?"

The court below held the property subject to the tax, and the representatives of the estate have duly prosecuted this appeal.

The proceeding is had under Act 197 of the Acts of 1913, page 826, and so much of the Act as is relevant here reads as follows:

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"Section 2. Taxable Transfers. A tax shall be and is hereby imposed upon the transfer of any tangible property within the State and of intangible property or any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases, subject to the exceptions and limitations hereinafter prescribed:

"(1) When a transfer is by will or by the interstate laws of this State of any intangible property or of tangible property within the State from any person dying seized or possessed thereof while a resident of the State."

Subdivision 2 of Section 1 of the Act defines tangible property as follows:

"The words 'tangible property' as used in this Act shall be taken to mean corporeal property, such as real estate and goods, wares and merchandise, and shall not be taken to mean money, deposits in banks, shares of stock, bonds, notes, credits or evidences of an interest in property or evidences of debt."

Subdivision 3 of the same Section defines intangible property as follows:

"The words 'intangible property' as used in this Act shall be taken to mean incorporeal property, including money, deposits in bank, shares of stock, bonds, notes, credits, evidences of an interest in property and evidences of debt."

And Subdivision 4 of the same Section defines the meaning of the word transfer as there employed as follows:

"The word 'transfer' as used in this Act shall be taken to include the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift in the manner herein prescribed."

It is insisted by appellants in opposition to the judgment of the court below that the certificates of stock were not "intangible property within the State of Arkansas" unless the maxim "*mobilia sequunter personam*" is applied, and it is urged that this maxim should not be applied here because it is conceded that these shares are subject to the succession or transfer tax imposed by the

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State of Oklahoma, and that the Oklahoma tax has been assessed and paid. It is said, therefore, that because Oklahoma can impose, and has imposed, this tax, it is wholly inconsistent for this State to do the same thing, and that the inheritance tax can only be imposed by a State upon the personal property of a domiciled decedent which is actually in the State at the time of his death, or which may subsequently be brought into it for the purposes of administration, and that no inheritance tax can be levied upon the personal property of a domiciled decedent which at the time of his death is located beyond the domain of the State and which is never brought within the State of his domicile for administration. It is pointed out that this inheritance or succession tax is a special and not a general tax and that the statute is therefore to be strictly construed in favor of the taxpayer and against the government. That such statutes are to be so construed was recognized by us in the case of *State* v. *Handlin*, 100 Ark. 175, and *McDaniel* v. *Byrkett*, 120 Ark. 295.

It is, therefore, necessary that the authority for the imposition of this tax affirmatively appear in the Act providing for its collection. We think this authority does appear. It will be seen from the part of Section 2 quoted above that the tax is imposed only upon the tangible property which is situated within the State, while all intangible property of residents of the State, wherever situated, is subject to the tax; and Subdivisions 2 and 3 of Section 1 quoted above define both tangible and intangible property, and "shares of stock" are expressly included in the definition of intangible property. It appears, therefore, that the State has undertaken to make these shares of stock taxable and has in fact done so, if it has that authority.

We have said that this Act does not levy a tax upon the property of a decedent, but is a tax upon the right of succession. *McDaniel* v. *Byrkett*, 120 Ark. 295; *State* v. *Handlin*, 100 Ark. 175. It may, therefore, be levied upon all property which passes from one person to another under the laws of this State, whether those laws be those

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of descent and distribution, or laws regulating the devolution of property by will or otherwise.

The right of the State to impose such tax is universally recognized and many, if not all, of the States have availed themselves of this method of raising public revenues, and there are many cases which discuss the nature of this power and uphold the authority of the State in its exercise.

A late case on the subject and one which announces the principles which control here is the case of *Re Hodges*, 150 Pac. 344. The case is also reported in L. R. A. 1916-A, page 839. The subject is there considered both on reason and the authorities. The facts of that case were that one Hodges, a resident of California, died in Massachusetts. His estate consisted in part of the stocks of certain corporations of Massachusetts, of which State he had formerly been a citizen. There was an ancillary administration upon these stocks in that State under a trust provision of the will, and in opposition to the attempt of the State of California to tax these stocks the same arguments were there made as have been advanced here. In the opinion in that case it was said:

"It is further claimed that the imposition of the inheritance tax by this State subjects this property of the decedent to double taxation in violation of the Federal Constitution. The point is presented under a stipulation that the State of Massachusetts, on distribution of this personal property under the ancillary administration, has there imposed an inheritance tax of that State upon it. In support of this contention appellants cite and rely on several decisions of the Supreme Court of the United States. But these cases, which involved the power of the State as to the imposition of general or annual taxes upon personal property, are not applicable in determining the legality of inheritance taxes. It is not only so stated by the Supreme Court of the United States, but the right to impose such a tax on personal property of a decedent in the State of the domicile of the decedent under the principle of '*mobilia sequuntur personam*,' and also in the State of the actual location of such property, and that

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such taxation in both violates no principle of constitutional law as constituting double taxation, is sustained. In *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493, that court, in deciding that certain personal property—railroad cars—was not subject to annual taxation when not physically located in the State levying it, says, in concluding its opinion on the subject: 'It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, * * * which are controlled by different considerations.' "

The court also quoted from the opinion in *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. Ed. 439, the following language:

"And, further: 'No doubt this power on the part of two States to tax on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, '*mobilia sequunter personam*', and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law.' "

We are not concerned with questions of policy; we can consider only those of power, and it appearing that in the imposition of this tax the State has exercised a power which inheres in it we must affirm the judgment of the court below, which was pronounced pursuant to the Act of the Legislature providing for its exercise. In the California case quoted from, the leading cases on the subject are cited, including several annotated cases, which collect many other cases on the subject.

The judgment of the court below is, therefore, affirmed.

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## THE ARKANSAS LAND DEVELOPMENT COMPANY v. BAYOU DEVIEW DRAINAGE DISTRICT NO. 1.

Opinion delivered October 16, 1916.

1. DRAINAGE DISTRICTS—FORMATION—REPORT AND MAP—VARIANCE.—Where a drainage district is organized under Act 279, Acts of 1909, as amended by Act 221, Public Acts 1911. There being no provision in the statutes for filing anything more than a report by the engineer, which must describe the lands to be benefited, the filing also of a map will be treated as surplusage, and any variance between the published notice and the description in the map will be immaterial.

2. DRAINAGE DISTRICTS—FORMATION—COLLATERAL ATTACK—PRESUMPTION.—In a collateral attack upon the organization of a drainage district it will be presumed that the county court considered the correctness of the survey and report when the hearing was given to property owners in response to the published notice; and the fact that the report was filed on the day of the appointment of the engineer will not necessarily imply that the survey was insufficient.

Appeal from Cross Chancery Court; *E. D. Robertson*, Chancellor; affirmed.

*Partlow & Shane*, for appellant.

1. The organization of the district is illegal, invalid and void for two reasons. (1) There is a variance between the descriptions of lands in the engineer's report and the maps filed with his report. 113 Ark. 566.

2. The amended petition was filed and the engineer was appointed and his report filed on the same day, viz.: April 12, 1915. It is apparent that no proper or sufficient survey could have been made. Acts May 27, 1909, p. 829, as amended by Act April 28, 1911, p. 193. This was a case of unparalleled celerity. Acts fixing a lien on lands should be strictly construed and the acts of all officials closely scrutinized, as the highest faith and most efficient service is required.

*Burr & Stewart*, for appellees.

1. The variance is not fatal. The case 113 Ark. 566 does not apply. 179 S. W. (Ky.) 339. This is a collateral attack.

2. The other objection is not tenable. Every requirement of the act was complied with. The record shows

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this and the district was legally organized; the court properly so held.

MCCULLOCH, C. J. Appellant owns land affected by the organization of the drainage district designated as Bayou DeView Drainage District No. 1 of Cross, Jackson and Woodruff counties, and instituted this action in the chancery court of Cross county attacking the validity of the organization. The chancery court sustained a demurrer to the complaint and rendered a decree dismissing it when appellant declined to amend.

The first point of the attack is that the engineer appointed to make a preliminary survey and report filed both a report and a map of the territory, and that the report embraced a description of lands not shown on the map so filed by the engineer. Counsel for appellant rely on the case of *Norton* v. *Bacon*, 113 Ark. 566, where it was held that a variance between the description of the lands on the plat or map and that given in the published notice was fatal to the legality of the organization. There is, however, a different statute to be dealt with in the present case, and it contains no requirement for the filing of a plat or map.

1. The statute (Act No. 279 of May 27, 1909, p. 829, as amended by Act No. 221 of April 28, 1911, p. 193) provides that the engineer appointed by the county court shall "proceed to make a survey and ascertain the limits of the region which would be benefited by the proposed system of drainage; and such engineer shall file with the county clerk a report showing the territory which will be benefited by the proposed improvement, and giving a general idea of its character and expense, and making such suggestions as to the size of the drainage ditches, and their location as he may deem advisable." Nothing is said in the statute about the engineer furnishing a map. It is provided that the clerk shall then give notice "calling upon all persons owning property within said district to appear before the court on some day to be fixed by the court, to show cause in favor or against the establishment of said district." There be-

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ing no provision in the statute for filing anything more than a report which must describe the lands to be benefited, the filing of the map must be treated as surplusage, and any variance between the published notice and the description in the map would be immaterial. We are of the opinion, therefore, that the attack on the validity of the district is unfounded.

2. The next point of attack is that the amended petition was filed on April 12, 1915, and that the engineer was appointed and filed his report on the same day. It must be remembered that the present suit constitutes a collateral and not a direct attack upon the validity of the proceedings, and we must assume that the county court considered the correctness of the survey and report when the hearing was given to property owners in response to the published notice. The fact that the report was filed on the day of the appoinment of the engineer does not necessarily imply that the survey was insufficient.

The complaint in the case shows that the order was made upon an amended petition in the proceeding which had been pending in the court for a considerable time, and that the same engineer had previously been appointed by the court. The statute (Act of 1911, *supra*) contains a provision that "when an engineer has been appointed and has made complete survey and report thereof, and for any reason the improvement has been abandoned and the proceedings dismissed, and afterwards proceedings are instituted for the establishment of a ditch or drain, or the changing of a water course, for the benefit of reclamation of the same territory surveyed in said former proceedings, or a part thereof, and territory additional thereto, the engineer shall use the engineer's report, survey, stakes and monuments made in said former proceedings, as far as practicable, or as much thereof as may be applicable." This is a direct expression of the legislative will to the effect that the survey of the engineer may be used even though made prior to the order of his appointment. It is therefore unimportant, under the statute, when the survey is made if it is found by the

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court on the hearing of the matter to be correct and to be available for use in the organization of the district. But aside from any statute on the subject, we are of the opinion that in a collateral attack such an apparent inconsistency in the report would not defeat the organization of the district found otherwise to be legal in every respect.

The two attacks made in the complaint being found to be insufficient it follows that the chancellor was correct in sustaining the demurrer, and the decree is therefore affirmed.

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## POE v. POE.

Opinion delivered October 16, 1916.

DIVORCE—DESERTION—LIMITATION.—An action for divorce upon the ground of desertion may be brought and maintained more than five years after the offending party deserted the other, the act of desertion being treated as continuing.

Appeal from Saline Chancery Court; *J. P. Henderson*, Chancellor; reversed.

*W. R. Donham*, for appellant.

The cause of action was not barred by the statute of limitations. The cause *existed* within five years next before the filing of the suit. Wilful desertion is a continuing offense. Kirby's Digest, § 2678; Bishop on Mar. & Div., Vol. 1, § 1771-2; 43 S. W. 168; 21 A. & E. Ann. Cases, 278; 4 Am. Rep. 579; 90 Ark. 40, &c.

MCCULLOCH, C. J. This is an uncontested suit for divorce on the ground of wilful desertion, and the appeal is from a decree of the chancellor refusing to grant the divorce. The alleged ground for divorce is fully established by the evidence, but the chancellor refused the decree of divorce for the reason that the original act of desertion did not occur within the time prescribed by the statute.

The statute on the subject reads as follows: "The plaintiff, to obtain a divorce, must allege and prove, in

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addition to a legal cause of divorce: First: A residence in the State for one year next before the commencement of the action. Second. That the cause of divorce occurred or existed in this State, or, if out of the State, either that it was a legal cause of divorce in the State where it occurred or existed or that the plaintiff's residence was then in this State. Third. That the cause of divorce occurred or existed within five years next before the commencement of the suit." Kirby's Digest, section 2678.

The theory of the chancellor advanced in support of his decision is that under the statute the desertion must exist for one year after its occurrence and that the suit must then be commenced within five years thereafter, but we are of the opinion that that is not the correct interpretation of the statute. Wilful desertion is a continuing offense and "exists" within the meaning of the statute as long as the desertion continues. Some of the grounds for divorce enumerated in the statute may consist of single acts, such as adultery, and others, such as wilful desertion, are continuing in their nature.

The provisions of the general statute of limitation are usually held not to apply to actions for divorce. 9 Ruling Case Law, Sec. 169.

In some of the States there have been statutes enacted, as has been done in this State, especially applicable to actions for divorce, but there seems to be little, if any, authority bearing directly upon the interpretation of our statute. This statute was copied literally from the Kentucky code, and there has only been one decision there, so far as our attention has been directed, bearing in any degree at all on the construction of the statute. That is the case of *Davis* v. *Davis*, 102 Ky. 440, which involved a suit for divorce on the statutory ground of "condemnation for felony," and it was decided that the word "condemnation" did not mean conviction, but that it existed as long as the judgment was in force, and that the cause of action was not barred even though the conviction of felony occurred more than five years before the commencement of the action. That decision was ren-

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dered long after we had borrowed the statute from our sister State, and we are therefore not bound to accept the construction; but it is at least very persuasive, and we think it is the correct interpretation of the statute.

It follows, therefore, that the decree of the chancellor is erroneous, and the same is reversed and the cause is remanded with directions to enter a decree for divorce in accordance with the prayer of the complaint.

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## STORTHZ v. WATTS.

Opinion delivered October 16, 1916.

1. ORAL CONTRACT—STATUTE OF FRAUDS—EXCEPTION TO THE RULE—LEASE OF LAND.—In order for an oral contract for the lease of land to be taken out of the operation of the statute of frauds, there must be substantial expenditures in the way of performance of the contract over and above the mere occupancy of the land and the payment of rent for the period the land is actually occupied.
2. APPEAL AND ERROR—FAILURE TO ABSTRACT INSTRUCTIONS—PRESUMPTION.—Where, on appeal, all the instructions are not abstracted, it will be presumed that those refused are covered by those given.

Appeal from Pulaski Circuit Court; Third Division; *G. W. Hendricks*, Judge; affirmed.

*W. T. Tucker*, for appellant.

1. This court has found the facts and established the law of this case on former appeal. 117 Ark. 500. The lease was only for one year and the verdict is against the law and the evidence.

2. Improper evidence was admitted as to a lease for a second year, how long it had been since the place had been in cultivation; the improvements made by defendant and amounts expended as shown by checks. All these were rejected when this case was here before and were improperly admitted.

3. The instructions asked by plaintiff expressed the law of this case and should have been given. Bishop Non-Contract Law, §§98, 102, 111; 17 Johns. 92, 99; 117 Ark. 500. The contract was verbal and good for only one year. There was no such performance or expen-

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ditures as to take this case out of the statute of frauds. Cases *supra* and cited in 117 Ark. 500.

*Miles & Wade*, for appellee.

1. The issues here are the same as on the former appeal. 117 Ark. 500. The contract was oral. But part performance, substantial expenditures and payment of rent were shown and the case thus taken out of the statute of frauds, and the tenant, if ejected, may recover damages. 49 Ga. 486; 103 Ind. 105; 123 Mass. 185; 109 Mass. 291; 34 Kans. 39; 134 Cal. 564; 124 Mo. App. 457; 117 Ark. 500, and cases cited.

2. The evidence fully supports the verdict. No improper evidence was admitted and the court gave practically the language of this court in its opinion on the former appeal in the charge to the jury. 21 Ark. 110; 112 *Id.* 502; 117 Ark. 500. Appellant's theory was submitted to the jury and the instructions refused did not state the law correctly.

3. Two juries have passed on this case and reached the same conclusion. No errors appear and the judgment should be affirmed.

HART, J. (1) This is an action of unlawful detainer instituted by L. Storthz to regain possession of a farm which he had leased by oral contract to J. A. Watts. This is the second appeal in the case. The opinion on the former appeal is reported in 117 Ark. page 500, under the style of *Storthz* v. *Watts*. Reference to that opinion is made for a more extended statement of the issues involved. The opinion on the former appeal is the law of the case and in that opinion the court held that in order to take an oral contract of lease of land out of the statute of frauds, there must be substantial expenditures in the way of performance of the contract over and above the mere occupancy of the land, and payment of rent for the period actually occupied. The jury again returned a verdict for the defendant for $160.00 and from the judgment rendered the plaintiff has appealed.

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The plaintiff testified that he rented the land to the defendant for the year 1913, and that there was nothing said about a longer lease of the land. That there were eighty acres in cultivation and that the defendant agreed to pay him $3.00 per acre therefor.

On the other hand the defendant testified that he would not have rented the land for the year 1913, alone, because the fences were out of repair and that the fields were grown up in bushes and that many logs were there which needed moving. The defendant said that he only agreed to cultivate forty acres of land for the year 1913, and pay the defendant $3.00 an acre therefor. That he was to cultivate the whole eighty acres for the year 1914, and pay the plaintiff $5.00 an acre therefor. The defendant further stated that the winds have blown a great many trees down in the field and that he piled and burned the logs. That locust bushes and hickory sprouts twelve feet high had grown up in the fields and that the fences had been torn down in many places and were badly out of repair. That he cut and burned the bushes that had grown up in the fields and made permanent repairs of the fences. That these repairs were necessary in order that the land might be profitably cultivated and that these improvements and permanent repairs cost him something like $100.00.

The judgment in the case on the former appeal was reversed because the court did not think there was sufficient testimony to warrant a finding that there had been such performance of the contract as would take the case out of the operation of the statute of frauds. The testimony was different on the retrial of the case according to the testimony of the defendant which is set out above and need not be repeated here. The cost of the improvements when compared with the rental value of the land shows that the defendant made substantial expenditures in the way of performance of the contract over and above the mere occupancy and payment for the period actually occupied. At the least the jury was warranted in finding such to be the fact.

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2. Therefore the evidence was legally sufficient to support the verdict. Complaint is made by counsel for the plaintiff that the court erred in giving certain instructions to the jury. All the instructions given by the court are not set out in plaintiff's abstract but only the instructions complained of by him are abstracted by the plaintiff. Where all the instructions are not abstracted, it will be presumed on appeal that refused instructions are covered by those given. *De Queen & Eastern Ry. Co.* v. *Thornton*, 98 Ark. 61; *Brown* v. *Simsboro Cash Store*, 102 Ark. 531; *Wallace* v. *St. L. I. M. & S. Ry. Co.*, 83 Ark. 356; *Reisinger* v. *Johnson*, 110 Ark. 7. Moreover the defendant in his abstract sets out an instruction given by the court and this instruction correctly instructed the jury as to the issues involved.

Therefore, the judgment will be affirmed.

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## CRANE v. JACKSON.

Opinion delivered October 16, 1916.

FERRIES—DAMAGES FOR OPERATION OF UNLICENSED FERRY.—The owner of a legally licensed ferry brought an action against defendant, who operated an unlicensed ferry within one mile of plaintiff's ferry, to recover the statutory penalties, and for damages for the unlawful operation of the ferry. *Held*, it was error for the trial court to require plaintiff to elect upon which of these bases of recovery he would proceed.

Appeal from Conway Circuit Court; *A. B. Priddy*, Judge; reversed.

STATEMENT BY THE COURT.

This is a suit by appellant, the owner of a licensed ferry across Petit Jean River, a navigable stream, against appellees for operating a ferry without license within one mile of his ferry.

The complaint alleges that appellant was operating a ferry across said stream after obtaining his license therefor, and that defendants had been operating and running a public ferry for hire, receiving tolls and other

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things of value for transporting people and property across said stream, within about 100 yards from the ferry of plaintiff, thereby depriving him of profits and revenue. It also contained a statement that the ferry was being operated without license, as required by law, and a list of the persons and property carried across. Alleged that plaintiff was entitled to have judgment in the sum of $5.00 for each and every person so ferried and $5.00 for every wagon or other article transported which could be the subject of a separate charge, etc., giving the number of persons and property for which a separate charge was made, or which was the subject therefor, to the damage of plaintiff in the sum of $1,130.00; and the plaintiff further alleges that as a result of the defendants running and operating their ferry as aforesaid this plaintiff has been damaged in the loss of tolls in the sum of $40.00 per month and that he is entitled to judgment against these defendants for the sum of $40.00 per month for the year 1914, year 1915 up until the present time, which would be $820.00.

Prayer was for the said sum of $1,300.00 allowed as statutory penalty and for the further sum of $820.00 damages caused by the unlawful operation by defendants of their ferry without a license and within one mile of plaintiff's ferry.

A motion was made requiring plaintiff to elect whether he would proceed for the recovery of the statutory penalties or for damages as charged in the complaint, and sustained, the court holding that there was a misjoinder of causes of action, which ruling was duly excepted to.

The plaintiff thereupon announced that he was standing upon his count for damages, to which a demurrer was filed and overruled. A motion was then made to require plaintiff to show whether he relied upon the operation of a free ferry as the basis for recovery of damages or upon the operation of an unlicensed ferry by defendants for hire, which motion was sustained.

The plaintiff declined to amend his complaint and it was dismissed by the court, its ruling being excepted to and an appeal prayed and granted therefrom.

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*Edward Gordon*, for appellant.

1 The court erred in requiring appellant to elect between statutory penalties and damages; and after he had elected to stand upon his count for damages the court erred in requiring appellant to allege either that appellees were operating a ferry for hire or a free ferry as a basis for his recovery of damages. Kirby's Digest, § 3582; Act May 11, 1905; 86 Ark. 138; 83 *Id.* 290; 88 *Id.* 128; 84 *Id.* 556; 90 *Id.* 484; 116 *Id.* 100; 20 *Id.* 561; *Ib.* 573; 94 *Id.* 190; 52 *Id.* 90.

*Sellers & Sellers*, for appellees.

Appellant set up two causes of action in his complaint which were improperly joined. He was properly required to elect. The right to recover penalties is exclusive. Kirby's Digest, § 3582; 71 Ark. 235; 74 *Id.* 589; 1. Jaggard on Torts, 98; 52 Ark. 90. The court also properly required the amendment, so as to show whether he relied upon the operation of a ferry for hire or a free ferry as a basis of recovery. Cases *supra*. The complaint was properly dismissed.

KIRBY, J. (after stating the facts). The court erred in sustaining the motion requiring plaintiff to elect whether he would proceed for the recovery of the statutory penalties or damages as alleged in his complaint, there being but one cause of action alleged therein and that for damages for the unlawful operation of an unlicensed ferry by appellees for hire, within the prohibited distance from appellants.

The statute provides: "If any person shall keep any ferry over any navigable stream, for which he shall charge any person any money or any other valuable thing, without complying with the provisions of law in relation to obtaining license, he shall forfeit and pay to every other person having a licensed ferry on the same stream or lake, in the same county, five dollars for every person so ferried, and the same sum for every wagon or other article so transported, which may be the subject of a separate charge, to be sued for and recovered by civil

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action, founded in this statute, with costs of prosecution." Kirby's Digest, Sec. 3582.

It has been held under this statute that the penalties provided are not recoverable against one who operates a free ferry or carries persons and property without compensation. *Shinn* v. *Cotton*, 52 Ark. 90.

It is not alleged in the complaint that appellees were operating a free ferry, but that they were operating a ferry for hire and that appellant was damaged in the sum of the amount of the penalties for persons and property carried and also in the sum of $40.00 per month for the loss of tolls during the time appellees were operating their ferry for the years 1914 and 1915 and until the beginning of the suit. Of course appellant could not recover the statutory penalties for carrying persons and property for hire and also damages for loss of tolls upon being deprived of such traffic carried by the unlicensed ferry, but we see no reason why he should not recover the damages suffered by reason of such carriage of traffic by the unlicensed ferry, whether it was carried free or for hire, the damage resulting from the carriage thereof and depriving the operator of the licensed ferry of tolls that otherwise must have come to his ferry. He could waive the right to recover the statutory penalties and recover damages for the operation of a free ferry, but there being no allegation of the operation of a free ferry, the court erred in requiring appellant to elect whether he would proceed for the penalties or for damages for loss of tolls, since he had the right to recover the damages under the allegations of his complaint for the loss of tolls, if any was shown to have resulted from the operation of the unlicensed ferry, whether it was operated free or for hire.

The judgment is reversed and the cause remanded with directions to overrule the motion to require plaintiff to elect and for further proceedings, according to law.

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## HEMINGWAY v. GRAYLING LUMBER CO.

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Opinion delivered October 16, 1916.

1. JUDGMENTS—BREACH OF CONTRACT—SUITS PIECEMEAL.—Where a contract is in its nature indivisible, it cannot be split up into several causes of action and sued upon piecemeal, or made the basis of several separate suits; but a recovery for one part will bar a subsequent action for the whole, the residue, or another part.

2. JUDGMENTS—BREACH OF CONTRACT—RES ADJUDICATA.—Plaintiff agreed to haul logs for defendant for a certain length of time for a certain price. Before the expiration of the time set in the contract, defendant committed an entire breach of the same, and in an action for such breach plaintiff recovered damages. *Held*, plaintiff cannot thereafter maintain an action for damages accruing since the rendition of the first judgment.

Appeal from Desha Circuit Court; *W. B. Sorrells*, Judge; affirmed.

*F. M. Rogers*, for appellant.

1. The first ground of demurrer is not well taken. Former adjudication can only be put in issue by plea or answer. The rule is that in actions for damages, only such as have accrued at the time of trial of the suit can be awarded. 58 Ark. 622; 78 *Id.* 342.

2. This action is based upon Kirby's Digest, § 6291 and the second ground of demurrer should have been overruled. 58 Ark. 622; 78 *Id.* 342; 23 Cyc. 1175. The case 83 Ark. 545 does not apply. The demurrer should have been overruled.

*J. Bernhardt*, for appellee.

No cause of action was stated. 23 Cyc. 1174; 58 Ark. 621; 63 *Id.* 259; 64 *Id.* 94; 78 *Id.* 336.

Kirby's Digest, § 6291 does not change the rule. 83 Ark. 547. Only *one* recovery can be had.

KIRBY, J. Appellant brought this suit for damages for breach of a contract for hauling logs for appellees for the remainder of the year 1915, after February, which appellees agreed to have cut, and have ready for hauling during said period, and agreed to pay the specified prices for a haul not exceeding one-fourth of a mile, and for all

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delivered which were hauled exceeding one-fourth but not exceeding one-half a mile, and for all which were hauled exceeding one-half but not exceeding three-fourths of a mile; and for all hauled over three-fourths but not exceeding one mile.

The complaint alleges that appellant entered into the performance of said contract and hauled and delivered logs thereunder until the 13th of May, 1915, at which time appellees, without cause, refused to permit appellant to continue the further performance thereof and further, "Plaintiff states that on the 28th day of August, 1915, he recovered judgement for damages sustained by him by reason of said breach of said contract by defendants, covering the period between the 13th day of May, 1915, and the date of said judgment; that he now sues for the recovery of damages accruing since said 28th day of August, 1915." He claims damages in the sum of ten thousand dollars.

A general demurrer was interposed and also a special demurrer alleging that the complaint shows upon its face the matters included therein are *res adjudicata*. The demurrer was sustained and appellants electing to stand upon the complaint, judgment was rendered dismissing the action, from which this appeal is prosecuted.

The complaint shows that the suit is upon the same contract for the breach of which an action for damages has already been maintained and that this action is prosecuted for the same breach of the contract, for damages accruing since the rendition of the first judgment. Its allegations show an entire breach of the contract and abandonment of its further performance by appellees, and no reason is disclosed why all the damages resulting from the alleged refusal of appellees to permit appellant to perform the contract did not accrue upon the breach thereof.

"Where a demand or right of action is in its nature entire and indivisable, it cannot be split up into several causes of action and sued piece-meal, or made the basis of as many separate suits; but a recovery for one part will bar a subsequent action for the whole, the residue,

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or another part." 23 Cyc. 1174; *Van Winkle* v. *Satterfield*, 58 Ark. 621; *Spencer Medicine Co.* v. *Paul*, 78 Ark. 336; *Reynolds* v. *Jones*, 63 Ark. 259; *St. L., I. M. & S. Ry Co.* v. *Paul*, 64 Ark. 94.

Appellant insists however that he was entitled to maintain this action under the terms of Section 6291 Kirby's Digest, providing: "Successive action may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action has arisen therefrom," but only attempts to allege damages accruing since the rendition of the first judgment for the same breach of contract for which damages were recovered in that suit and not a new cause of action arising therefrom, and his contention can not be sustained under said statute. *National Surety Co.* v. *Coates*, 83 Ark. 547.

The demurrer was properly sustained and the judgment is affirmed.

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## MORRISON v. STATE.

Opinion delivered October 16, 1916.

LIQUOR—ILLEGAL SALE—SUFFICIENCY OF THE EVIDENCE.—The evidence *held* sufficient to warrant a conviction of the crime of selling intoxicating liquor.

Appeal from Hot Spring Circuit Court; *Geo. R. Haynie*, Judge on Exchange; affirmed.

*Oscar Barnett*, for appellant.

There is no evidence to sustain the verdict. 101 Ark. 569.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee. *D. D. Glover* of Counsel.

The evidence is ample to sustain the conviction. Appellant either sold, or aided in the illegal sale, and was clearly guilty. 105 Ark. 462.

KIRBY, J. Will Morrison prosecutes this appeal from a judgment of conviction for selling and being interested

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in the sale of intoxicating liquors urging as a ground for reversal that the evidence is insufficient to support the verdict of the jury.

It appears from the testimony that the officers of the City of Malvern were planning to catch the violators of the law and sent a negro, Keesee, with a dollar bill marked with the officers initials "C. L. R." to Emmerson's place to get some whiskey. The messenger went to the place designated in the back of Alexander's garage, while the officers watched from a place across the street. The negro went into the garage and came out and they took the whiskey from him and arrested appellant and Emerson in the garage. They saw Fred Emerson give Will Morrison, appellant, the key and he went back and unlocked the back room and in a short time Emerson and the negro messenger went back in there and the negro came out with the whiskey. Upon giving the signal agreed upon if he succeeded in getting the whiskey, the officers came up and arrested Emerson and Morrison. Keesee stated in their presence, and the statement was not denied, that Morrison drew the whiskey out of a large bottle that was in a barrel and sold it to him. They looked in the barrel and found whiskey there.

The place was a "hang-out for loafers," as one witness expressed it. The officers found the marked dollar bill in Emerson's pocket and Emerson testified that he sold the liquor and he only, was interested in the sale. Neither Keesee nor appellant testified at the trial.

There was no error in admitting in evidence the statement made by Keesee in the presence of appellant and Emerson when they were arrested about his having purchased the whiskey from appellant, which statement was not denied and the testimony is sufficient to sustain the verdict.

The judgment is affirmed.

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## WILSON-WARD COMPANY *v.* WALKER.

Opinion delivered October 16, 1916.

CONFLICT OF LAWS—USURY—EVIDENCE OF INTENTION OF PARTIES—PROMISSORY NOTE.—Where A. in Tennessee loaned money to B. in Arkansas, B. executing his promissory note therefor in Arkansas, the note bearing a rate of interest legal in Arkansas, but usurious in Tennessee, it will be presumed that the parties contracted with reference to the laws of Arkansas, and it is error to exclude testimony by the lender that he intended the transaction to be governed by the laws of Arkansas.

Appeal from St. Francis Circuit Court; *J. M. Jackson*, Judge; reversed.

STATEMENT BY THE COURT.

Appellants brought this suit on a promissory note in form and with endorsements as follows:

"Forrest City, Ark., Mar. 2, 1910.

"January 15, 1911, after date we promise to pay to the order of Wilson-Ward Company, Twenty Five Hundred and no-100 Dollars, for value received, negotiable and payable without defalcation or discount and with interest from date at the rate of eight per cent. per annum until paid, payable at the office of Wilson-Ward Company, Memphis, Tenn.

(Signed) "THE J. W. BECK COMPANY,
BY J. H. TIPTON, *Prest.*"

Endorsed on back of note:

"J. H. Tipton, Ike Mallory, R. W. Benson, G. P. Walker, J. M. Nichols, Hall Bros., by Sam Hall, J. G. Sanders, Wilson-Ward Company, by J. M. Ward, *Prest.*"

Payments previously made.

"October 1, 1912, $250.00.
January 14, 1914, $75.00.
February 19, 1914, $1,500.00."

Appellees answered setting up that the note was a Tennessee contract, governed by the laws of that State and usurious on its face, bearing interest at the rate of 8% and under the laws of Tennessee no rate of interest in excess of 6% could lawfully be charged. Other defenses were also set up.

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It appears from the testimony that appellant company of Memphis, Tenn., loaned the money for which the note was given to the Beck Company of Forrest City, Arkansas, the negotiations therefor being conducted at the office of appellant in Memphis, where it was agreed the money would be loaned upon the execution of the note with the endorsement of certain persons, only one of whom was present. The note was prepared and sent to Forrest City for execution, and later returned to Memphis with all the signatures as shown above, except that of the Wilson-Ward Company, the last endorser.

The court refused to allow witness, Ward, Vice-President of appellant company, to state that the company had customers in three other States, including Arkansas, besides Tennessee; that its custom was to have the contracts executed by its customers in the States where they resided with the intention that the laws of such States should control.

Another witness testified that the money was furnished upon the execution of the note; that the payments endorsed thereon had been received and that the balance was due as shown.

Appellees thereupon moved the court to direct a verdict in their favor "On the ground that under the proof of the plaintiff in the case this contract is shown to be a Tennessee contract and on its face would not be enforceable in that State and therefore would not be enforceable in this State." The motion was sustained by the court and from the judgment on the directed verdict, this appeal is prosecuted.

*C. W. Norton* and *W. W. Hughes*, for appellant.

1. The note was given for money loaned to the J. W. Beck Company; the money was not advanced until after the note was signed and the loan was made on the strength of all the signatures and endorsers. Under the law of Arkansas all the parties were joint makers and liable as such. 77 Ark. 5-3.

2. The court below held the note was a Tennessee contract and void for usury. Our contention is that it

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was an Arkansas contract and to be construed under the laws of this State. 67 Ark. 252, 259; 99 Ky. 24; 142 Mass. 567; 81 N. Y. 566; 16 R. I. 740.

3. But if a Tennessee contract the note was not void and the courts of this state will enforce it according to the laws of Tennessee. 70 Ark. 493; 109 *Id.* 69. This court takes judicial notice of the laws of Tennessee. Kirby's Digest, § 7823. Where the paper shows usury on its face the party cannot enforce it. 104 Tenn. 11, 16, 17. But where it does not so appear on the face of the paper or from the plaintiff's pleadings, but the fact is developed by proof *aliunde*, the contract is unenforceable only to the extent of the excess over the legal rate of interest. 2 Heisk. (49 Tenn.) 491, 499; 7 Heisk. (54 Tenn.) 500; 14 Lea (82 Tenn.) 433, 438; 20 Pick. (104 Tenn.) 11, 16, 17; 9 Baxt. (68 Tenn.) 245. The note is not usurious on its face. As a general rule the validity of a note is to be determined by reference to the laws of the place of payment. But the rule is not without exceptions. 72 Ark. 83; 3 Cold. (43 Tenn.) 31. See also 68 U. S. 298; 37 Ill. 45; 79 Ind. 172; 46 N. H. 300; 81 S. W. 457, 460; 12 Wisc. 692.

4. It was error to exclude the testimony that it was the intention of the parties to make an Arkansas contract. The note was dated and executed in Arkansas.

*Mann, Bussey & Mann* and *R. J. Williams*, for appellees.

The note was a Tennessee contract. It was completed in Memphis and was payable in Tennessee. It should be governed by the laws of the State where it is to be performed. It was void for usury under the laws of Tennessee. 95 Ark. 421; 9 Cyc. 297 and note 58-84, and 577; 30 Am. St. 828; 8 Humphrey 416; 3 Cold. 462; 14 Blackf. (U. S.) 233; 55 Fed. 223; 33 Ark. 645; 60 *Id.* 269; 66 *Id.* 77; 2 Gerger, 255; 6 Humph. 278; 2 Head. 441. The judgment is right and is supported by the law and the testimony.

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KIRBY, J. (after stating the facts). It is contended that the court erred in directing a verdict and the contention must be sustained.

In *Whitlock* v. *Cohn*, 72 Ark. 83, the court, in a suit upon a note executed in this State bearing a higher rate of interest than was allowed in the place designated for its payment, Illinois, where the rate of interest stipulated was usurious, said:

"Where the intention of the parties is not otherwise more directly and definitely expressed in the contract, nor can be otherwise inferred, the place of payment will determine the law with reference to which parties have contracted; but parties will not be presumed to have contracted with reference to a law which will have the effect of annulling their contract for illegality in its very making, where another intention can be gathered, unless it be found that they were seeking in some way to avoid the force of the law, as in case of usury, for instance. The contract of the parties would be valid on its face under the laws of Arkansas, but not under the laws of Illinois. The presumption is against the contention that the parties contracted with reference to the laws of Illinois."

Under the laws of Tennessee of which this court takes judicial notice, the contract provides for a usurious rate of interest, and under the decisions of that State where commercial paper shows on its face that the contract is usurious, it cannot be enforced. Kirby's Digest, Sec. 5389; Shannons Code, Tenn. Secs. 3493, 3499; *Bank* v. *Walter*, 104 Tenn. 11.

If, however, the usury does not appear upon the face of the paper and is not shown by the plaintiff's pleadings, but the fact is developed by evidence *aliunde*, the contract will be enforced there to the extent of the loan with lawful interest, the excess of interest charged over the legal rate only not being collectible. *Jackson* v. *Collins*, 2 Heisk. (49 Tenn.) 491; *Chaffin* v. *Lincoln Sav. Bank*, 7 Heisk. (54 Tenn.) 500; *Stephenson* v. *Landis*, 14 Lea (82 Tenn.) 433; *Bank* v. *Walter*, 20 Pick. (104 Tenn.) 11; *Richardson* v. *Brown*, 9 Baxter (68 Tenn.) 245.

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The presumption being that the parties contracted with reference to the laws of the State where the note was made, under which it was valid, and the testimony excluded tending to show that it was the intention of the lender of the money that the law of the domicile of the borrower, the makers of the note, should govern in determining its validity, as is also the general rule, the court erred in excluding the testimony, which was competent to show that it was not done to evade the laws of Tennessee against usury.

The court erred in directing a verdict and the judgment is accordingly reversed and the cause remanded for a new trial.

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## CHITTIM v. ARMOUR & COMPANY.

Opinion delivered October 16, 1916.

MARRIED WOMEN—CONTRACT OF GUARANTY.—Appellant was a married woman and one L. rented from her a store room which she owned. In order for L. to obtain certain articles of merchandise to sell in his store, appellant guaranteed in writing to pay for the same. *Held*, the contract not being for the benefit of appellant's separate estate, that the same was not binding upon her.

Appeal from Pulaski Circuit Court, Third Division; *G. W. Hendricks*, Judge; reversed and dismissed.

STATEMENT BY THE COURT.

This appeal comes from judgments rendered against appellant in suits of Armour & Company and Sulzberger & Sons Company against her and Charles Lundy, which were consolidated and heard together below, the Sulzberger Company's having been appealed from a judgment in the municipal court.

The suits were for the balances due on account for merchandise and commodities furnished by said companies to Charles Lundy and upon the written guaranty of appellant as follows:

"For value received, of Armour & Company, the receipt of which is hereby acknowledged, and in further

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consideration of said Armour & Company extended to Charles Lundy, of Second and Victory Streets, Little Rock, Ark., a line of credit for such meats, provisions and other of their products as he (they) may from time to time require, the amount and extent of such credit, however, being at all times in the discretion of Armour & Company, and subject to change by them without notice, I hereby guarantee to said Armour & Company the prompt payment at maturity, or at any time thereafter, for any and all purchases heretofore or hereafter made of them by said Charles Lundy, together with interest thereon at the rate of six per cent. per annum after maturity until paid. Also all costs, attorney's fees, and expenses of collection. It is agreed, however, that my liability hereunder is limited to one hundred dollars ($100.00), the said Armour & Company reserving the right to exceed that limit of credit at their own risk. This guaranty is to continue in force until written notice of revocation thereof shall have been given to and received by said Armour & Company at its Chicago office, and is independent of any and all other security which it may now or hereafter have for the payment of any of the purchases or indebtedness herein mentioned. And each of the guarantors hereby waive notice of the acceptance of this guaranty, notice of the maturity of any and all bills purchased hereunder, and notice of default in payments.

"Dated at February 2, 14, this day of 2, 14, 1915.

"KATIE A. CHITTIM (Seal)".

"The Sulzberger & Sons Company of America, 324 East Markham Street, Little Rock, Ark.:

"Gentlemen: You will please accept this as my guarantee on the account of Charles Lundy or the Little Rock Meat and Grocery Company, located 120-122 Victory Streets, Little Rock, Ark., to the amount of one hundred fifty dollars ($150.00) weekly.

"(Signed) KATIE A. CHITTIM.

"Witness: Charles Lundy."

In one of the cases it is alleged "that in order to obtain credit for the said Charles Lundy, Mrs. Kate A. Chittim, his landlady, in order to retain him as a tenant,

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and thus benefit her separate estate, executed and delivered the written guaranty, etc." The other alleges that the guaranty was made for the benefit of the separate estate of Mrs. Kate A. Chittim.

She answered, denying the allegations of the complaint and setting up her coverture. Lundy admitted his indebtedness and was the principal witness against appellant. He stated that he rented the store owned by her and moved in three rooms in the back part of it and fixed the place up and that business got dull and he told Mrs. Chittim that he could not open up the store, that he was not making enough money, but if she could help him he would do so. He asked her to stand for goods to be purchased by him, saying he would open up the place. He borrowed money from her to pay for the first goods purchased. He got her to sign the guaranty to Armour & Co., set out above, and later another of like kind for $300, and also the one to Sulzberger & Sons Co. He stated the store had been vacant for three or four months before he took it and, "She knew when she made the guaranty that I was going to be a tenant of hers. I told her that I would have to move unless she would help me. She gave me the guaranty. I thought it was helping her."

Appellant stated that the store was a good stand and she had been getting $30.00 a month for it; that it was vacant in January before Lundy occupied it in February; that he insisted after the first month that he was going to keep the store and he ought to have it for $25.00 per month. He talked with her about her having been in the grocery business and wanted her to stand for him for a credit of $100.00 for 30 days. She did not remember signing the guaranty of the S. & S. people and said Lundy asked her to sign several papers that she did not sign, that she had no trouble to rent the house after Lundy left; that she rented it the same day he moved; stated she received no consideration whatever for signing the guaranties and, "It never benefited me one penny—it was not any benefit to my estate. He made no improvement on the building." She accounted for signing the guaranties by saying Lundy was a good talker and prom-

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ised that he would pay all the indebtedness and she could lose nothing.

Appellant requested the court to direct a verdict in each case in her favor, but the request was denied and it was submitted to the jury on the question whether the guaranty was executed by appellant to obtain credit for Lundy for the benefit of her estate and the jury answered in each case that it was.

Judgment was rendered against her for the amounts sued for, from which this appeal is prosecuted.

*Miles & Wade*, for appellant.

The court erred in not directing a verdict for defendant. To bind a married woman as surety or guarantor there must be something of special benefit coming to her, or her estate and the burden was on the plaintiff to show this. 108 Ark. 362; *Id.* 151; 103 *Id.* 246; 66 *Id.* 437 and many others. See also 70 Ark. 9. Receiving rent was no special benefit. 145 S. W. 1061; 54 Miss. 485. There was nothing to submit to a jury. 103 Ark. 246; 194 Pa. St. 141.

*Jno. F. Clifford*, for appellees.

The guarantee was executed for the benefit of her separate estate. 70 Ark. 5; 78 *Id.* 517; 62 *Id.* 146; 52 *Id.* 234; 30 *Id.* 727; 89 *Id.* 345; 194 Pa. St. 141.

The evidence was conflicting but the jury found for plaintiff and this court will not disturb the verdict. 92 Ark. 590; 102 *Id.* 203; 103 *Id.* 538; 82 *Id.* 214; 84 *Id.* 406; 90 *Id.* 100; 103 *Id.* 65.

KIRBY, J. (after stating the facts). It is contended by appellant that the trial court erred in refusing to direct a verdict in her favor and we agree with this contention.

It is not claimed that there was any consideration passing between the plaintiffs and appellant, inducing her to execute the guaranties, nor that she received any of the merchandise purchased by Lundy. Being a married woman she could bind herself only on such contracts as she was permitted by law to make.

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In *Goldsmith* v. *Moore*, 108 Ark. 362, the court said: "It is well settled in this State that a married woman cannot bind herself as surety or guarantor for the debts of her husband, nor for a third person, but her personal liability on contracts is restricted to contracts made for her own use and benefit or for the use and benefit of her separate estate."

The burden of proof was upon appellee to show that the contract was one that appellant had the power to make and it attempted to discharge this burden by showing that Lundy, for whom the guaranties were made, was a tenant occupying the store house, belonging to appellant, with his statement that she executed the guaranties in order to help him to procure a stock of goods and enable him to open the store and pay the rent he had agreed to therefor. He said the store had been vacant before he rented it and that he would have had to move out and would not have been able to keep it and conduct business there but for the guaranty and that he thought it was for her benefit. The store house it is true, was her separate property, but it is also true that there was no testimony showing the building could not have been rented to anyone else or occupied by another tenant, who would have paid the same rent therefor, and in fact the testimony does show that it was rented to another tenant the very day it was vacated by Lundy. According to appellant's statement, Lundy did not pay rent after occupying the store and procuring the goods on the guaranty. There was no special benefit to her separate property resulting from the contract made, its usable value was in no wise enhanced, nor its physical condition changed. In other words, there is no substantial testimony to support the verdict of the jury, and it cannot be upheld. The judgments are reversed, and the causes as to appellant, dismissed.

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## ST. FRANCIS BOX & LUMBER CO. *v.* PERRY & CO.

Opinion delivered October 23, 1916.

1. CONFLICT OF LAWS—CONTRACT OF INSURANCE MADE IN ANOTHER STATE. A contract of insurance made in another State will be treated as valid here, if it is valid in the State where it is made.
2. CONFLICT OF LAWS—INSURANCE—CONTRACT MADE IN ANOTHER STATE. A contract made in New York is not rendered invalid in Arkansas, because one of the parties, which was a foreign corporation had not complied with the laws of the State of Arkansas.
3. APPEAL AND ERROR—FAILURE TO ABSTRACT TESTIMONY. The court, on appeal, will not pass upon the admissibility of testimony which is not set out in the abstract.

Appeal from Clay Circuit Court, Eastern District; *J. F. Gautney*, Judge; affirmed.

*Spence & Dudley* for appellant.

1. The appellee, under the law, had no right to do business in the State of Arkansas, and had no right to enforce any contract made in this state. Acts 1907, No. 185, § 6; Act 313, 1907, §§ 1 and 2; Act 294, § 4; Acts 1904; Acts 1911, Act 87, § 14; etc. It is settled that the Legislature may dictate terms upon which foreign corporations may do business in this state. 76 Ark. 303; 66 *Id.* 466; 95 *Id.* 389.

The articles of incorporation were never filed as required by law.

*L. Hunter* for appellee.

The contract was valid in Massachusetts and valid here. 40 Ark. 423; 44 *Id.* 230; 61 *Id.* 1; 67 *Id.* 252; 69 *Id.* 352; 73 *Id.* 518; 114 *Id.* 82. It was a New York transaction.

MCCULLOCH, C. J. Appellee, a corporation organized and domiciled in the State of New York, instituted this action against appellant, an Arkansas corporation, to recover the sum of $229.90 alleged to be due on premiums for insurance policies procured by appellee as a broker. There was a verdict by the jury in appellee's favor and an appeal has been prosecuted to this court.

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The evidence in the trial below tended to show that appellee was engaged in the insurance brokerage business in the City of New York, and procured policies at the instance of appellant covering the latter's property in Clay county, Arkansas. The account shows premiums on nine separate policies in as many different companies, and the premiums aggregated the sum of $229.90. The testimony is undisputed that appellant mailed a check to appellee for $125.00 on the account, which check was lost in the mail, and appellant failed, on demand, to give a duplicate.

The principal contention of appellant for a reversal of the cause is that the evidence shows that appellee had never complied with the laws of this State so as to permit it to do business here, and that it therefore has no right to sue on the alleged contract. It is also contended that the insurance companies which issued the policies were not authorized to do business in this State, and that the contracts of insurance were therefore void.

(1-2) The law is well settled that a contract of insurance made in another State will be treated as valid here if valid in the State where made. *Massachusetts Bonding & Insurance Co.* v. *Home Life & Accident Co.*, 119 Ark. 102. The service, upon which the account sued on is based, was performed by appellee in the State of New York, and the fact that appellee had not complied with the laws of Arkansas, with respect to foreign corporations doing business in the State, did not render the transaction invalid. Appellee, in procuring the insurance policies for appellant in the State of New York, was not doing business in this State so as to require it to comply with the laws of this State in the particular named.

(3) Error of the court is assigned in refusing to admit in evidence certain correspondence alleged to have taken place between appellant and an insurance company in New York, but the letters are not abstracted and we would have to explore the record in order to determine the contents. We are, therefore, not called on to pass on the question of admissibility of testimony which is not set out in the abstract. Judgment affirmed.

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## BRASSFIELD v. JONES.

Opinion delivered October 23, 1916.

1. SCHOOLS—LENGTH OF TERM—VOTE AT ANNUAL SCHOOL MEETING. Under Act 189, p. 445, of the Acts of 1907, affirmative action on the part of the voters at the annual school meeting is required to enable the board to make a valid contract for a school of more than three months.
2. SCHOOLS—INVALID CONTRACT TO TEACH—SALARY. A teacher cannot recover salary under a contract to teach, where the contract was invalid, because beyond the authority of the directors, and known to be so by the teacher.

Appeal from Franklin Chancery Court; *W. A. Falconer*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellants, who are electors and tax payers of School District No. 45 in Franklin County, Arkansas, instituted this action in the chancery court against appellees, directors of said school district, and the county treasurer of said county and Travis Reece. The object of the suit was to restrain the directors from issuing a warrant to Travis Reece for services in teaching the school and to restrain the county treasurer from paying said warrants. The facts are undisputed and are as follows:

On April 24, 1915, the directors of School District No. 45 of Franklin County, entered into a written contract with T. R. Reece, who held a license of the first grade, to teach a common school in the district, for a term of four months commencing November 1, 1915, at a salary of $50 for each school month.

The annual meeting was held on the 3rd Saturday in May, 1915. After notice thereof had been given by the directors, as required by law, the meeting was regularly held and twenty-eight electors were present and voted thereat. Sixteen of these voted against a winter term and the remaining twelve did not express any choice on the question of a winter term. After Reece had taught school for a week under the contract above referred to, appellants on November 16, 1915, instituted this action

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and secured a temporary restraining order as prayed for in the complaint. On final hearing the chancery court dismissed appellant's complaint for want of equity and the case is here on appeal.

*Sam R. Chew* for appellants.

The length of time in excess of three months that a school may be taught in a rural district is wholly in the discretion of the electors of the district. Castle's Supplement, Kirby's Digest, § 7590. The action of the board of directors in contracting with Mr. Reece to teach a four month's term was not authorized by the electors, and was contrary to the above statute—therefore void. 49 Ark. 94.

The law applicable in case of *Gates* v. *School District*, 53 Ark. 468, cited by the chancellor in support of his decree, has no effect in settling the principle involved in this case.

*June P. Clayton* for appellees.

We think the act of 1911, Acts 1911, p. 164, gives full power to school directors, and takes away the power from the electors, if they ever had it, to abrogate a contract duly entered into by the directors with a teacher; and this Act was intended to cure the very defect in section 7590 which appellants rely on as the law.

As to the right of a board of directors and a teacher to contract for a school to be taught in the future there is now no question, and such a contract cannot be annulled without the consent of the teacher and directors. 90 Ark. 335; 118 Ark. 597; 53 Ark. 468. The benefits have been accepted. The teacher must be paid his just compensation. 87 Ark. 93; 98 Ark. 38.

HART, J. (after stating the facts). In the case of *Gates* v. *School District*, 53 Ark. 468, the court held that the power conferred upon the Board of Directors of a single school district to employ a superintendent of schools is not limited to an employment during the term of office of such directors; and that there is no law that forbids the board to make a contract for a superintendent for a

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term beginning after some members of the board go out of office. While this decision was rendered with reference to the power of the board of directors of a special school district, much reliance is placed upon the principles decided in it as controlling the question here raised by the appeal. We do not think the decision has any bearing on the question raised by the appeal. It is true the decision would be controlling if there were no other question before us, except the one that the directors made a contract to commence after their term of office had expired, but that is not the question involved by the appeal. Section 7590 of Kirby's Digest and Act 189 of the Acts of 1907 amendatory thereof provide, that the electors of every school district shall when lawfully assembled in annual school district meeting, have the power by a majority of the votes cast at such meeting, to determine the length of time in which a school shall be taught more than three months in a year. Acts of 1907, p. 445. If there had been no votes cast upon the question, under the statute, the board could not have contracted for a school to be taught longer than three months during any scholastic year. In short, under the statute, it required affirmative action on the part of the voters at the annual school meeting to enable the board to make a contract for a school of more than three months. If the qualified electors of the school district had, by vote at the annual school meeting, determined that a school of more than three months should be taught, the contract under the authority of *Gates* v. *School District*, *supra*, would have been valid, notwithstanding it was executed before the annual school meeting. The voters, at the next annual meeting, however, not only did not vote for a school of more than three months' duration, but by voting against a winter term, evidently intended to express their disapproval of a longer term than three months. Reece began to teach the school at a time when he knew that he had no authority under the statutes to teach the school under the contract made with the board; and he is not entitled to pay from the district for his services.

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The chancellor was right in granting the temporary injunction and it should have been made permanent.

For the error in not doing so, the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree making the injunction permanent.

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## LITTLE ROCK RAILWAY & ELECTRIC CO. *v.* THE LEADER CO.

Opinion delivered October 23, 1916.

1. PUBLIC SERVICE CORPORATIONS—FAILURE OF SUBSCRIBER TO PAY—DISCONTINUANCE OF SERVICE. Where an electric light company had a rule that it would discontinue furnishing electricity where a subscriber was in default over ten days, the company cannot refuse to furnish electricity where the subscriber tenders to it the amount due.
2. PUBLIC SERVICE CORPORATIONS—DISCONTINUANCE OF SERVICE FOR FAILURE OF SUBSCRIBER TO PAY. Where a tender of the amount due is made the company has no right to cut off the service.

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

*Rose, Hemingway, Cantrell, Loughborough & Miles* for appellant.

At the time appellee was put into bankruptcy the $329.69 was past due. On March 23rd appellant was forced to accept in satisfaction of its claim 25% of the amount due, and on March 25 it notified appellee that the contract was at an end. At no time did appellee tender the amount due until after this notification. Appellant was legally within its rights when it terminated the contract in accordance with its terms. 238 U. S. 482; 231 Fed. 684; 124 U. S. 385.

*Powell Clayton* for appellee.

No demand for a deposit was ever made, and appellee tendered the full amount owing when notified that the current would be turned off because of their default in payment of arrears. Failure of appellees to pay promptly did not justify appellant in cancelling the contract. 100

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Ark. 565, 569; 72 Ark. 359; 6 R. C. L. 928; 26 Am. & Eng. Enc. of L. 73; 134 U. S. 68; 91 Fed. 705.

The rule is almost universal that equity will relieve against a forfeiture where the right is attempted to be exercised merely because of the failure to pay money promptly when due. 75 Ark. 410; 65 Ark. 521; 59 Ark. 405; Story, Equity Jur., 12th ed., §§ 1314, 1315, 1316; Pomeroy, Equity Jur., §§ 381, 433, 450, 456; 96 S. U. 234, 242; 40 So. 1018. The *Danaher* case, 238 U. S. 482, relied on by appellant, is not in point

HART, J. Appellee instituted this action in the chancery court against appellant to restrain it from cutting off the electricity furnished to its place of business. The material facts are as follows:

The appellant is a domestic corporation engaged in furnishing electricity to the citizens of Little Rock, Arkansas. It acquired, by transfer, all the contracts of another lighting company which had a contract with a firm doing business on Main street in Little Rock, Arkansas, to furnish it the electricity for its business. The partnership transferred its contract to the Leader Company, a domestic corporation. On January 4, 1915, a petition in involuntary bankruptcy was filed against the partners and a receiver was appointed to take charge of the estate of said bankrupts. The partnership and individuals composing it were duly adjudicated bankrupts under the acts of Congress relating to bankruptcy. Appellant had a claim against the partnership for $329.69 for lights which had been furnished under the contract above referred to, and was paid the sum of $82.42 under orders of the court, made in the bankruptcy proceedings. This payment was made on March 23, 1915. On March 25, 1915, appellees were notified by appellant that because of default in the payment of appellees, the contract between the parties was terminated and the lights in the premises occupied by appellee, The Leader Company, would be cut off. Thereupon appellee, the Leader Company, tendered to appellant all that appellant claimed

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to be due under the contract, but appellant refused to accept the tender and this suit was instituted.

The provisions of the contract just referred to are as follows:

"The consumer shall pay the company for such electric service within ten days from date of bills, at the rate computed on the following basis, viz." * * *

"The company shall have the right to discontinue this service without notice in case the consumer fails to comply with or perform any of the conditions or obligations of this agreement, or of any other agreement with the company; and the consumer hereby authorizes the company to remove the meters belonging to it and to discontinue the supply of electricity whenever any bill for said service or supplies is in arrears, or upon the violation of any of the terms of this contract."

The chancellor found in favor of appellees and the case is now here on appeal. This is the second appeal in the case. On the former appeal the court held that a contract to supply electricity to be used in a certain building for business purposes, which does not call for the exercise of personal services by either party, may be assigned. *The Leader Company* v. *Little Rock Ry. & Elec. Co.*, 120 Ark. 221.

Counsel for appellant insists that the judgment should be reversed under the authority of *The Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482, but we do not agree with counsel in this contention. In that case Mrs. Danaher's telephone was disconnected because she refused to pay her telephone rental for the two months preceding, although she had been frequently requested to pay it and warned that the telephone would be disconnected if payment was not made. The regulation had been in force for several years and had been applied universally against all delinquent patrons without partiality or discrimination. The Supreme Court of the United States held that the rule adopted by the telephone company was a reasonable regulation and as such that the telephone company had the right to enforce it. This is in application of the rule, that public

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service corporations are charged with certain public duties, which they may not refuse, and they may adopt such rules as are reasonably proper and necessary to enable them to discharge these public duties and to render the public efficient service.

In the present case the contract between the light company and the consumer provided that the latter shall pay the company for electric service within ten days from date of bills. The contract also provides that the company shall have the right to discontinue service, without notice, in case the consumer fails to comply with any of the conditions or obligations of the agreement. It makes no difference, under the facts and pleadings as disclosed by the records in this case that the contract required payment within ten days from the date of bills and also provides that the company shall have the right to discontinue service, without notice, in case the consumer fails to comply with any of the provisions of the agreement. It has long been a settled rule in this state that forfeitures are not favored at law or in equity. The consumer tendered to the light company the proper amount due it before the service was discontinued and the company refused to accept payment. The consumer was not in default after it had tendered to the company the proper amount due it. It had the right to make the payment at any time before the service was discontinued. The appellant had no right either to terminate the contract or to cut off the electricity upon tender being made of the amount due. The consumer should have had notice and a reasonable opportunity to pay before a forfeiture of the contract would be enforced. In any event if it did pay or offer to pay before the service was discontinued, this entitled it to further service under the contract.

It follows that the decree will be affirmed.

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## PUMPHREY v. ROAD IMPROVEMENT DISTRICT NO. 1, GRANT COUNTY.

Opinion delivered October 23, 1916.

1. ROAD DISTRICTS—POWERS OF COMMISSIONERS UNDER SPECIAL ACT. Act 177, of Acts of 1913, is complete in itself and is the grant of power for making an improvement in accordance with its terms in the district organized or created thereby, and no general law in force at the time of its enactment could have effect to enlarge its powers or increase the powers of the board of commissioners.
2. IMPROVEMENT DISTRICTS—ASSESSED BENEFITS—VALUE—VALIDITY. An improvement district is invalid where the cost of the improvement exceeds the assessed benefits accruing to the property because of the improvement.
3. IMPROVEMENT DISTRICTS—VALIDITY—VALUE OF BENEFITS. The property of an individual cannot be taxed for the construction of an improvement in excess of the estimated benefits accruing to the property, because of the improvement upon an assessment thereof duly made in accordance with law.

Appeal from Grant Chancery Court; *J. P. Henderson*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant, a land owner, within Road Improvement District No. 1, of Grant County, brought this suit to enjoin said district from issuing additional bonds to complete the proposed improvement.

The complaint alleges that the commissioners caused an assessment of benefits to be made and confirmed, amounting to $319,324 and had issued bonds for making the improvement in the amount of $175,000, which had been sold and the proceeds used in the work of construction; that the proceeds of the bonds sold will be exhausted by the middle of September, 1916, leaving the work incomplete; that the bonds already issued, with the interest thereon, will consume or amount to the sum of the assessments of benefits, except about $10,000, and that appellee has entered into a contract, which is set out, for the sale of additional bonds in the amount of not less than fifteen nor more than thirty-five thousand dollars; that if said bonds are issued and sold they will pass

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into the hands of innocent holders, who will endeavor to subject the property of appellant to their payment and that same will constitute a cloud upon the title of his property, impair its value and prevent his making a sale thereof.

Prayer for a restraining order to prevent the district from issuing "additional bonds, which with the interest thereon, added to the bonds heretofore issued and the interest thereon will exceed the total amount of the assessments assessed against the district, etc."

A general demurrer was interposed to the complaint and sustained, and from the judgment dismissing it this appeal is prosecuted.

*E. M. Ross* for appellant.

The authority of the board of commissioners to borrow money and issue bonds therefor, and what they may pledge for the repayment of the money so borrowed, must be gathered from the Act creating the district. From section 15 of the Act it is plain that the board of commissioners can only pledge the assessments of benefits.

Act 177, Acts 1913, does not apply in this case. That act was clearly intended to amend the drainage district laws and provide the ways by which the cost construction of the ditches were to be paid for. See the Act and its title. The intention of the act must govern, and that is gathered from the Act taken in connection with its title and evident purpose. 86 Ark. 518; 106 Ark. 371; 117 Ark. 606; 102 Ark. 373, 144 S. W. 514. We think the phrase "and other improvement districts" used in section 10 of said Act 177, referred to other drainage districts, and was not intended to include road improvement districts. 36 Cyc. 1127.

*Rose, Hemingway, Cantrell, Loughborough & Miles* for appellee.

With reference to the interest, section 10 of Act 177, Acts 1913, is controlling in this case. It is a mistake to say that only the provisions of the special act creating the district are applicable. If this were so, all the law

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applicable to any improvement district created by a special act would have to be embodied in that act, a requirement which would render all such acts of unwieldy bulk.

For convenience the General Assembly has enacted many general provisions for the construction of statutes. See chap. 148, Kirby's Dig., §§ 7790, 7791, 7794-5-6-7. Undoubtedly these provisions would apply to special acts.

There is no reason why a general act should not be passed governing all improvement districts, whether created under general laws or by special statutes. No matter how created, they necessarily have many features in common, and these features may be controlled by general acts. See 156 N. Y. 570, 51 N. E. 312, for an instance of a general statute being made applicable to all future legislation not inconsistent therewith.

The canons of construction laid down by this Court make it plain that appellant's effort to eliminate the words "and other improvement districts" must be unavailing. See 2 Ark. 250; 11 Ark. 44; 15 Ark. 555; 17 Ark. 651; 28 Ark. 203; 71 Ark. 561; 38 Ark. 205; 109 Ark. 60. From these rules of construction, it is plain that some effect must be given to the words "and other improvement districts," and the only effect which can be given them is to make them apply to all other improvement districts of whatsoever nature.

There is no reason for interpreting this statute contrary to its express words. 46 Ark. 159-163; 47 Ark. 406; 93 Ark. 42.

KIRBY, J. (after stating the facts). The road improvement district was created by Special Act No. 48, of the Acts of the General Assembly of 1915, page 136. The only provision of said act relating to interest is contained in Section 15, which provides: "In order to do the work, the board may borrow money at a rate of interest not exceeding 6% per annum; may issue negotiable bonds therefor signed by the members of the board and may pledge, assign and mortgage all assessments for the

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repayment thereof. It may also issue to the contractors who do the work, its negotiable evidence of debt, bearing interest at not exceeding 6%."

It is contended for the improvement district, however, that the assessed benefits bear interest at the rate of 6% per annum under the provisions of Section 10 of Act 177 of the Acts of the General Assembly for 1913, which provides that the deferred installments of the assessed benefits in drainage and other improvement districts, shall bear interest at the rate of 6% per annum.

(1) There is of course no merit in this contention. Said Special Act is complete in itself and is the grant of power for making the improvement in accordance with its terms in the district organized or created thereby and certainly no general law in force at the time of its enactment could have effect to enlarge its powers or increase the powers of the board of commissioners.

There is no question involved here as in *Hampton* v. *Hickey*, 88 Ark. 324, of the implied repeal by a later general law granting enlarged powers of a former special act, under which only restricted powers were granted.

(2) Improvement districts have invariably been held invalid when it appeared that the cost of the improvement exceeded the assessed benefits accruing to the property because of the improvement. *Kirst* v. *Street Imp. Dist.*, 86 Ark. 1; *Thibault* v. *McHaney, Receiver*, 119 Ark. 196.

(3) In other words, under our Constitution, the property of an individual cannot be taxed for the construction of an improvement in excess of the estimated benefits accruing to the property, because of the improvement upon an assessment thereof duly made in accordance with law. *Peay* v. *City of Little Rock*, 32 Ark. 31-39; *Coffman* v. *St. Francis Drainage Dist.*, 83 Ark. 54; *Kirst* v. *Street Imp. Dist.*, *supra*.

The demurrer concedes that the commissioners of the improvement district had contracted for the sale of additional bonds for completing the improvement, which they were about to issue in a sum, which added to the amount of the original bonds with interest, would exceed

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the benefits assessed against the property in the district. Such action was in excess of their power and the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded with instructions to overrule the demurrer and for further proceedings according to law not inconsistent with this opinion.

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## PFEIFFER STONE CO. *v.* BROGDON.

Opinion delivered October 23, 1916.

MECHANICS' LIENS—TEN DAYS' NOTICE—SUIT. The institution of a suit by a material man to enforce a lien for materials furnished, cures the omission to comply with the requirements of Kirby's Digest, §§4976 and 4981, requiring the claimant to give ten days' notice, and to file a copy of the account with the clerk of the circuit court.

Appeal from Independence Circuit Court; *Dene H. Coleman*, Judge; reversed.

*McCaleb & Reeder* for appellant.

Suit was commenced in this case within ninety days from the time the last material was furnished. That dispensed with the necessity of giving the ten days' notice to the owner, and of filing the account upon which the lien is claimed with the circuit clerk. 114 Ark. 464.

*Ernest Neill* and *Chas F. Cole* for appellees.

One who seeks to avail himself of the mechanic's lien law, must bring himself within the letter of the statute. Kirby's Dig., § 4970; 102 Ark. 539; 119 Ark. 43. See, also, Kirby's Dig., §§ 4985, 4981, 4976.

This Court has held that a proper complaint, with a statement of the account duly verified, filed in the clerk's office within 90 days after the material was furnished, does away with the necessity of filing the account required by section 4981, *supra*, but the complaint must be filed within the specified time. The complaint, however, which was the subject of this demurrer, was filed 21 months after the material was furnished.

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There is no compliance with the statute and the complaint is fatally defective, *supra;* 27 Cyc. 386; 30 Ark. 682; 93 Ark. 277, 280; 114 Ark. 1.

SMITH, J. Appellants brought this action to enforce a lien under Sections 4 and 5 of Act No. 446 of the Acts of 1911, page 462, for material furnished to the contractors and used by them in the building of a church. The ten days' notice required under Section 4976 of Kirby's Digest was not given, but before the expiration of the ninety days allowed by law for the enforcement of liens of this character appellants brought this suit on this account for the material furnished. It was alleged that the bond provided for by the Act of 1911 above referred to had not then been given. The complaint alleged that the last item of material was furnished on September 11, 1913, and placed in position in the building under the contract on September 12, 1913. The original complaint was filed and summons issued December 9, 1913.

Appellees, who were the contractors engaged to build the church and the trustees of the church, filed a demurrer to the complaint in which the following grounds of demurrer were set up:

"First. Said complaint is insufficient to support a lien against said building because it fails to show that plaintiff filed a just and true account of its alleged demand due and owing it, within the time required by law, verified by affidavit, as required by Section 4981, of Kirby's Digest.

"Second. Said amended complaint is insufficient to entitle plaintiff to a lien against said church for the reason that same does not show that plaintiff gave notice that it held a lien against said church, as required by Section 4976 of Kirby's Digest.

"Third. Said amended complaint does not state facts sufficient to entitle plaintiff to a lien against the church of which these defendants are trustees."

The judgment of the court below recites that the demurrer was sustained "for the reason that notice was not given by plaintiffs for ten days as required by law

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before attempting to enforce the lien herein," and appellees argue that the demurrer should have been sustained upon the first and third grounds as well as upon this second ground.

It is not contended by appellants that it complied with Sections 4976 and 4981 of Kirby's Digest by giving the ten days' notice and filing copy of the account with the clerk of the circuit court. It is urged that the necessity for so doing was obviated by the institution of the suit to enforce the lien within ninety days after the last materials were furnished. Appellants are correct in this contention, as we expressly decided in the case of *Simpson* v. *Black Lumber Co.*, 114 Ark. 464.

It is pointed out that the amended complaint was filed on June 12, 1915, and that the demurrer was sustained to this complaint. It is not contended, however, that the original complaint was insufficient to furnish notice of the claim of the lien if that notice can be given by the mere institution of the suit, and as we have held and now hold that the institution of suit does cure the omission to comply with the requirements of Sections 4976 and 4981 of Kirby's Digest it follows that the demurrer was improperly sustained, and the judgment of the court to that effect must be reversed and the cause will be remanded with directions to overrule the demurrer.

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## ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* EVERETT.

### Opinion delivered October 16, 1916.

1. RAILROADS—INJURY TO PERSONS AT CROSSING—DUTY TO MAINTAIN LOOKOUT.—Plaintiffs were driving a team of mules, and as they approached defendant's tracks they discovered the approach of an engine. The mules became frightened, and rushed upon the tracks, and were struck by the engine, plaintiffs sustaining personal injuries. *Held*, in an action by plaintiffs for damages against the railway company that it was for the jury to determine what were the exact facts as to whether or not a lookout was kept, and if kept, whether the plaintiffs were discovered by the employees of the railway company to be in a perilous position, and whether they were seen, or could have

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been seen, by the exercise of ordinary care, in time to have prevented the injury.

2. DAMAGES AMOUNT—PERSONAL INJURY—ACTION.—In an action for damages against a railway company for personal injuries, when plaintiffs were struck by an engine while crossing the tracks at a public crossing, the verdict of the jury, awarding damages, held not to be excessive.

Appeal from Monroe Circuit Court; *Thos. C. Trimble*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellees instituted separate actions against the appellant alleging substantially in their respective complaints that on the 31st day of August, 1914, they were in a wagon and drove up to the crossing where appellant's track crossed Cypress street in the town of Brinkley and undertook to stop the team of mules after discovering appellant's engine at a distance of about 60 yards south of the crossing; that the mules became frightened and unmanageable and ran across the track in front of the engine; that the engine struck the appellees and threw them on the pilot of the engine, causing severe injuries, which they describe; that the appellant's servants, by keeping a proper lookout, could have discovered the perilous position of appellees in time to have stopped the train and avoided the injuries.

Appellee Everett alleged that he was damaged in the sum of $3,000 for which he prayed judgment, and appellee Moye alleged that he was damaged in the sum of $2,500, for his personal injuries, and in the sum of $25 for injury to his wagon, and $50 for injury to his mules, and prayed judgment for the amounts alleged.

Appellant answered, admitting that the mules became frightened and went up on the side of appellant's track and that the appellees were unable to hold them, and that the engine struck the wagon, but denied all other material allegations of the respective complaints, and set up that when the team became

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frightened and started across the track in front of appellant's engine it was impossible to stop the train until after the injury was inflicted; that if the injuries occurred they resulted from the contributory negligence on the part of the appellees and the unruly condition of the mules.

Appellee Everett testified substantially as follows: Appellees were farmers, living near the town of Brinkley, Monroe County, Arkansas. On the day of the alleged accident they were in the wagon of Moye, driving east on Cypress Street, in the city of Brinkley. Cypress Street is 80 feet wide and runs east and west. They were approaching the crossing of appellant's railroad on Cypress Street. Appellant's main line runs north and south. There is a side or house track, some thirty feet west of the main track. Brinkley is a town of about 1,800 or 2,000 people, and there was much travel at that crossing. Appellee Moye drove up close to the sidetrack. Then after a passenger train that was then passing north had cleared the main line they started across. Just before they got on the main line another train came dashing in and scared the team and they ran away, going in a northeast direction, and about the time the wagon got straightened out on the track the engine ran into it.

Appellees first discovered the train that collided with them about sixty yards south, down the track and about where the switch went into the house track. At the time they discovered the train to the south they were going right towards the main line, between the side track and the main line, and just at that time the mules began to run. Appellees were about 65 yards from the engine when they first discovered it, when the mules began to run. They were "near plumb across the street" when the engine struck the wagon. From the place where the engine was first seen to where it struck the wagon was 275 feet. They saw the engine after they drove across the sidetrack; they were between the two tracks. They saw it coming about the time the mules got scared.

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Witness Everett was asked: "If the mules had not got scared you would not have had any trouble?" and answered, "I do not know that we would, and I do not know that we would not." There were storerooms on the south side of Cypress Street, near appellant's right-of-way which prevented appellees from seeing the engine that struck them until they had passed the corner of the last of these buildings going east. After getting across the sidetrack they could see the engine. After the engine struck the wagon the next thing appellee Everett knew they were taking him off the cowcatcher. One arm and one leg were badly skinned and his shoulder was broken up. The injuries to his arm and leg did not last long, but the injury to his shoulder lasted for a long time, and was not well at the time he gave his testimony on the 29th of November, 1915, more than a year after the injury occurred. All of the injuries were painful and the injury to his shoulder had continued to pain him down to the time of the trial, and at that time he could not raise his shoulder. He could not raise it because something seemed to stick in it when he attempted to raise it up. He could not lift with that shoulder at all without suffering for a day or two. He lost about two months time from his work on the farm on account of the injury, and was still, at the time of the trial, at least half disabled from doing his accustomed work. His services were worth $75.00 a month.

The testimony of appellee Moye corroborates substantially the testimony of Everett. Moye was the owner of the team and was driving the same at the time of the accident. He did not see the train that struck them until the mules became frightened. They were then between the two tracks. The mules were six or seven feet from the main track, on the south side of Cypress Street. They ran in a northeasterly direction, and the wagon was on the north side of Cypress Street when the engine struck it. After the collision witness was on the cowcatcher. He was struck under the eye, on the back of the head, and on the left arm and hip.

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The injury to the arm and hip lasted about six weeks. The injury to his head had never gotten well. Before this injury he never had the headache. Now his head hurt him nearly half the time. On account of the injury he was only able to do about half of the farm labor that he was accustomed to do. Such labor was worth from $38 to $40 per month. Witness' wagon was damaged to the extent of $10.00. The mule, before its injury, was worth $125 or $150; after the injury it was worth only $40.00.

On cross-examination, this witness testified that he was in between the sidetrack and the main track when he first saw the engine. He did not stop the mules after he got in there because he could not, as the mules were frightened. He turned his head to see what frightened the mules; was not looking for the train before that time, but if he had been he could not have seen it. He could have seen it after he got on the sidetrack, but did not look.

A witness by the name of Hill testified that he saw the accident. He saw the team, driven by Moye, cross the sidetrack and saw the mules begin to run. The appellees were trying to hold them. He could not see the train at that time because he was standing near the wall of the building and could not see more than ten feet.

Pretty soon the team turned to the left and got on the main track down the track, and the train appeared from behind the building, and he saw that it was going to catch the team and watched to see if it was going to get off on the opposite side, but the engine struck the team about twenty feet north of the crossing. Witness did not see anybody on the engine. He looked for them when the train approached, and on the side next to him there was nobody in sight. He did not see anybody at all. The engine was coming on and witness wondered why the bell was not ringing; he did not hear the whistle. Witness wondered why they did not put on brakes, and after the train struck the team it kept running on. There was nothing done to stop the

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engine before it struck the wagon that witness could see. The engine struck the wagon about twenty feet north of Cypress Street, and the street is eighty feet wide. Witness could see the engine for a distance of 50 or 60 feet before it struck the wagon and team. The engine dragged the wagon ten or fifteen feet after striking it. They stopped in about ten or fifteen feet after striking the team and wagon. Witness was looking and did not see any brakeman on or close to the crossing at that time.

Appellees also testified that there was no brakeman at the crossing, and that there was no ringing of the bell or blowing of the whistle on the engine.

The physician in attendance upon the appellees at the time and after they were injured, testified describing the extent of the injuries. He stated, in answer to a question, that if appellee Moye had never had the headache to amount to anything before the accident, and that he had been afflicted with headache probably half the time since, that such headache might have resulted from the injury. If there had been a pain in his head for a year and a half it would indicate that there was some inflammation—a chronic form of inflammation, and same might be permanent. After describing the nature of the injury which appellee Everett received in his shoulder, the witness testified that he "could not say but what it was a permanent injury. Owing to his age and the absorption of the callous to date it rather appears it is permanent."

The fireman on the engine at the time of the accident testified that when he first discovered the team it was standing back from the house track. The team started up and came across the track and as they tried to stop them one of the mules stopped, but the other one started to run. When he first discovered the mules he did not think there was any reason to stop. He supposed the men in charge of the team would stop. They tried to stop the mules, but they started to run. The engine was about 25 or 30 feet from the road crossing when the team stopped the last time.

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The engine made no particular noise except that the bell was ringing. It was running about 7 or 8 miles an hour. Witness was on the left side of the engine, next to the appellees. The engineer was on the right side, and witness did not think the engineer saw appellees. The first the engineer knew of it was when witness gave him a signal to stop. He then put on the emergency. When witness first saw the team he was about 50 or 70 feet south of Cypress Street, or along about that distance. Further along in his testimony, witness was asked if it was a fact that they were down at the switch, just about 200 feet south of the street, when they first discovered the team, and answered, "Somewhere near it. It was below the switch stand." Witness further stated, in answer to questions, that when he first discovered the team he was south of the switch stand; then he stated, "It must have been about at the switch stand." Further on in his testimony he stated that when the mules crossed the house track and one of them stopped and the other did not, the engine was about the switch stand. Witness then told the engineer to stop the train. Then he stated that when he notified the engineer it was "this side of the switch stand," and again stated that it was "somewhere along there." The witness further stated that a train going at the rate of six or seven miles an hour could be stopped in about 70 or 80 feet. Witness saw the flagman out there flagging and he looked out and saw the team coming up. The flagman was not flagging the engine. When witness saw the mules were going to run he gave the signal to stop.

The engineer testified that he first discovered the approach of the appellees when they were in about twenty feet of the crossing. The fireman gave him the signal to stop; he applied the brakes in the emergency and did everything in his power to stop. He was on the street when the signal was given to stop, and pretty close to the center. He was asked if the fireman did not notify him when he was down about the switch stand or between the switch stand and the street

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that these parties were approaching and he answered, "No, sir." The bell was ringing. Witness did not see the team approaching until he received the signal to stop, and saw the mules ahead.

A witness testified on behalf of appellant that he first noticed the wagon and team at the time the brakeman was flagging them. The brakeman was near the crossing, looking west and waving his hand. The team, at that particular time, was about ready to approach the house track. They came to a stop, and then proceeded forward. The engine, at that particular time, was back some forty feet from the crossing. As the engine approached the crossing the mule on the right side made a lunge to go in ahead of the engine. Both men in the wagon took hold of the lines and tried to control the team; they could not do it, and it ran in ahead of the engine, in a northeasterly direction. There was no unusual noise made by the engine; the bell was ringing.

Another witness testified that he was flagman at the crossing and gave the appellees the signal to stop. The train at that time was coming up the main line. Appellees seemed to accept the signal and slowed down, but started up again. They came over the house track, next to the main line, and witness hallooed at them to hold up. They slowed down and the mules took fright at the engine and got away from them. The engine was twenty or twenty-five feet from where the mules took fright. When he first saw the engine it was perhaps two hundred feet south. Witness further testified that he was flagging both the train and the team on account of the team approaching; that the train, at that time, was somewhere about the switch, and that the wagon was ten or fifteen feet west of the house track. Witness stated that he continued to flag the train after he saw the team commence to run. Witness gave the sign for the train to stop.

Another witness testified that the mules stopped about twenty-five feet from the crossing, in between the house track and the main line. The mules were a

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little nearer the crossing than the engine, and when they started to run the engine was right on them. The engine was right on the crossing when the team started.

Another witness testified that he was agent of the appellant at Brinkley. He heard someone making a noise that attracted his attention. He looked out of the window directly in front of him and saw the team momentarily stop; then they started again, running and jumping, and the appellees were trying to hold them. The width of Cypress Street was 80 feet. The street proper was travelled all the way across except where it crossed the railroad track. Where it crosses the main line of the railroad it was about 18 or 20 feet.

Witness was asked this question: "How far was the engine from the crossing at the time the mules approached and stopped?" and answered, "I could not see when the mules stopped. When they started again I could see the engine, and I should judge it was about 100 or 125 feet from this 18 or 20 foot crossing."

At the request of appellees the court granted their prayer for instruction as follows:

"You are instructed that even though you believe and find from the evidence in this case, that plaintiffs were negligent in driving upon, or dangerously near, defendant's railroad track when one of its trains was approaching, without looking and listening for said trains, and without stopping the team before approaching near to or crossing said track, or that said team became frightened and ran upon said track, yet, if you find from the evidence that if defendant's employees, or one of them in charge of said train, had kept a proper lookout, that plaintiffs would have been discovered in time to have avoided injuring them, or if you believe that defendant's employees in charge of said train discovered plaintiffs in a dangerous position and failed to use all means within their power to avoid injuring them and that by reason of the failure to keep such

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lookout or to use such means, plaintiffs were injured, you should find for plaintiffs."

Appellant duly excepted to the ruling of the court in granting the above prayer. The jury returned a verdict in favor of appellee Everett and assessed his damage at $2,000.00, and in favor of appellee Moye, and assessed his damages for personal injury in the sum of $750, and for damages to his wagon and team in the sum of $150. Appellee Moye entered a remittitur in the sum of $45.00. Judgments were entered in favor of the appellees, from which this appeal was taken.

*Edw. A. Haid, A. L. Burford* and *Hawthorne & Hawthorne*, for appellant.

1. The lookout statute has no application to this case. The theory upon which plaintiffs seek to recover is one of discovered peril and the burden was upon them to show that the peril was discovered in time to avoid the injury. There is some controversy as to the distance the engine was from the crossing at the time the approaching team was discovered, but there is no controversy as to when the team took fright. The employees were not required, under the law, to stop the engine or check its speed until they did discover, or could have discovered, the peril of plaintiffs, and there was no peril until the team took fright, and then it was too late. Defendant was in no way responsible for the injury and is not liable. 60 Ark. 409; 69 *Id.* 130; 77 *Id.* 174; 89 *Id.* 270; 99 *Id.* 226; 106 *Id.* 32; *Ib.* 530; 118 *Id.* 37; 4 N. E. 34. On the whole case the verdict should have been for the defendant.

2. The court erred in giving the first instruction for plaintiffs. Part of it is abstract and misleading.

3. The verdict is excessive. 79 S. W. 351; 76 *Id.* 402; 117 Ark. 47; 114 *Id.* 224. The injuries were not proved to be permanent and none of the cases found by us sustain verdicts so large as this. The

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jury's minds must have been inflamed and the verdict, the result of passion and prejudice.

*G. O. Bogle* and *Manning, Emerson & Morris*, for appellees.

1. There is ample evidence to sustain the verdict. Negligence was shown to the satisfaction of the jury. 119 Ark. 36 and cases cited.

2. There is no error in the court's instructions. 107 Ark. 431; 108 *Id.* 326; 119 *Id.* 36.

3. The verdicts are not excessive. 86 Ark. 587; 87 *Id.* 109; 95 *Id.* 220; 106 *Id.* 353; 90 *Id.* 108; 15 S. W. 456; 103 Ark. 374; 67 *Id.* 531; 92 *Id.* 350; 105 *Id.* 269.

WOOD, J. (after stating the facts.) Counsel for appellant contend that there was no evidence to support the verdict and that the instruction given by the court was erroneous for the reason that the lookout statute has no application. They say that while it is true that the employees of appellant discovered the appellees approaching the house track, yet the undisputed evidence shows that these employees did not discover that the mules were frightened and beyond the control of the appellees until it was too late for the employees, using all the means at their command, to stop the engine; that, although the fireman had discovered the wagon approaching the house track and the crossing, he did not know that appellees were ignorant of the approaching engine and did not know that appellees would not stop before undertaking to cross the track; that appellees did in fact stop, and the mules became frightened when it was too late for the employees to stop the train.

These contentions of the learned counsel are not tenable. There is an irreconcilable conflict between the testimony on behalf of the appellees and that of appellant on the issues of fact. And, besides, appellant's witnesses contradict each other, and the testimony of some of them is inconsistent and contradictory in itself. In this hopeless conflict of the evidence, whether or

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not appellant's servants were keeping a lookout, and whether or not they discovered that appellees were in a perilous position, or in the exercise of ordinary care might have discovered them in time to have avoided the injury, were issues of fact which it was the peculiar province of the jury to determine. The evidence is fully set forth in the statement, and it shows that there was substantial testimony to warrant the finding in favor of appellees on these issues.

(1) The jury was justified in finding from the testimony of the witnesses for the appellees, and also from the testimony of appellant's witness, the fireman, that, when the mules first began to run, the engine was about the switch stand, or close to the switch stand, which was between 195 and 210 feet from the place where appellant's engine collided with the wagon. The undisputed evidence shows that the fireman on the engine, had he been keeping a lookout, could have seen the appellees after the team crossed the side or house track. It further shows that the engine was running at the rate of seven or eight miles an hour, and that it could have been stopped within a distance of sixty or seventy feet. So there was ample testimony to justify the conclusion that appellant's servants either did not see the appellees when the mules took fright, or that if they did see them, they failed to exercise ordinary care to use the means within their power and control to avoid the injury. There was testimony to warrant a finding that the fireman was not in his place in the cab of the engine on the side from which appellees approached the crossing, and that he was therefore not keeping any lookout at all. True, the fireman testified that he was in his place and that he discovered appellees. His testimony is inconsistent and contradictory as to the exact place where he first discovered them. But it was for the jury to reconcile the conflicts in his own testimony and also between his testimony and the testimony of the other witnesses, and to find what were the exact facts as to whether or not the lookout was kept, and if kept, whether or not the

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appellees were discovered by the employees of appellant in a perilous position, and whether or not they were seen, or could have been seen by the exercise of ordinary care, in time to have prevented the injury. But it could serve no useful purpose to discuss further the conflicts in the evidence.

The instruction given by the court was applicable to the facts presented, and correctly stated the law in conformity with many decisions of this court. *Central Railway Co. of Ark.* v. *Lindley*, 105 Ark. 294; *St. L., I. M. & S. R. Co.* v. *Gibson*, 107 Ark. 431; *St. L. & S. F. Rd. Co.* v. *Champion*, 108 Ark. 326; *St. L. Sw. Ry. Co.* v. *Wilson*, 119 Ark. 36.

(2) Appellant's counsel next contend that the verdicts were excessive. Giving the testimony in regard to the character and extent of the injuries its strongest probative force in favor of the appellees, as we must do, we cannot say that the verdicts assessing the damages for personal injuries were excessive.

Appellee Everett received a serious and painful injury to his shoulder, from which he had not recovered at the time of the trial, and which the attending physician stated might be permanent. Likewise the appellee Moye had received a severe and painful injury in his head, which had caused him much suffering, and from which he was also suffering at the time of the trial. A period of nearly a year and a half had elapsed from the time of the injuries, during which time the appellees had not only been suffering continuous pain, but, on account of these injuries, they had been only able to do about half as much farm work as they had done before the injuries were received. Under these circumstances we cannot say that the amount of the verdicts evidenced any passion or prejudice on the part of the jury.

The remittitur cured the excess in the amount of damages assessed for injury to the property.

There is no reversible error in the record, and the judgments must be affirmed.

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## HAMPTON v. HANELINE.

Opinion delivered October 16, 1916.

1. DEEDS—PECUNIARY CONSIDERATION NAMED—PRESUMPTION.—Where a pecuniary consideration therefor is named in a deed the presumption arises that the grantor has recited the real consideration, and in the absence of testimony tending to show that the pecuniary consideration named in the deed was inserted therein by mutual mistake or by some fraud practiced upon the grantor at the time that he signed the deed, neither the grantor nor those claiming under him can be permitted to question the consideration named in the deed for the purpose of invalidating the same.
2. DEEDS—CONSIDERATION NAMED—FRAUD—PROOF.—If the consideration named in a deed is not the true consideration, and was inserted through fraud or mutual mistake, such fact may be shown to defeat the conveyance.
3. DEEDS—RECITAL OF PECUNIARY CONSIDERATION—PROOF TO DISPUTE.—Where a deed recited a pecuniary consideration, and there was no proof that the same was inserted through fraud or mistake, it is improper for the court to consider other testimony of another, different or additional consideration, adduced for the purpose of defeating the conveyance.
4. DEEDS—TIME OF FILING—NOTICE OF PRIOR DEED.—A second deed to the same land, although filed for record before a former deed, executed by the same grantor, will be invalid as againstt he first deed, of which the second grantor had knowledge.

Appeal from Greene Chancery Court; *Chas. D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellees instituted this suit against the appellant to recover a certain tract of land in Greene County, Arkansas. They sued as the widow and children of L. E. Penny. They alleged in their complaint that they had title under a deed from one Amanda Haneline to L. E. Penny, R. L. Haneline and S. P. Haneline, dated February 3, 1897, and filed for record September 27, 1913; that they were entitled to the immediate possession, and prayed judgment for the recovery of the lands, and damages for the unlawful detention of the same.

Appellant answered, denying that appellees had any title or right to the possession of the land described

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in their complaint, and set up that their grantor, Amanda Haneline, on March 4, 1913, had conveyed the lands to appellant by warranty deed, and that under said deed appellant entered into possession of the land and holds the same as the owner thereof; that the consideration of the deed under which he claimed title was grantee's (appellant's) promise to live with the grantor, furnish her a home, care, nursing, medical attention, and support for the remainder of her life, and the payment of her funeral expenses, all of which promises as the consideration for the deed had been fully performed by the appellant; that the appellant, in order to make the premises a fit habitation for the grantor and to enable him to perform his promise and pay the consideration named in the deed, had expended of his own money and labor the sum of $315 in improvements on the premises. Appellant further alleged that the pretended deed under which the appellees claimed was null and void; that the real consideration for the deed under which appellees claimed title was the covenant on the part of the grantees, Penny and the two Hanelines, to live with, take care of, and furnish all supplies and medical attention to the grantor during her lifetime, and to pay her doctor bills and funeral expenses at her death; that the grantors fraudulently caused the deed to recite a consideration of $100 instead of the real consideration, which was the covenant upon the part of the grantees to support and care for the grantor; that the grantor signed the deed in the belief that it recited the true consideration; that the grantees moved upon the tract of land in controversy and lived with the grantor, Amanda Haneline, until about the year 1900, at which time they neglected and refused to perform their covenant to support the grantor, and it was then agreed by all parties that the grantees should be released from their covenant to support the grantor and that the deed executed by the grantor to them should be destroyed and the contract abandoned; that all parties believed that by this action the covnants of the deed would be rescinded and the title to

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the land be again vested in Amanda Haneline; that this latter agreement was executed by the grantees surrendering possession of the land to the grantor and removing therefrom; that the grantor from thenceforth continued in the sole, exclusive and adverse possession of the lands for about thirteen years, and until March 4, 1913, when she executed the deed under which appellant claims; that the pretended deed under which the appellees claim title was not filed for record until September 27, 1913, long after the death of L. E. Penny, and that none of the grantees ever asserted title thereunder during the lifetime of the grantor. He further alleged that the grantor, in her lifetime, and appellant after her death, had paid all taxes on the land since 1872. He prayed that the complaint be dismissed; that the deed to appellees be cancelled as a cloud on her title, and for all equitable and proper relief.

Appellees replied and denied that Amanda Haneline had acquired title by adverse possession; admitted the execution of the deed under which appellant claimed, but averred that such deed was subsequent to the deed under which appellees claimed title; and alleged that at the time appellant recorded his deed he had actual knowledge of the appellees' deed. They denied that they had perpetrated any fraud upon their grantor; denied that appellant had expended $315, or any other sum of money, for the care and support of Amanda Haneline or for improvements and taxes, as alleged in his cross-complaint, and prayed that the same be dismissed.

The Lipscomb Lumber Company intervened and set up a claim for $71.70 for materials and lumber furnished and used in the construction of the dwelling house on the land in controversy. This claim of the Lumber Company was not disputed.

After hearing the testimony, the court found that on February 3, 1897, Amanda Haneline, then the owner of the lands in controversy, conveyed the same by deed to L. E. Penny, R. L. Haneline and S. P. Hane-

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line, and that since said conveyance was made Penny had died, leaving surviving him his widow and children (naming them); that the deed recited a consideration of $100, but that the actual consideration was the care and support of Amanda Haneline during her lifetime; that on March 4, 1913, Amanda Haneline executed a second deed for the land in controversy to W. N. Hampton; that the express consideration in that deed was the care and support of Amanda Haneline during her lifetime, and the payment of her doctor bills and funeral expenses; that the deed last executed to Hampton, was recorded prior to the one made to plaintiffs, but that defendant had actual knowledge of the existence of the deed made to plaintiffs at the time said second deed was made.

The court further found that plaintiffs are entitled to recover the lands, but found that defendant expended some money on improvements while in possession of the land, and that defendant carried out part of the contract undertaken by plaintiffs of caring for Amanda Haneline.

The court found in favor of the defendant for the value of the improvements and defendant's services in the sum of $150, and entered a decree in his favor for such sum, and also, by the consent of all parties, in favor of the intervener for $71.70, and ordered that the lands be sold for the payment of these sums. The court also entered a decree in favor of the plaintiffs for the land in controversy. Defendant appealed from the judgment against him decreeing the title to the lands in controversy in the plaintiffs, and the plaintiffs prayed a cross-appeal from the decree against them for the improvements. Other facts stated in the opinion.

*R. E. L. Johnson* and *Burr & Stewart*, for appellant.

1. The parties agreed to a rescission of the contract and the cancellation of the Penny deed. Possession was surrendered under the agreement to Mrs.

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Haneline and that ended the matter except the cancellation of the deed, and that under the evidence should be cancelled by the court.

2. There was no consideration for the deed. Penny's course and conduct—making only temporary repairs and abandoning the premises within three years, shows he had no intention of complying with his covenant to support the grantor and a fraud was perpetrated. 103 Ark. 464.

3. The action is barred by limitation and adverse possession. 85 Ark. 520; 69 *Id.* 562; 58 *Id.* 142; 84 *Id.* 52.

4. The facts here show such an abandonment of the land accompanied by circumstances of estoppel and limitation as to defeat the action of appellees. 105 Ark. 663, and cases cited.

5. Conveyances upon condition of life-support of grantor are not governed by the law governing conveyances upon expressed condition subsequent, and 50 Ark. 141 and similar cases do not apply. The doctrine of appellant is sustained by the following cases. 174 S. W. 526; 89 Ky. 529; 86 Ark. 169; 101 *Id.* 603; 172 S. W. 853; 86 Ark. 251; 103 *Id.* 464; 104 *Id.* 568. The record abounds with proof both of estoppel and limitation. The acts of appellees in utterly failing to support; in agreeing to destroy the deed, move off and surrender all rights and in actually surrendering possession, etc.; in standing by for 12 years without asserting claim, etc., and thereby inducing appellant to accept a deed and perform the burdens they agreed to assume; expend money in lasting improvements, etc., make a clear case for appellant. See cases *supra*.

*M. P. Huddleston*, *Robert E. Fuhr* and *J. M. Futrell*, for appellees.

1. The chancellor found the issues of fact for appellees, and if Hampton had actual knowledge of the prior deed, the title to the lands was properly in favor of appellees as the chancellor found. In the absence

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of fraud or mistake the pecuniary consideration in a deed cannot be proved to defeat or invalidate the deed. 71 Ark. 494; 99 *Id.* 350. Nor can a different consideration be proven to defeat it. 60 Am. Dec. 481; 64 *Id.* 469.

2. The obligation to support the grantor as a consideration is a personal covenant and when broken can only be taken advantage of by the covenantee. 77 Ark. 168; 103 *Id.* 464; 71 *Id.* 494. A deed reciting a consideration to support cannot be rescinded for breach thereof where there has been part performance, in the absence of offer to return the benefit received. 57 N. Y. Supp. 201; 131 N. W. 632; 70 N. E. 673; 93 N. W. 614.

3. The contract to support was not breached by Penny. But if so, only Mrs. Haneline could rescind. 67 Ark. 526.

4. There is no such thing in law as abandonment of real estate, except a homestead right. 1 Rul. Case Law, p. 3.

5. No pecuniary consideration can be proved to defeat a deed. 71 Ark. 494 and *supra;* 99 Ark. 350.

6. All testimony as to the consideration should have been excluded.

WOOD, J. (after stating the facts.) The appellant alleged in his cross-complaint that the grantees in the deed under which the appellees claimed title fraudulently caused said deed to recite a consideration of $100 instead of the covenant to support the grantor, and secured the grantor to sign the deed in the belief that it recited the true consideration.

The appellees, in their answer to the cross-complaint, "deny that the deed under which they hold is null and void, or that any fraud, as alleged in defendant's cross-complaint, was practiced, etc."

Upon these allegations of the complaint and answer it cannot be said that the appellees admitted that the $100 consideration was fraudulently inserted in the deed under which they claimed. Appellees challenged

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that allegation in the cross-complaint of the appellant.

Oral testimony was taken on this issue, which the appellees moved to strike from the record, but the court overruled appellees' motion and considered the testimony. There was no testimony to justify a finding that the grantees, in the deed under which the appellees claim title, had perpetrated any fraud upon the grantor, Mrs. Amanda Haneline, in the procurement of the deed. There was nothing in the testimony to warrant the conclusion that the consideration of $100 named therein was fraudulently inserted in the deed. The fact that there was an additional consideration in the way of a promise on the part of the grantees for support, etc., would not be sufficient to show that the insertion of the $100 as the consideration, without mentioning the additional consideration, was a fraud practiced upon the grantor by the grantees in the procurement of the deed.

(1) The grantor makes the deed. The presumption is that he had the real consideration recited therein, and in the absence of testimony tending to show that the pecuniary consideration named in the deed was inserted therein by mutual mistake or by some fraud practiced upon the grantor at the time he signed the deed, neither the grantor nor those claiming under him can be permitted to question the consideration named in the deed for the purpose of invalididating the same. See *Davis* v. *Jernigan*, 71 Ark. 494; *Wallace* v *Meeks*, 99 Ark. 350-354.

In the latter case this court quoted from *Hendrick* v. *Crowley*, 31 Cal. 472, as follows: "There is no doubt but that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. But this is not the rule, but an exception to the rule, that the legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence. The exception can never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve the exception. The ex-

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ception always loses its governing force when it comes in conflict with the rule which it qualifies, and must yield to its higher claim. Hence the consideration cannot be contradicted or shown to be different from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated."

(2-3) Of course, if the consideration was not the true consideration, and was inserted through fraud or mutual mistake, such fact might be shown to defeat the conveyance. Since the deed to appellees recited a pecuniary consideration, and there was no proof that such consideration was inserted by mutual mistake or through any fraud practiced upon the grantor at the time, the court should not have considered any testimony of another, different, or additional consideration adduced for the purpose of defeating the conveyance.

The court, however, sustained the deed under which appellees claim under the law applicable to the facts that should have been considered by the trial court. The finding was correct and therefore must be upheld by this court.

(4) The appellant had a deed also from Mrs. Haneline executed after the deed under which appellees claim title and appellant recorded his deed before the other deed was recorded. But the court found that appellant had knowledge that the deed under which appellees claim had been executed prior to his deed. This finding of the court is sustained by a preponderance of the testimony.

While appellees prayed an appeal from the judgment against them in favor of appellant in the sum of $150 for improvements and services rendered to Mrs. Haneline by appellant, they do not contend in their brief that the decree against them for this amount should be reversed. They say: "It was proper to charge appellee with improvements placed upon the land by Hampton, and there is no objection to charging them for keeping Mrs. Haneline ten and a half months."

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In the concluding part of their brief they say: "This case should be affirmed." Thus appellees concede that appellant was entitled to compensation for services and remuneration for improvements. The finding of the trial court as to the amount is supported by a preponderance of the evidence.

There is no reversible error in the record and the decree is therefore in all things affirmed.

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## MUTUAL AID UNION v. WADLEY.

Opinion delivered October 16, 1916.

LIFE INSURANCE—PAYMENT OF ASSESSMENTS—NOTICE—QUESTION FOR JURY.—It is a question for the jury, whether notice was sent out to deceased that an assessment against her was due, and whether she received the same, where, by the contract of insurance, deceased's policy was to become void for failure to pay an assessment after proper notice.

Appeal from Greene Circuit Court, First Division; *W. J. Driver*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee was the beneficiary in a certificate of membership held by his wife, Fannie Wadley, in the appellant. The appellant was a corporation engaged in the insurance of its members. Upon the death of his wife appellee instituted suit against appellant for the sum of $225.00, alleged to be due on the certificate or policy issued by the appellant to the wife of the appellee.

Appellee alleged the issuance of the certificate, the death of his wife, and compliance with the terms of the certificate and the by-laws of the company, on the part of his deceased wife, and refusal of the company to pay, and prayed for judgment.

Appellant admitted the execution of the certificate, and that appellee was the beneficiary named therein, but denied appellee's right to recover, on the ground that his wife had failed to pay the assessment levied against her as provided in the contract of insurance,

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thereby permitting her certificate of membership to lapse and become void.

In the application made by the wife of the appellee to the company, among others are the following provisions:

"The assessment shall begin at 50 cents and graduate one cent per month for the first eighty months of the life of the certificate when it reaches $1.30, which is named as the maximum assessment which can be made on any one death loss. Should the applicant fail to pay an assessment the certificate will lapse and become void."

"It is understood that the Secretary of the Mutual Aid Union is to notify said applicant by ordinary mail, to the address herein stated, of any death occurring, which will make applicant liable for assessment, and of the proper amount of the assessment due thereon, and prompt payment of same must be made within 15 days to the home office."

"It is hereby provided and mutually agreed that this application shall be considered as part of the contract for membership and should this application be accepted and the certificate issued thereon, I hereby accept the by-laws and regulations with all amendments governing the Mutual Aid Union."

Appellee testified, among other things, as follows: "I certainly did pay every assessment that I ever had any notice of. I did not mean for my wife to go suspended," that no notice ever came to his house of the assessment of February, 1914, the non-payment of which appellant alleged caused the lapse of the policy; that he did not get such notice.

The testimony on behalf of the appellant was substantially as follows: The company kept a card record that was a part of its system. A specially prepared case, holding 1000 cards, was used. The cards were numbered from 1 to 1000, consecutively. The case was arranged so that each card was put in its place according to number, from 1 to 1000. When notice is mailed the cards are marked up, showing the

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amount of the assessment. After the cards are marked, the employee in charge takes the assessment notices and from each card the notice is mailed out. The usual custom was to first address the envelope, then fill out the notice to place in the envelope, then pass it and turn to the next card. The notices asked for remittance within 15 days. At the expiration of 15 days all payments that have been made are noted on the cards. The payments are also marked on a tally sheet which has 1000 numbers on it. The date and the number of the certificate and the amount are put on that tally sheet, thus making a double check. At the end of 15 days the employees go through these cards and take out all that have not paid. All that are not credited are turned over to another set of clerks who issue a second notice, and the second notices are handled in the same way as the first, and these second notices state the exact date on which the membership certificate will become lapsed and void. At the expiration of the second notice the clerks go through these cards again, and all that have not paid are taken out and placed in the record of lapses, and their places are filled with other members. If the members fail to remit after this second notice has been given then they are no longer members of the Mutual Aid Union; they are dropped from the roll.

The notices of assessment are sent out by the office force. The secretary's name is signed to them. The president orders the assessment made, and turns them in to the department handling the notices to send out the assessments. The president ordered the department to notify Fannie Wadley that a certain amount was due in the usual way. The president did not write the notices, but it was a part of his duty to have the assessments made and to have the living members notified of such assessments. The president did not handle the notices in person, but had supervision of that department of the company's work, and the notices of assessment were sent out under his authority and instructions.

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After testifying to the above method of keeping the record of the standing of the members, the president of the company further testified that he made an investigation of all records and the records showed that the notices were mailed out to Mrs. Wadley and that the assessment was not paid. Some notices that are mailed out are returned unclaimed. When a notice is sent out it is put in an envelope with a return of the company on it. When the unclaimed notices come back to the office they are always preserved in the returned envelopes. In the case of Mrs. Wadley there were no returned envelopes.

Witness stated that an assessment was made against Mrs. Wadley's certificate, No. 22, on which this suit was instituted, in February, 1914. Witness introduced in evidence, which was made an exhibit to his testimony, a duplicate record made up from the first and second notices that were given her, which showed that on February 19, 1914, assessment No. 2 in Circle 22 was levied, and that this assessment was not paid by Mrs. Wadley, and that under the rules of the company that caused her policy to lapse. It was so marked on the card. This card was intended, as explained by the president, to be a record of what was done when the member was notified as the contract required in the matter of the payment or non-payment of the assessments levied.

Among others, the appellant asked the court to grant the following prayers for instructions:

"1. I charge you that the burden is on the plaintiff, John M. Wadley, to show by a preponderance of the evidence, that the insured, Fannie S. Wadley, performed all of the conditions required of her in her contract with the defendant, Mutual Aid Union.

"2. If the insured, Fannie S. Wadley, failed or refused to pay the assessments made against her, as provided for in her contract with the defendant, then the plaintiff, John M. Wadley, is not entitled to recover in this action, and your verdict should be for the defendant.

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"3. I charge you that the defendant, Mutual Aid Union, was only bound to give the insured, Fannie S. Wadley, notice of the assessment made against her in the manner and for the length of time provided for in the contract made between the said Fannie S. Wadley and the Mutual Aid Union.

"4. If you find that the defendant, Mutual Aid Union, gave the insured, Fannie S. Wadley, notice of the assessment made against her in the manner and for the length of time provided for in the contract, and the said Fannie S. Wadley failed to pay said assessment within the time specified in the contract, then the defendant had the right to cancel her membership certificate, and the plaintiff would not be entitled to recover in this action."

The court refused these prayers. There was a verdict in favor of the appellee in the sum of $225.00 and judgment was entered in his favor for that sum, from which this appeal was taken.

The appellant *pro se*.

1. The testimony showed that the deceased member failed to pay the assessment made and hence the policy lapsed. But appellee contends that no notice was received. This presented an issue of fact for a jury and it was error to refuse instructions 1 and 2 asked by defendant. 80 Ark. 190; 98 *Id.* 388; 103 *Id.* 425.

2. The agreement was that notices were to be mailed to John M. Wadley, by ordinary mail. The testimony tended to show this was done, that a careful and systematic record was kept of the mailing of notices; that both the first and second notice had been duly mailed in return envelopes and that same were never returned. This raised a *prima facie* presumption that the notices were duly received. 98 Ark. 392; 60 *Id.* 539; 72 *Id.* 305; 73 *Id.* 194; 93 *Id.* 252. This, of course, could be rebutted by competent testimony, but the only testimony offered was the appellee's own statements. The presumption was not overcome.

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73 Ark. 194; 74 *Id.* 16; 94 *Id.* 388. This should have been submitted to a jury. Cases *supra.*

The appellee *pro se.*

The burden was on appellant to show forfeiture; failure to pay assessments after due notice and the levying of an assessment. Appellant failed to show any ground of forfeiture or lapse and hence there was no question for a jury, but a question for the court. Under the evidence of appellee no notice was ever received. The appellant's evidence only showed its system and custom of mailing notices—no personal knowledge of any officer or employee. No one testified that the notice had ever been mailed. The card established nothing as to notice and it was on this theory the court acted. The judgment should be affirmed.

WOOD, J. (after stating the facts.) The court erred in refusing to grant appellant's prayers for instructions numbered respectively 1, 2, 3 and 4, as above set forth. These instructions were intended to submit the issue as to whether or not Mrs. Wadley had complied with the provisions of the contract of insurance requiring her to make prompt payment of the assessments in order to keep her policy. There was testimony to warrant the submission of such issue to the jury. It was a question for the jury, under the evidence, as to whether or not appellant complied with the provisions of the contract in giving notice to the insured of the assessment against her by ordinary mail, as provided in the contract.

The court, by refusing to grant appellant's prayers for instructions on this issue, refused to submit the same to the jury.

While there was no proof by the secretary, the president of the company, or any of the office force in this department of the company's business, that they in person mailed a letter to the insured notifying her of the assessment levied against her, yet there was testimony showing appellant's system of doing business

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and the record that was made by it with reference to the mailing out of these notices, and showing the standing of the members in regard to the payment or non-payment of assessments when such notices were mailed as the contracts provided.

The testimony in regard to appellant's system of business and the record that it kept was competent as tending to show that appellant had complied with its contract, and that the insured had not paid the assessment of February, 1914, as the contract required. This was an issue for the jury which the court erred in taking away from them. The effect of the court's ruling was to declare as a matter of law that the appellant had not complied with its contract by failing to give the insured notice of the assessment, and that the company was therefore precluded from setting up the failure on the part of Mrs. Wadley to pay the assessment which the appellee admitted had not been done.

It will be remembered that the president testified that it was a part of the system of the company to keep a record of the standing of each member by the card system, which he explained and exhibited the original record card of the membership of Mrs. Wadley which was kept under his supervision and that these records show that the notice had been given by mail. This card was intended, as explained by the president, to be a record of what was done when the member was notified, as the contract required. The jury had a right to infer from this testimony, as introduced and explained by the witness, that notice of assessment had been mailed to Mrs. Wadley as the contract provided and that she had failed to pay the same. It was error for the court to deprive the appellant of the benefit of this issue before the jury.

For the error in refusing to grant the prayers for instructions set out in the statement the judgment is reversed and the cause will be remanded for a new trial.

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## GREER v. GRIFFIS-NEWBERN COMPANY.

Opinion delivered October 16, 1916.

1. HOMESTEAD—ACQUISITION OF RIGHT—OUTSTANDING CLAIM.—Appellant cannot acquire a homestead in his own right, so long as there is an outstanding right of homestead in the lands existing in another.
2. HOMESTEAD—ACQUISITION OF RIGHT.—Where appellant came into possession and ownership of certain lands by inheritance, *held* under the facts, that his residence upon and occupancy of the same was insufficient to impress upon the land the character of a homestead.

Appeal from Lee Circuit Court; *J. M. Jackson*, Judge; affirmed.

STATEMENT BY THE COURT.

The appellee obtained a judgment against appellant in the sum of $2,424.09 and caused execution to be issued, which was levied upon a certain tract of land in Lee County as the property of appellant. Appellant filed his schedule with the clerk of the circuit court, claiming the lands as a homestead. Supersedeas was issued by the clerk. The appellee moved to quash the supersedeas. Upon a trial of the issues raised by the motion, appellant testified substantially as follows:

The land in controversy belonged to his father who, at the time of his death, occupied the land as his homestead. Appellant's father died in 1899, leaving a widow, appellant's step-mother, a daughter and appellant surviving him. Appellant, at the time of his father's death, was twenty-five years of age. He lived with his father and continued to live on the place after his father's death with his step-mother and half sister until the first of February, 1900. Appellant managed the place for his step-mother and his sister until they moved to Marianna. They were cropping the place in 1900 and appellant looked after it, continuing to live on it. Appellant did not at that time own any other land. His step-mother died in 1903, when his sister was still a small girl. His sister died in 1911, before she was 21 years of age. After the mother died the sister went to live with her guardian and was living with him at the time of her death.

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Appellant, after his sister's death, rented out the place and had had a room there since 1912. Had farmed the place and made a crop there himself. Appellant married in 1908. His wife and children lived continuously in Marianna. They never lived on the place in controversy. Appellant did not own any lots in Marianna. Had bought some but had not finished paying for them. His property usually was assessed in Bear Creek township. Appellant sometimes voted in Bear Creek township and sometimes in Marianna. Appellant made a crop on the place in controversy in 1902. From 1902 to 1912 the place was rented to negro tenants. Appellant did not come into the possession of the place in his own right until the death of his sister in 1911, and in 1912 he went down to make a crop and moved into a little room 12 by 14, where he had a bedstead, bedding, a stove and chairs. The wife of a negro tenant cooked for him. He stayed there pretty regularly during the year 1912; would come home two or three times a week. Appellant stated that he recognized that his sister had a right in the homestead until she became of age.

The court found that appellant "abandoned whatever interest he may have had in the homestead." Judgment was entered quashing the supersedeas.

*H. F. Roleson*, for appellant.

The testimony fails to show an abandonment of his homestead right. It does show that after old man Greer died, appellant took charge of the place and affairs of the family and impressed the lands with the character of a homestead. 71 Ark. 206; 42 *Id.* 175; 35 *Id.* 49; 41 *Id.* 94; 39 *Id.* 301; 56 *Id.* 621. It was always his intention to claim it as his homestead; that he expected to move his family on it and that he lived there most of the time. 69 Ark. 596. The question of intention is a large element in homestead matters and claims and exemption laws of homesteads are liberally construed in favor of claimants. 55 Ark. 65; 65 *Id.* 373.

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*D. S. Plummer* and *Daggett & Daggett*, for appellee.

1. Conceding that appellant had a homestead right at the death of John H. Greer, it is shown he abandoned it for ten years or more and it is necessary for him to show by his actions the intention, at least, to impress the characteristics of a homestead on the lands. His acts show otherwise. The case, 71 Ark. 206, and others cited, have no application, for in such cases the claimant who had acquired the right as head of a family, continued to reside on the land after the loss of family. 57 Ark. 181; 22 *Id.* 402; 29 *Id.* 280; 76 *Id.* 575; 31 *Id.* 466.

2. Nor does 69 Ark. 596 apply for the reason that the intention to occupy was manifested by acts clearly showing such intention and actual occupancy was only prevented by sickness. In this case *bona fide* intention to occupy is not shown. The evidence clearly shows that the homestead claim is a mere subterfuge to defeat a judgment.

WOOD, J. (after stating the facts.)

(1) Appellant could not acquire a homestead in his own right so long as there was an outstanding right of homestead in his sister. *Brooks* v. *Goodwin*, 123 Ark. 607. See also *Kulbeth* v. *Drew County Timber Co.*, 125 Ark. 291.

Upon the death of his sister, appellant came into possession of the property by virtue of his right of inheritance, and he could only ground a claim of homestead after having impressed and occupied it as such.

(2) A preponderance of the evidence shows that appellant was not entitled to have the lands declared exempt from execution under his claim of homestead, and the court's judgment was correct, even though the court may have given an erroneous reason for it. The evidence shows that appellant never impressed the land with the character of homestead.

This court, in *Tillar* v. *Bass*, 57 Ark. 179, 183, upon a somewhat similar state of facts, said: "He (the homestead claimant) testified that his intention,

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during the entire time that he owned it, was to make it his home, and that he considered it his home after he built the new house and moved his bed, but his occupancy before and after he built the new house, and until he moved his family, was of the same character, he working and sleeping there while cultivating and gathering crops. There was no evidence that he moved his household goods, domestic animals and other property, which usually attend the change from one to another home in the country. His family remained away. His stay was more like camping than a residence. It was not homelike. In short, there was no evidence to show that he actually and in good faith occupied his land as a residence before the levy of the execution."

In *Gebhart* v. *Merchant*, 84 Ark. 359, we held that the "occupancy of a dwelling house with the intention of making it a homestead sometime in the future does not constitute an impressment upon it of the homestead character."

Appellant's family had never been upon the land in controversy and the character of the appellant's occupancy was not such as to constitute a homestead.

The judgment is, therefore, affirmed.

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## SMITH, TREASURER, *v.* FARMERS BANK OF NEWPORT, ARK.

Opinion delivered October 16, 1916.

1. STATUTORY CONSTRUCTION—RULE.—Statutes relating to the same subject must be considered as a whole and, to get at the meaning of any part of a statute, it must be read in the light of other provisions relating to the same thing.

2. PUBLIC INSTRUCTION—LICENSES TO TEACH—REVOCATION BY STATE SUPERINTENDENT.—The State Superintendent of Public Instruction has power to revoke licenses to teach, issued by himself. Kirby's Digest, § 7528; § 14, Act 431 of General Acts of 1911.

3. SCHOOLS—REVOCATION OF LICENSE TO TEACH—SALARY.—Where the license of a teacher, holding a license to teach issued by the State Superintendent of Public Instruction, is revoked by the State Super-

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intendent, the directors of a school district have no authority to issue to said teacher a warrant on the school funds, in payment of services rendered after the revocation of the license.

Appeal from Jackson Circuit Court; *Dene H. Coleman*, Judge; reversed and dismissed.

*Stuckey & Stuckey*, for appellant.

The county was not liable. The teacher's license had been revoked for cause. The Superintendent had power to revoke the license and due notice was given. Her contract to teach was terminated. The warrant was not negotiable and there can be no innocent holder of a school warrant issued without power or contrary to law. The warrant showed on its face that it was not to be cashed until approved by the County Superintendent and the bank was put on notice. The judgment should have been for defendant. Kirby's Digest, §§ 7573-4, 7615; Acts 1911, pp. 164-5; 71 Ark. 372; 84 *Id.* 520; 94 *Id.* 583; 108 *Id.* 1; 119 Ark. 592; 122 Ark. 337-8.

*Gustave Jones*, for appellee.

The County Superintendent cannot revoke a teacher's license—state-wide. There never was a revocation of the license prior to the issuance of the warrant. Proper notice of revocation was not given before the issuance of the warrant. In the absence of legislative enactment a County Superintendent has no authority to approve or disapprove a warrant for teacher's salary properly drawn by the directors of a school district. The only remedy plaintiff had was mandamus. Act No. 399, 1907, as amended Acts 1911, 268; Kirby's Digest, §§ 7508 to 7535, 7573; 61 Ark. 294; Kirby's Digest, § 7627-7665.

HART, J. The Farmers Bank of Newport, Arkansas, filed a petition for writ of mandamus against G. L. Smith, as treasurer of Jackson County, Arkansas, to compel him as such treasurer to pay a certain school warrant in the sum of $30.00, which had been transferred to it. The material facts are as follows:

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On September 16, 1915, the Farmers Bank of Newport, Arkansas, became the owner in due course of business, of a school warrant in the sum of $30.00 issued to Tommie Hill for her services as a teacher by the directors of Jacksonport Special School District. On September 17, 1915, the warrant was presented by the bank to the county treasurer, who refused payment.

Tommie Hill held a first grade county certificate and made application for and secured a state-wide certificate to teach school, under Section 14 of Act 431 of the General Acts of 1911. She was employed by the directors of the special school district of Jacksonport in Jackson County, Arkansas, to teach school there. The license was issued to her by the State Superintendent of Public Instruction on June 15, 1915. She began to teach school at Jacksonport, Arkansas, and after she had taught a month, complaint was made that she was not qualified to teach. On July 26, 1915, the State Superintendent of Public Instruction wrote to Tommie Hill that complaint had been made that she was not qualified to teach school and requested her to appear for re-examination before the County Superintendent of Schools for Jackson County at Newport in that county, on the 5th and 6th of August, 1915. On the 21st day of July, 1915, the State Superintendent of Public Instruction authorized the County Superintendent to cite her for re-examination. Tommie Hill appeared on the 5th day of August, 1915, and took the examination required of her except arithmetic. The County Superintendent sent the questions and answers to the State Superintendent of Public Instruction and the next week received a reply from his office stating that Tommie Hill was not qualified to teach school and that her license had been revoked. The County Superintendent notified the secretary of the School Board that her license had been revoked and that this terminated her contract with the school board. Tommie Hill did not send in her license for cancellation but the State Superintendent of Public Instruction sent out a formal notice to all the County Examiners and County

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Superintendents of the State of the revocation of her license. This was done during the latter part of September, 1915. The County Superintendent refused to endorse on the warrant issued to Tommie Hill that it was approved by him because her license had been revoked before the warrant was issued and before the services were performed for which the warrant was issued. The circuit court found that the defendant showed no legal cause to refuse payment of the school warrant in question. That the warrant was owned and held by the plaintiff in due course of business and that it was entitled to its writ of mandamus. Judgment was rendered accordingly. The case is here on appeal.

(1-3) We think the court erred in granting the writ of mandamus. Tommie Hill held a certificate issued by the State Superintendent of Public Instruction. After she had taught a month complaint was made that she was not qualified to teach school. The State Superintendent cited her to appear before the County Superintendent of Jackson County, in which county she was teaching school, for re-examination; she appeared before him as requested and the questions propounded to her and the answers to the same were sent in to the office of the State Superintendent of Public Instruction. An examination of the papers showed that she was not qualified to teach school and the County Superintendent was notified that her license had been revoked. He in turn notified her and the directors of the school district in which she was teaching, that her license had been revoked and that terminated her contract with the school district. Notwithstanding this fact she continued to teach school and the warrant in question was issued to her for services performed after the board had been notified that her license had been revoked. It is true her license was not sent in for cancellation and was not formally cancelled by the State Superintendent, but this was not necessary. An examination of the papers and the declaration that her license had been revoked because she had been found incompetent to teach was all that was necessary.

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This constituted a revocation of her license to teach. This brings us to the question of whether the State Superintendent had the power to revoke her license. Section 7528 of Kirby's Digest provides that the State Superintendent of Public Instruction shall have power to grant State certificates which shall be valid for life, unless revoked, to any person in the State who shall pass a thorough examination in all those branches required for granting county certificates, etc. The license was granted to Tommie Hill under Section 14 of Act 431 of the General Acts of 1911. This section provides that teachers holding a first grade county license may have their license made State-wide by applying to the State Superintendent of Public Instruction for an examination under the terms of the Act. It is true that the Act does not contain any provision giving the State Superintendent authority to revoke licenses issued by him, but it is a well settled principle of statutory construction that statutes relating to the same subject must be considered as a whole and, to get at the meaning of any part of it, we must read it in the light of other provisions relating to the same thing. So when section 14 just referred to, is read in connection with Section 7528 of Kirby's Digest, it is manifest that the Legislature intended to give to the State Superintendent the power of revoking licenses issued by him. Section 7528 provides that he shall have power to grant certificates which shall be valid for life unless revoked, evidently meaning unless revoked by him. So we think when Section 14 of Act 431 of the Acts of 1911 is read in connection with the section of Kirby's Digest relating to the same subject, it is evident that the State Superintendent of Public Instruction is given the power to revoke licenses granted by himself. This being true, it necessarily follows that the revoking of her license and notice to her and to the board of directors of the school district of that fact terminated her contract with the school district. She performed the services for which the warrant was issued after her license had been re-

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voked and the directors of the school district had no authority to issue her a warrant on the school funds in payment of her services.

Therefore, the County Treasurer was right in not paying the warrant and the circuit court should not have directed a writ of mandamus compelling him to do so.

Other reasons are urged as grounds for a reversal of the judgment; but having reached the conclusion already stated, it is not necessary to consider them.

It follows that the judgment of the circuit court must be reversed and the petition for the writ of mandamus will be dismissed.

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## AMERICAN SURETY COMPANY *v.* BLACK.

Opinion delivered October 16, 1916.

1. PLEADING AND PRACTICE—COMPLAINT—MOTION TO MAKE MORE DEFINITE AND CERTAIN.—Where a complaint stated all the essential facts constituting the plaintiff's cause of action, and it did not appear that the defendant was surprised by any of the testimony introduced, or was prevented thereby from having witnesses at the trial, a motion to make the complaint more definite and certain will be held to have been properly overruled.
2. PLEADING AND PRACTICE—DEMURRER TO THE COMPLAINT.—Where the facts stated in the complaint with every reasonable inference deducible therefrom constitute a cause of action, a demurrer thereto should be overruled.
3. BUILDING CONTRACTOR'S BOND—LIABILITY OF SURETY.—In an action to recover upon a building contractor's bond, *held*, the plaintiff had done everything in compliance with the law, to enforce the same, and that the surety was liable thereon.
4. APPEAL AND ERROR—UNDISPUTED TESTIMONY—ERRONEOUS INSTRUCTIONS.—Where a verdict is supported by the undisputed testimony, alleged errors in the giving of instructions are immaterial, and will not be considered on appeal.

Appeal from Sebastian Circuit Court, Fort Smith District; *Paul Little*, Judge; affirmed.

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STATEMENT BY THE COURT.

Albert H. Black sued the American Surety Company of New York to recover damages for an alleged breach of a building contract. The material facts are as follows:

On April 15, 1913, Albert Black entered into a written contract with Rambo & Kemp, contractors, to erect for him a residence in the city of Fort Smith, according to certain plans and specifications. The contract required that the contractors should execute a bond to secure the faithful performance of their contract and the American Surety Company signed the bond as surety for the contractors. The present suit was instituted on the first day of November, 1913. By the terms of the contract Black agreed to pay the contractors $6,466.00 for the construction of his residence and the bond signed by the surety company was for the sum of $3,500.00 to indemnify and secure Black in the full and complete performance by the contractors of their contract.

The contract provided that the residence should be completed by September 1, 1913. It also provided that payments should be made by the owner to the contractors as the work progressed, on estimates made by the architect. The contractors began the erection of the house and payments were made to them from time to time on the architect's certificate until July 26th, when they had been paid $4,466.00. Sometime in August Black found out that there was a claim of a material furnisher against the contractors for $900.00. Black knew that only $2,000.00 was due from himself to the contractors, so he reported the matter to Kennedy & Albers, who were the local agents of the Surety Company. Albers notified the district manager of the surety company at Memphis. The district manager had charge of and supervision over the company's business in the State of Arkansas. The district manager wrote the local agents that he had notified the home office about it and asked them to gather together

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all the information they could about the matter. The house was completed about the first of September, 1913. On the 9th of September, 1913, Black addressed a letter to the American Surety Company at New York which was forwarded to them in due course of mail. The letter recited the fact of the Company executing the bond in the sum of $3,500.00 as surety for Rambo & Kemp, who had contracted for the erection of a two-story dwelling house for Black. The letter notified the Surety Company that the materialmen, who furnished brick for the erection of the house, had the day before filed a lien for $346.46. That it was the only lien filed against the building thus far, but that others would likely be filed. That he was advised that the contractor owed the materialmen to the amount of $4,000.00, and that the balance due them under the contract was about $1,700.00.

The provision of the bond upon which this suit is based is as follows: "First: That in the event of any default on the part of the principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety, by registered mail, at its office in the city of New York promptly and in any event within ten days after the obligee or his representative, or the architect, if any, shall learn of such default; that the surety shall have the right within thirty (30) days after the receipt of such statement to proceed, or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the principal; and any or all moneys or property that may at the time of such default be due or that may thereafter become due to the principal under said contract, shall be credited upon any claim which the obligee may then or thereafter have against the surety, and the surplus, if any, applied as the surety may direct." The bond was conditioned that the contractors should faithfully perform all the terms, covenants and conditions of the contract. The contract provided for the payment of all claims for labor

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and material entering into the building by the contractors.

Other facts will be referred to in the opinion. The jury returned a verdict in favor of Black in the sum of $1,500.00, and from the judgment rendered the surety company has appealed.

*Geo. W. Dodd*, for appellant.

1. The court erred in overruling the motion to make definite and specific. Kirby's Digest, § 6091; 71 Ark. 562; 66 *Id.* 480; 70 *Id.* 161; 29 *Id.* 448; 56 *Id.* 629; 67 *Id.* 15; 58 *Id.* 7; 95 *Id.* 249; 77 *Id.* 351; *Ib.* 1.

2. The court erred in overruling the demurrer to the complaint. It states only general conclusions—the facts are not stated. 43 Ark. 296. No damage was shown or alleged.

3. There was error in the admission of evidence and in the instructions of the court as to notice. 177 S. W. 20; 32 Cyc. 73. An erroneous instruction is presumed to be prejudicial. 70 Ark. 79; 77 *Id.* 200; 74 *Id.* 585.

4. The court erred in refusing instructions asked by defendant. The plans and specifications were defective and it was error to modify No. 18 by inserting the words "thereby injuring the contractors." 32 Cyc. 178, notes 78-9.

*Warner & Warner*, for appellee.

1. The motion to make more definite and certain was properly overruled. It is not necessary to set up or plead the evidence. The complaint states the essential facts constituting plaintiff's cause of action. 102 Ark. 200; 95 *Id.* 438.

2. The demurrer was properly overruled. The complaint alleged every essential fact necessary to constitute a cause of action. A failure to pay for material and labor and the filing of a lien against the property were a breach of the bond. 79 Pac. 1097; 77 *Id.* 794; 117 Ark. 372; 84 Pac. 817; 107 Ark. 442; 101 *Id.* 352; 93 *Id.* 373.

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3. Notice was given within the terms of the bond. 78 Pac. 1021; 91 Ark. 43; 87 *Id.* 171.

4. There is no error in the court's charge. 87 Ark. 281; 80 *Id.* 454; 80 *Id.* 444; 72 *Id.* 578.

5. The judgment is right upon the whole record. 44 Ark. 556; 46 *Id.* 542; 54 *Id.* 280; 56 *Id.* 594; 62 *Id.* 228.

HART, J. (after stating the facts.)

(1) Counsel for the defendant insists that the court erred in overruling his motion to make the complaint more definite and certain. We do not think the court erred in this regard. The complaint contained a statement of all the essential facts constituting the plaintiff's cause of action and it was not necessary that the complaint should set forth the evidence to support its allegations. The allegations of the complaint were sufficient to advise the defendant of the nature of the claim, for which plaintiff sought recovery so that it might prepare any defense which it might have thereto. It is not even claimed by the defendant that it was surprised about any testimony adduced by the plaintiff or that it was prevented from having witnesses at the trial whose testimony it might need to prove its defense to the action. *Hodges* v. *Bayley*, 102 Ark. 200.

(2) It is next contended that the circuit court erred in overruling the defendant's demurrer to the complaint. In support of their contention counsel urged that the complaint contained nothing but general conclusions and that the facts constituting plaintiff's cause of action are not stated. We do not deem it necessary to set out the complaint, but it is sufficient to say that it contained every essential allegation of fact necessary to advise the defendant of the nature of plaintiff's cause of action. The rule is that where the facts stated in the complaint with every reasonable inference deducible therefrom constitute a cause of action, the demurrer should be overruled. *McLaughlin*

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v. *City of Hope*, 107 Ark. 442; *Claxton* v. *Kay*, 101 Ark. 352; *Cox* v. *Smith*, 93 Ark. 373.

(3) Counsel for the defendant also assign as error the action of the court in giving certain instructions in regard to the written notice required by the bond and upon the question of the waiver of forfeiture. It is unnecessary to set out these instructions, for upon this branch of the case the evidence is undisputed and shows that the plaintiff complied with the terms of the bond in regard to giving notice of the default of the contractors. The bond provides, that in the event of any default on the part of the contractors, a written statement of the particular facts showing such default, and the date thereof, shall be delivered to the surety by registered mail at its office in the city of New York, promptly and in any event within ten days after the obligee shall learn of such default. In compliance with this provisions of the bond, on September 9, 1913, Black sent by registered mail to the defendant at its home office a letter notifying the company of the default of the contractors. The letter notified them that a lien had been filed against the building on the day before for brick furnished and that other liens would probably be filed. The company received this letter in due course of mail and wrote Black a letter acknowledging that fact. In it Black was asked to advise the company whether the contract had been completed and the work was satisfactory and what amounts he had paid the contractors for the work. Black promptly answered this letter giving the information required. He stated that the contract had been practically completed and was satisfactory so far as he knew. It will be noted that under the terms of the contract and the conditions of the bond that Black was not required to give notice to the Surety Company until default was made. All the evidence in the case shows that the contract was completed on time and that the work was done in a satisfactory manner. The only complaint made by Black is, that certain materialmen filed liens for material which went into the building and which had

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not been paid for by the contractors, and that default occurred in this way. Under our Mechanics' Lien Law the materialmen are given a lien on the building and certain amount of land occupied by it. The lien was filed as soon as the house was completed. Black gave the notice required by the contract within ten days after the lien was filed. There was no circumstance shown from which an inference against the facts testified to by him on this point could be drawn. It is true Black was an interested party and under the rule laid down in *Skillern* v. *Baker*, 82 Ark. 86, his oral testimony could not be said to be undisputed. Still in the present case we think that Black is corroborated by all the other facts and circumstances adduced in evidence. Sometime in August he feared that the balance due by him to the contractors would not be sufficient to pay all the claims for materials which went into the building, which were unpaid. He notified the local representatives of the Surety Company of his fears in this respect. There was no default at this time, however, and this fact is shown not only by his own testimony but by the evidence of Kennedy & Albers, the local representatives of the company who made an investigation of the matter. Black talked with them about it at that time, not because the contractors had made any default but because he feared they might do so and he thought that it was his duty to notify the representatives of the Surety Company of this fact. The testimony of Kennedy & Albers in regard to the investigation they made tends to corroborate the testimony of Black to the effect that no lien was filed against the building and no default made by the contractors in their contract until the day before Black wrote to the company on September 9, 1913, in compliance with the terms of the bond. Black made a straightforward candid statement about the whole affair. It is true it was the duty of the contractors to pay all claims for materials when the building was completed and before they turned it over to the owner. In this case, however, the facts show that the

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building was completed practically at the time the lien was filed, so there was no default until the lien was filed. There were no evasive replies by him to any questions asked him. His testimony as to the matters not contained in the contract and letters of the parties is corroborated by the other facts and circumstances adduced in evidence as well as by the testimony of Kennedy & Albers.

(4) Therefore, we hold that the undisputed evidence requires a verdict for the plaintiff and it therefore becomes immaterial to consider the alleged errors in giving the instructions.

The judgment will be affirmed.

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## PADGETT v. STATE.

### Opinion delivered October 23, 1916.

1. CRIMINAL LAW—HOMICIDE—SUFFICIENCY OF THE EVIDENCE.—Where appellant was convicted of homicide, *held*, under the evidence that the court, on appeal, could not say as a matter of law, that there was no substantial testimony to sustain the verdict.
2. APPEAL AND ERROR—OBJECTION TO TESTIMONY—MUST BE MADE WHEN.—An objection to the admission of testimony cannot be made for the first time on appeal.
3. EVIDENCE—PERFORMANCE OF BLOODHOUNDS.—Evidence of the performance of bloodhounds is admissible when the proper foundation for the introduction of such testimony is laid.
4. EVIDENCE—EXCLUSION OF INCOMPETENT PORTION—GENERAL OBJECTION.—Where a portion of a narrative detailed by a witness is competent, it is the duty of the appellant to object specifically to the portion complained of as incompetent, and a general objection is insufficient.
5. EVIDENCE—WIFE AS WITNESS IN CRIMINAL CASE.—A married woman cannot testify in behalf of her husband in a criminal case, and this rule is not changed by Act 159, Acts of 1915.

Appeal from White Circuit Court; *J. M. Jackson*, Judge; affirmed.

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STATEMENT BY THE COURT.

Appellant prosecutes this appeal from a judgment of conviction for the crime of assault with intent to kill one F. D. Worthington. On the night of January 11, 1916, at about 8 o'clock p. m., someone shot F. D. Worthington while sitting by the fire in his home at Beebe, White County, Arkansas. Immediately after the shooting a Mrs. Kimbro, who lived within two blocks of Worthington's, testified that she saw two men going from his house. They passed by and she saw them by an electric light. They were walking very fast. One of the men was about as tall as Sidney Padgett, but not any taller. The other man was lower than Padgett. They were going east towards the railroad. The next morning the dogs seemed to be following the course that the men took.

Another neighbor, Mrs. Robertson, stated that immediately after Worthington was shot she saw two men who passed within eight feet of her. She saw them plainly by the electric light. One of them was a good-sized man. The other was lower, and heavy set. One of them was a negro. The larger man was a white man, and he had on a brown suit. Both of them had on black slouch hats that were pulled down over their faces. Each of them had their hands down like they were holding something. The men went down by Mrs. Kimbro's.

Immediately after the shooting one Billings and one Thompson were on the street on the west side of the railroad and saw two men running across the railroad track just ahead of a train. The men were coming from the direction of Worthington's, in a roundabout way. The larger man had on a dark corduroy suit; he had something in his hand. Billings testified that one of the men that crossed the track was about the size of Padgett, but he did not know who it was. Neither one of them was a negro. Witness Thompson testified that he saw the two men, as stated by Billings; that one was about four inches taller than the other.

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and the taller one had on a corduroy suit, and a cap on his head, and a gun in his hands. He knew Sidney Padgett and since that night he had seen him dressed in a corduroy suit and walking across the grand jury room. The same man that witness saw in the grand jury room was the man that witness saw that night cross the railroad, according to witness' best judgment. The man was Sidney Padgett. Witness went with the bloodhounds the next morning. The dogs crossed the railroad track at the same place the men crossed it. They went to Sidney Padgett's house; ran up to his house and stopped. Witness did not know whether the other man was a negro or not. He took them both to be white men. Witness went with the sheriff and others with the dogs on their last chase; he did not go with them on the first chase, where the dogs first went that night. It was between 4:30 and 5 o'clock on the following morning, after the shooting, when they reached Sidney Padgett's house. The road was muddy, and those in the party were very muddy and wet when they reached his house. They could not get there without getting muddy and wet.

After the shooting that night officers had bloodhounds brought from the town of Forrest City. They had been used for trailing human beings, and their capacity for trailing people was good. They had a reputation of being reliable for trailing people. They arrived in Beebe about 2 o'clock in the morning and went directly to Worthington's house. They picked up the trail and went in a westerly direction. They went in the yards of several people in going that route. When the dogs would get lost from the trail the parties in charge would take them back and put them on the trail again. They lost completely the west track, which they first started on and which led to the west part of town. The dogs were tracking a human being from the point where the man stood who shot Worthington to the west side of town, where the trail was lost. After they lost that trail they were taken back to the starting point. They then went in a northeasterly

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direction, different from the one they first followed. When they were put on the trail the second time they trailed up to the steps of one or more houses. The dogs lost the trail so badly that the party in charge took them off, rested them awhile and washed out their mouths and noses. It rained some before they arrived at Padgett's house. The ground was very muddy. The dogs led the party to Padgett's house. There were two men in the house when the party arrived at Padgett's. The dogs barked some while they were on the west trail, and also while they were on the last trail that led to Padgett's house. The sheriff went in ahead of the dogs and arrested Padgett, placing handcuffs upon him. He seemed to be excited. The sheriff took charge of the trousers which were exhibited, and which Padgett had on the night of the killing. They did not have much mud on them. His shoes and trousers were dry. The sheriff also took charge of the coat and a cap which Padgett was supposed to have had on that night.

The sheriff testified, on cross-examination, that he knew where he was going; that he was at Padgett's, and that he went ahead of the dogs and got him; asked for the suit that he wore the night before and the corduroy suit described was presented to him. His shoes were not near so muddy as witness expected to find them. In going out the sheriff and posse got their clothes covered with mud. They found in Padgett's house a No. 12 shot gun; found a shell or two in his coat pocket, but those shells were loaded with small shot, and not buckshot. Padgett complained of being sick.

Other witnesses testified as to the manner in which the dogs trailed that night; that they got on trails and went to other houses also and last went to Padgett's house. One of the witnesses who was in the crowd following the dogs stated that when the dogs stopped and went into another man's house witness remarked, "We know where we have started and we had just as well go down there and get him." This witness stated

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that when they reached Padgett's house Padgett was in bed; he complained of being sick. They called for his clothes and they were promptly furnished. They found nothing unusual about them. There was nothing on his shoes or clothes to indicate that he had come over the trail that the dogs followed. The dog, when he went into Padgett's house and walked up to Padgett, seemed to be perfectly satisfied, but he didn't bark and whine nor attempt to jump on or bite Padgett.

A certain witness, a detective, was employed from the Burns Detective Agency and while Padgett was in jail at Newport he went there and remained in the cell with Padgett for fourteen days, having been arrested at the depot on a pretext and handcuffed and placed in jail like other prisoners. Witness represented to Padgett that he had been arrested and placed in jail for robbing a bank. The witness then detailed the conversation which he had with Padgett, the effect of which was that Padgett told witness that he was in jail charged with shooting a man named Worthington. Padgett told witness that he shot Worthington, and entered into details as to the cause of the shooting and the circumstances.

The testimony on behalf of the appellant tended to show that appellant was sick with lagrippe on the night of the shooting of Worthington and had a fever that night. The physician attending testified that Padgett on that night was a very sick man and was suffering from fever. He left the physician's office about 5:30 o'clock. He was advised by the physician about 5:30 in the afternoon to go home and go to bed. The physician was of the opinion that he was not out of the house that night.

The testimony by several witnesses was to the effect that at 8 o'clock the night of the killing he was in his own home, engaged with his family and others in a game of cards, and continued to play until about 8:30, at which time he retired and did not leave the house that night.

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F. M. Jarvis testified that about 7 o'clock on the night of the shooting he went to Padgett's house; Padgett was there. Witness remained until about 8:30 and Padgett did not leave the house while witness was there. While there they heard over the telephone that Worthington was shot. Witness testified that he was arrested in connection with the shooting of Worthington; that while he was in jail he met a man by the name of Carr.

On cross-examination he was asked this question: "Didn't you tell Mr. Carr that they had the right man, referring to Sidney Padgett?" Witness answered, "No, sir, I did not; I did not tell Mr. Carr any such thing as that."

In rebuttal witness Carr testified that he had been in jail with F. M. Jarvis and had a conversation with him about the shooting of Worthington. Jarvis said he (Jarvis) was innocent of it, but that they had the right party.

*John E. Miller*, for appellant.

1. Counsel reviews the testimony and contends that there is no legal or credible evidence on which to base a conviction; that the verdict is the result of passion and prejudice, based upon a "frame up" of testimony, and that the alleged confession is not sufficiently corroborated.

2. The testimony relative to appellant's alleged admissions that he had killed another man and had been acquitted thereof under an alibi, and of his being a member of a whiskey faction in Beebe, etc., was incompetent, was intended only to discredit him in this trial and to destroy the force of his defense in this case. The court erred in admitting such testimony.

3. The jury should have been instructed to disregard the testimony concerning the trailing by the dogs, and the court erred in failing to so instruct.

4. The testimony of the witness Carr to the effect that Jarvis, a witness for appellant, told him that he, Jarvis, was not guilty but that he thought they had the

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right party, referring to appellant, was not admissible under any theory of the case, and its admission was reversible error.

5. The court erred in excluding the testimony of appellant's wife, offered to contradict the testimony of the sheriff. Act 159, Acts 1915; 124 Ark. 167.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. There was no error in failing to charge the jury to disregard the testimony relative to the trailing by the bloodhounds. They were proved to have been trained in the trailing of human beings and reliable. Moreover, appellant did not call this matter to the court's attention by requesting an instruction on the point.

2. There was no error in the admission of testimony. As to that of the detective, Whitfield, and the confession of the appellant detailed by him, the court fully and fairly instructed the jury as to the admissiblity of confessions and as to the weight to be given them under all the circumstances. Confessions fairly and voluntarily made are admissible in evidence. 73 Ark. 497; 93 Ark. 156; 109 Ark. 366.

3. Carr's testimony as to what Jarvis told him to the effect that he thought they had the right party, meaning the appellant, was admissible for the purpose of contradicting his other testimony to the effect that he was at appellant's home playing pitch with him and other members of his family at the time of the shooting.

4. The wife's testimony was properly excluded. Act 159, Acts 1915, does not apply to the admission of testimony, neither does it repeal or conflict with the rule of evidence established in this State that a husband and wife are incompetent to testify for or against each other. Kirby's Digest, § 3095; *Id.* 3092; 84 Ark. 119.

WOOD, J. (after stating the facts.) No objection is urged in the brief of counsel for the appellant to the instructions of the court. We assume therefore that the instructions were correct.

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(1) Appellant contends that the evidence is not sufficient to sustain the verdict. The issue of fact as to whether or not the appellant shot Worthington, as charged in the indictment, was for the jury to determine. The court cannot say as a matter of law that there was no substantial testimony to sustain the verdict.

(2-3) Appellant urges in his brief that the court erred in not instructing the jury to disregard the testimony concerning the trailing by the bloodhounds, but there was no objection to this testimony when offered and no prayer for such an instruction. The appellant therefore cannot now complain of the ruling of the court in permitting this testimony. Moreover, the proper foundation was laid for such testimony, and this court, in *Holub* v. *State*, 116 Ark. 227, held that such testimony was competent.

(4) Appellant insists that the court erred in permitting witness Whitfield to detail an alleged conversation which he had with appellant, in which appellant in alleged to have told witness about shooting a man other than Worthington, and about certain car robberies, and about being a member of the whiskey faction in Beebe, and having the judge and the prosecuting attorney under his control. When the witness began to detail the conversation with appellant while in jail, the record shows that counsel for appellant said: "Let the record show we object to all this testimony," and after the witness had given his testimony in chief the record shows the following: "The defendant objected to the witness being permitted to detail to the jury the conversation and statements made to him by the defendant while in jail at Newport." Thus it appears that only a general objection was saved to the testimony of the detective Whitfield. No specific objection was made to the testimony on the grounds now urged here.

Some of the testimony of Whitfield was at least competent evidence on behalf of the State, and if appellant wished to have that part of it which he now claims to be incompetent excluded he should have called the court's attention specifically to that part of the

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testimony which he now claims was objectionable, and not having done so, objection here for the first time cannot avail him. See *Kansas City So. Ry. Co.* v. *Leslie*, 112 Ark. 305.

Counsel for appellant contend that the court erred in permitting the State to prove by the witness Carr that appellant's witness Jarvis had told him that he was innocent of the crime himself, but that he thought they had the right party. The proper foundation was laid for the introduction of this testimony, in contradiction of witness Jarvis, and there was no error in the ruling of the court admitting the testimony.

A witness by the name of McQuiston testified that while the appellant was in jail in Jackson county he heard a conversation that appellant had with his wife by means of a dictograph. Witness heard appellant tell his wife "that if they knew what he knew the whole bunch would be gone." Witness did not know to whom appellant referred.

(5) The appellant offered to prove by his wife that he never made any such statement as the witness detailed. The court refused to allow the wife of appellant to testify. Appellant duly objected and excepted to the ruling of the court, and urges this as a ground for reversal. Under our statute the appellant's wife was not a competent witness in his behalf. See Kirby's Digest, §§ 3095 and 3092; *Woodward* v. *State*, 84 Ark. 119. This statutory rule of evidence is not changed by Act 159 of the Acts of the General Assembly of 1915, giving to married women all the rights to contract and be contracted with, to sue and be sued, and in law and equity to enjoy all rights and be subjected to all the laws of this State, as though she were a *femme sole*. This last act has no reference to rules for the production of evidence.

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

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## WISCONSIN & ARKANSAS LUMBER CO. *v.* PRICE.

Opinion delivered October 23, 1916.

MASTER AND SERVANT—INJURY TO SERVANT—UNACCUSTOMED TASK.—Defendant company's foreman ordered plaintiff, an employee, to do certain work to which he was unaccustomed and which normally required the services of two men. After performing the service in safety for several hours, plaintiff sustained an injury to his finger. *Held*, under the evidence that the defendant was not liable in damages for the injury, no negligence nor the violation of any duty owing to the plaintiff being shown, and the plaintiff failing to show that the service could not have been continuously performed safely had he continued to exercise due care.

Appeal from Hot Spring Circuit Court; *W. H. Evans*, Judge; reversed and dismissed.

STATEMENT BY THE COURT.

The appellee, a young man twenty-two years of age, was in the employ of appellant. His usual work was taking down what was called "strip stock" and loading same on a lumber truck, which he designated "the buggy." On the morning of the 18th of May, 1914, the foreman of appellee ordered him to leave his usual work and go down and pull lumber off of the chains. The duty of taking the lumber from the chains required that appellee stand at a certain point, with the transfer chains at his right and the truck or buggy on which he loaded the lumber at his left. The transfer chains ran along the length of a table at an elevation of about three or four feet. The width of the table on which these chains were operated was something like six feet. The boards of lumber were placed one after another in succession on the transfer chains and were by this means transported to certain points along the chains where employees were situated to unload them as they passed. The machinery was so arranged that it carried by the place where appellee was situated either lumber from the cars or from the rip stock, or from both, just as the foreman should direct.

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The foreman told appellee on this occasion, "Now, I want you to get them," meaning that appellee was to catch the boards of lumber as they came by on the transfer chains and load the same on the buggy or truck. When lumber was coming only from the cars one man could handle it, and one man could handle it when it was coming from the rip stock department only, but when it was coming from the cars and also the rip stock department it required the services of two men to handle it.

Appellee, on the occasion mentioned, had to catch both the lumber from the car and also from what they called the rip stock. He was directed by his foreman to do this work, which usually required the services of two men. Appellee was put in the position three or four minutes before 7 o'clock in the morning and worked until about 11 o'clock. He had not worked in this position before. Appellee, while doing this work, had the middle finger of his left hand injured. He testified as to the manner of his injury as follows: "The way I came to get hurt, I had taken hold of a plank and had hold of it back this way (demonstrating) and went to put it on the buggy and bumped my hand against the plank on the buggy and busted my finger. The way my hand came to get caught there, was by overrush of work. I couldn't catch them. I was watching what was coming and what I was putting on the buggy. I was working so fast I didn't have a chance to catch them. I was doing the work as carefully as I could. I was doing all I could to obey the orders of my foreman to get all these slabs that came by. This stock and stuff was coming over the chains sometimes three and four deep, and I had to take all of it, not let any of it get by, and load it. I had to obey what the foreman told me and I was trying to do it. The pieces were coming one right after another and sometimes piled upon top of each other. I had hold of it with my left hand. I caught hold of it some distance on the plank with my right hand and shoved the plank back against the lumber on the buggy and mashed my finger. If

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I had had time to have noticed what I was doing I might have taken hold of the side of it, but I didn't have time; it was coming so fast I was overrushed. I don't expect I would have been hurt if I had taken hold of the side of the plank with both hands. If my hand had not been on the end of the board it would not have been hurt. Some of the boards passed me that morning without me taking them off; I could not catch them. When they passed me I don't know whether the next man could get them or not. We were all grading and every man had to catch his own grade. If I didn't catch my grade it went down to the end of the chain and fell off. I was ordered by my foreman to get the planks that came by me and not let them go by. That's what I was trying to do and in order to do that, I had to keep my eye both on the car the best I could and the planks to keep them from going by."

Appellee instituted this suit against the appellant for damages, alleging that the appellant was negligent in requiring appellee to do the work of two men in handling the large volume of lumber; that thereby appellant rendered unsafe and dangerous the work which plaintiff was required to do, and that by reason of such negligence appellee received his injuries.

The appellant denied the allegations of negligence, and set up the defenses of contributory negligence and assumed risk on the part of the appellee.

The above are substantially the facts, stated in the most favorable light for appellee, upon which the verdict and judgment were based.

*T. D. Wynne*, for appellant.

The negligence complained of was not the proximate cause of the injury, but the injury resulted from appellee's own careless and inattentive conduct.

The proximate cause, to render the defendant liable, must be the wrongful act of the defendant or its employees, otherwise no cause of action for the injury can be maintained. 1 White, Personal Injuries, par.

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39; 24 S. E. 278; 36 N. Y. S. 926; 102 Mich. 72; 60 N. W. 286; 44 N. E. 273; 72 N. Y. S. 501; 58 S. W. 151.

*J. C. Ross*, for appellee.

The proof is positive both that it had been the custom to put two men to do this work, and that it *required* two men to do it. It was therefore clear negligence for the foreman to direct and require appellee alone to do the work. As to the duty of a master to furnish adequate help, see 4 Thompson on Negligence, §§ 3807, 4175, 4768, 4829, 4865, 4868; White's Supp., § 3807; 3 Labatt, Master and Servant, §§ 1107, 1108. The negligence of the foreman in requiring appellee to do this work alone was the proximate cause of the injury. The agency which resulted in the injury complained of was the negligence of the foreman in not providing the usual and necessary number of men. 97 Ark. 576; 104 Ark. 59; 1 Thompson, Neg., § 49; *Id.*, §§ 52, 64; 77 Ark. 377; 191 Ill. 439; 116 Ky. 318; 90 Minn. 343; 215 Mo. 567; 114 S. W. 1013; 181 S. W. (Ark.) 278; 3 Labatt, Master and Servant, §§ 1256, 1273, 1274; 33 Ia. 52, 59; 51 Ore. 21; 11 Ind. App. 118, 129; 99 Ark. 254, 257; 53 Ark. 466.

WOOD, J. (after stating the facts.) The appellant contends that the undisputed evidence shows that it is not liable. This is the only ground urged for a reversal of the judgment.

It appears that appellee received his injury by taking hold of the plank with his left hand gripped to the end of it and shoving the end so gripped against the plank on the lumber buggy. If he had caught hold of the board on the side with both hands, and had not had his left hand on the end when he shoved it against the plank on the lumber buggy, he would not have been hurt. He had loaded possibly three or four buggies that morning before he received his injury and had worked about four hours at that place before he was injured.

There was testimony to warrant the jury in finding that the appellant was negligent in directing appellee

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to do the work that required the services of two men to perform. But there is no testimony to warrant the conclusion that such negligence caused or contributed to the injury of the appellee.

Appellee's testimony shows that notwithstanding the rush order of the appellant, he had been able to obey the order and do the work which he was directed to do for at least four hours without injury, and that so long as he handled the lumber in such manner as not to permit his hand to come in contact with the plank on the truck he escaped injury.

While appellee testifies that the injury was caused by overrush of work, this was a mere conclusion of his, and an incorrect conclusion, too, since he testified to facts which show conclusively that the injury was caused by handling the lumber in the manner that appellee himself adopted.

The undisputed testimony of the appellee shows that it was not necessary for him to handle the lumber in the particular way that he was handling it at the precise moment when he injured himself. Appellee does not pretend that he was overrushed any more after he had worked for four hours than when he first began to remove the lumber under the directions of the foreman.

Although the appellee, by reason of the failure of the appellant to furnish another man to assist him, under the orders of the foreman, was constrained to rush the work, his undisputed testimony shows that for about four hours he had endeavored to obey the commands of his foreman and had done so by handling the plank in a way not to injure himself. The fact that he had done this for four hours shows that he might have continued to do so by exercising the same care for his protection that he did when he first began to work. Appellee did not testify, and there is no testimony to warrant the conclusion that by reason of the strain that he was under and the labor that he had done for four hours in endeavoring to obey the commands of his foreman, he had become so fatigued that he was

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unable to handle the lumber as he had been doing, or that it was necessary for him to place his left hand in the position it was in at the precise moment when he received the injury.

If appellant had furnished another employee to assist appellee in removing the lumber, still this would not have prevented appellee from being injured if he hand handled the plank in the same manner that he did handle it at the precise moment of his injury, and there is no evidence to warrant the conclusion that appellee would not have taken hold of the plank as he did if he had been furnished an assistant.

Inasmuch as the undisputed evidence shows that appellee, notwithstanding the strain and hurry caused by the directions of his foreman, could and did handle the lumber for about four hours in such manner as to avoid injuring himself, the jury were not justified in finding that the manner in which he handled it at the precise moment of the injury was caused by such rush and hurry. If the appellee had shown that by reason of the order of the foreman, requiring him to do the work of two men, he was under the necessity, while discharging his duties, of placing his hand where it was at the time he received the injury, or that in attempting to carry out the orders of the foreman he did not have time to see how he should place his hands in order to do the work, and at the same time avoid injury to himself, then the case would have been different. But the undisputed testimony of the appellee shows that he was under no such necessity.

The testimony does not show or tend to show that the appellee, by direction of his foreman was placed in an emergency where he did not have time to choose between a safe and an unsafe way of handling the lumber. On the contrary, the undisputed evidence shows that he had for nearly four hours adopted a perfectly safe method. We are convinced, therefore, that the undisputed evidence shows that the method adopted by the appellee in handling the lumber at the precise moment of his injury was not caused by the

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failure upon the part of the appellant to furnish him a helper to do the work, or by reason of the orders of the foreman requiring him to do such work without an assistant. Had an assistant been furnished appellee, he would still have had to handle his part of the lumber.

While appellant, through its foreman, directed the appellee to do certain work which required the services of two men to perform, appellant did not direct the appellee to handle the lumber in a particular way or in a manner that was calculated to result in his injury. The appellee adopted his own method of handling the lumber, and his testimony shows that by one method which he adopted he was able to handle it without injury to himself for a period of four hours, when he attempted to handle it in a different way that resulted in his injury. While the testimony shows that appellant must have known when it directed appellee to do the work that in order to accomplish his task he would have to rush and do the same work that two men were accustomed to do, yet there is no testimony to warrant the jury in finding that appellant could have reasonably anticipated that the order of the foreman would cause the appellee to handle the lumber in the particular manner that caused his injury. Neither the work itself nor the place of work was dangerous, because if appellee failed to catch each piece of lumber as it passed by, such failure could not have resulted in his injury, for, in that event, the lumber would pass on and drop off at the other end of the chain. We conclude, therefore, that the undisputed evidence shows that the appellee's injury was caused, not by the negligence of the appellant, but was the result of his own inadvertence in the manner of handling the lumber.

We have examined the cases upon which appellee relies and they are all differentiated by the facts from the case under review. In the case of *Griffin* v. *St. L., I. M. & S. R. Co.*, 121 Ark. 433, 181 S. W. 278, five men were directed by their foreman to pick up a heavy piece of timber and to carry the same to a push car. It was shown that it was customary for a crew of seven

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to nine men to handle a timber of that size. Griffin was one of the five men who were directed to carry the load, and while attempting to do so his foot turned or slipped on the gravel and he was injured. There the foreman directed the particular manner in which the employees should do the work, and that manner was negligent because the work itself was dangerous when done in that way, and, as the jury might have found, the injury to Griffin was but the natural and probable consequence of such negligence. In other words, the strain of the heavy load put upon Griffin by the foreman caused his foot to turn upon the ground. Nothing that Griffin did caused it.

In *Bolen-Darnell Coal Co.* v. *Rogers*, 99 Ark. 254, the company left a hole in the street, into which Mrs. Rogers by inadvertence fell. The negligence of the company was the direct and proximate cause of the injury.

In the case of *St. L., I. M. & S. Ry. Co.* v. *Higgins*, 53 Ark. 458, upon which appellee relies, Higgins was a brakeman and was directed by the conductor to make couplings between cars whose drawheads were known to the conductor to be wholly defective. This defective condition was unknown to Higgins until he attempted to make the coupling. The defective drawhead was the proximate cause of the injury. There was no issue as to the negligence of the Railway Company being the proximate cause of the injury. The liability of the railway company turned upon the issue as to whether or not Higgins was guilty of contributory negligence, and the facts showed that he was confronted with an emergency in which he had to determine on the instant whether he could make the coupling with the straight link that was in the box car which the conductor had ordered coupled onto the caboose. The effect of the holding in that case was that the railway company could not escape liability for its negligence on account of the alleged contributory negligence of Higgins, because the jury were warranted in finding under the evidence that Higgins was not guilty of contributory

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negligence. The issues and facts were entirely different from those in the case at bar.

So other authorities upon which appellee relies are readily distinguished from the present case.

The court, upon the undisputed facts, should have given appellant's prayer asking a directed verdict in its favor, and for this error the judgment is reversed, and the cause will be dismissed.

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## CLEMENTS v. KNIGHT & CO.

Opinion delivered October 23, 1916.

1. APPEAL AND ERROR—OBJECTION TO ORDER SETTING ASIDE VERDICT AND GRANTING A NEW TRIAL.—Where the trial court set aside the verdict, and granted a new trial, the appellant's objection and exception to the court's action is tantamount to an appeal from the order of the trial court.
2. APPEAL AND ERROR—PREPONDERANCE OF THE EVIDENCE—DETERMINATION BY TRIAL COURT.—Where there is a substantial or decided conflict in the evidence, the action of the trial court in determining the preponderance thereof, will not be disturbed on appeal.
3. APPEAL AND ERROR—GRANTING NEW TRIAL—ACTION OF TRIAL JUDGE. Where the evidence was conflicting and the trial court concluded that the verdict of the jury was not sustained by a clear preponderance of the evidence, the action of the trial court in granting a new trial will not be disturbed on appeal.

Appeal from Cross Circuit Court; *W. J. Driver*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee (a corporation) instituted this suit against the appellant and M. M. Jennings and J. M. Turnage. They alleged that the appellant executed his promissory note, dated January 18, 1913, to his co-defendants, agreeing to pay them the sum of $2,064.12, with interest at six per cent. from date until paid, and that the payees, for value received, endorsed and delivered the note to the appellee. It alleged that the sum of $1,342.10 remained due and unpaid on said note, for which it prayed judgment.

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The appellant, Clements, answered and admitted the execution of the note sued on and the credit, but denied that the note was endorsed and delivered by the payees for value to appellee. He alleged that appellant executed and delivered to the payees a deed of trust on certain real estate in Tennessee to secure the payment of the note, which real estate was later sold under the power contained in the deed of trust and the note was paid in full from the proceeds of said sale.

The cause was dismissed as to the payees Jennings and Turnage. The appellant filed a motion for a continuance, in which he set up that Jennings and Turnage were material witnesses in his behalf, and that if present they would testify that the property (mentioned in his answer as included in the deed of trust) was sold to satisfy said trust deed, and that the proceeds from such sale were sufficient to pay said note. Appellee admitted that the absent witnesses, if present, would testify as set up in the motion. The court thereupon overruled the motion, and the cause proceeded to trial before a jury.

W. T. Walker testified on behalf of the appellee that he was secretary and treasurer of the appellee corporation; that in 1913 Jennings and Turnage, merchants at Millington, Tennessee, doing business under the name of Turnage Supply Company, owed appellee seven or eight thousand dollars; that Turnage and Jennings, the payees in the note, before its maturity, endorsed the note to the appellee and secured credit on account for the face value of the note; that the deed of trust executed by the appellant to secure the note was foreclosed November 23, 1914, and that the property brought $3,300.00, and the amount, after paying expenses incident to the foreclosure, was credited on the note, leaving the sum of $1,217.61, including interest, all of which was past due and no part of which had been paid.

The appellant then introduced as evidence the testimony as set up in the motion for a continuance.

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J. O. Hillis testified in rebuttal that he was the attorney for appellee. He went to Wynne and conferred with the appellant for the purpose of trying to adjust the account between the appellant and the appellee without suit. He asked appellant if there was anything wrong with the claim; if he had any set-off or counterclaim of any kind; that appellant said that he owed the debt and had no objection to the account, but did not have the money to pay it and wanted time, which appellee granted. Again witness had consulted the appellant on two other occasions and appellant never disputed the account or the amount that appellee claimed to be due. Appellant never suggested in any way that the property at Millington, embraced in the deed of trust which was foreclosed, brought an amount sufficient to pay the note, and never intimated that he ever thought that the note was paid.

On cross-examination the witness stated that he first saw appellant in the summer of 1914 in the office of J. C. Brookfield, in Wynne; that appellant had never paid anything on the amount claimed to be due. Witness went over the whole matter with appellant and he knew exactly what was claimed on the note. Witness knew that one Mr. Harrow bought the property at Millington for $3,300.00, because witness saw the check and examined the books of the appellee. He was the attorney for the appellee only in the present case; had no connection with the appellee's office.

Witness Brookfield testified on behalf of the appellant that the appellant came into his office on the first of January, 1915; that he did not know him until that time.

The jury returned a verdict in favor of the appellant. The court set aside the verdict. The appellant moved also for a new trial. The court overruled the motion, continued the cause and set the same for trial on the first day of the next term of court. The appellant excepted to the court's order overruling its motion for a new trial, and prosecutes this appeal.

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*J. C. Brookfield*, for appellant.

The testimony of the absent witnesses, which was admitted by appellee, was positive to the effect that the property *sold for enough to pay the debt.* If in its discretion appellee admitted this testimony without having sufficient testimony to overcome it, we think the court, in the light of the statute, was not authorized to set the verdict aside. Kirby's Dig., § 6215, sub-div. 6th.

Where there is any substantial evidence to support the jury's finding it will not be disturbed. 98 Ark. 334; 100 Ark. 71; 71 Ark. 445; 36 Ark. 451; 63 Ark. 94; 76 Ark. 603; 98 Ark. 160; *Ib.* 370; 104 Ark. 267; 77 Ark. 556; 35 Ark. 146; 103 Ark. 401; 22 Ark. 445; 23 Ark. 115.

*J. O. Hillis* and *L. C. Going*, for appellee.

1. An order by the trial court granting a new trial is not appealable unless the appellant in his notice of appeal, which is the *prayer for appeal*, in accordance with the statute, assents that if the order be affirmed, judgment absolute shall be rendered against him. 82 Ark. 490; 83 Ark. 631; 94 Ark. 566; 101 Ark. 90; 49 Ark. Law Rep. 89. Such a stipulation, subsequently filed, comes too late.

2. There was no abuse of discretion in granting the new trial. There was such a conflict in the evidence as called for the exercise of the trial court's discretion in determining the preponderance. 94 Ark. 566; 98 Ark. 304; 100 Ark. 596; 10 Ark. 136; 11 Ark. 630; 14 Ark. 203.

WOOD, J. (after stating the facts).

(1) The appellant's objection and exception was tantamount to an appeal from the order of the court setting aside the verdict and granting the appellee a new trial.

The court did not abuse its discretion in granting the appellee a new trial. There was a decided conflict in the evidence as to whether or not the note had been paid.

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Witnesses on behalf of the appellant testified that the property included in the deed of trust given to secure the note in suit was sold for an amount sufficient to pay the note in full, but, on the other hand, a witness for the appellee testfied that, although the property was sold, it did not bring a sufficient amount to pay the note.

The court doubtless concluded that the testimony on behalf of the appellee was of greater weight than the testimony on behalf of appellant and that the verdict of the jury was therefore contrary to the preponderance of the evidence.

(2) In several recent cases we have held that, "Where there is substantial or decided conflict in the evidence this court will leave the question of determining the preponderance of the evidence to the trial court and will not disturb or overrule the same." *Taylor* v. *Grant Lumber Co.*, 94 Ark. 566; *Blackwood* v. *Eads*, 98 Ark. 304; *McDonnell* v. *St. L. S. W. Ry. Co.*, 98 Ark. 334; *McIlroy* v. *Ark. Valley Trust Co.*, 100 Ark. 596-599.

(3) The trial court was justified in concluding that the verdict of the jury was not sustained by a clear preponderance of the evidence. Hence, it cannot be said that the trial court thoughtlessly and without due consideration set the verdict aside.

The judgment of the circuit court is therefore affirmed, and judgment will be entered here in favor of the appellee in the sum of $1,342.10, with interest at 6 per cent. from the 18th day of January, 1913.

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## GUNTER & SAWYERS *v.* ROAD IMPROVEMENT DISTRICT NO. 1, GRANT COUNTY.

### Opinion delivered October 23, 1916.

1. CONTRACTS—PAROL TESTIMONY TO VARY WRITING.—Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. Where the written contract is plain, unambiguous and complete in its terms, parol testimony is not admissible to contradict, to vary or to add to any of its terms.

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2. CONTRACT—AGREEMENT TO PURCHASE BONDS—PAROL TESTIMONY TO VARY WRITING.—Where a contract to purchase improvement district bonds was in writing and unambiguous, the sellers will not be permitted by parol testimony, to engraft a new provision or condition upon the contract, and then forfeit the contract for the buyer's alleged breach of such condition.

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

STATEMENT BY THE COURT.

Appellants, a partnership, engaged in buying bonds, brought this suit against Road Improvement District No. 1 of Grant County and the commissioners thereof, naming them, for damages claimed for the alleged breach of the contract of a sale of bonds of said district, to them. Sealed bids were advertised for and appellants submitted a bid as follows:

18——March——1915.

Board of Commissioners of Grant County, Arkansas,
Road Improvement District No. 1, Sheridan, Arkansas.

Gentlemen:

For your $150,000 of 6% road bonds, to be issued by your Road Improvement District, we hereby offer you par less $4,500 for same; bonds to be dated April 1, 1915, and any interest accruing on the bonds after May 1, 1915, shall be paid to you in addition to the purchase price. Interest payable semi-annually; bonds to mature serially at any intervals most satisfactory to you, provided they do not extend over a period longer than thirty years from date. Will deposit $25,000 of the proceeds with the Grant County Bank at Sheridan, the remainder with the Southern Trust Company at Little Rock. The acceptance of the bonds by us will be conditioned upon the bonds being approved by either F. Wm. Kraft or Wood & Oakley, bond attorneys, of Chicago, for whose services we agree to pay. We also agree to pay for printing and lithographing of the bonds, and to pay Trustee's charges for registration of same.

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As an evidence of good faith, we enclose you herewith our certified check for $3,000, payable to you as per contract.

Yours very truly,

GUNTER & SAWYERS,

JOG-McM By.....

This bid was accepted by the commissioners.

The minutes of the meeting of the board of commissioners of March, 1915, at which all were present, show that motions were made and carried that only sealed bids for the sale of bonds should be received; that a certified check of $3,000 should be required of each bidder; that the schedule presented by R. R. Posey marked "Exhibit A" be adopted and that bonds run for a period of 25 or 30 years, the exact time to be later determined; that Fred Jones be elected assessor of the district to take the place of R. W. Glover, who did not qualify, and upon opening the bids of Gunter & Sawyers of Little Rock, Ark., and of James Gould of Pine Bluff, Ark., they being the only two bidders on the sale of the bonds, Gunter & Sawyers were found to be the highest and best bidders, and "Motion made by J. L. Butler and carried that Gunter & Sawyers be declared the highest and best bidders, and that the bonds of Road Improvement District No. 1, Grant County, be sold to Gunter & Sawyers, that the Board this day enter into a written contract with said Gunter & Sawyers for the sale of said bonds."

Thereupon the following contract was entered into, executed and delivered to appellants.

"Contract.

"Know all men by these Presents:

"That for and in consideration of the sum of One Dollar to us in hand paid by Gunter & Sawyers, of Little Rock, Arkansas, the receipt of which is hereby acknowledged, and in consideration of the stipulation hereinafter set forth, we, the Commissioners of the Road Improvement District No. 1, Grant County,

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Arkansas, by virtue of authority vested in us, have this day sold, transferred, set over, assigned, and do by these presents agree to sell, transfer, set over and assign to Gunter & Sawyers 150,000 to 160,000 dollars of bonds to be issued by said Road Improvement District, No. 1, Grant County, Akansas, for the purpose of Road Improvements.

These bonds are to be dated the first day of April, 1915, and bear interest at the rate of 6% per annum, interest payable semi-annually. Interest after May 1, 1915, to accrue to the District until bonds are delivered. Interest and principal payable at such place as may be designated by the purchasers. Bonds to mature at any time satisfactory to said Commissioners of said Improvement District, provided said maturities do not extend over a period longer than thirty years from date.

"It is further understood and agreed that the purchase price of said bonds shall be 100 cents on the dollar of par value and for the purpose of this contract said par value is and does not exceed 100 cents on the Dollar.

"It is also agreed and understood that the funds derived from the sale of said bonds shall be deposited as follows:

"Twenty-five Thousand Dollars ($25,000) in the Grant County Bank at Sheridan, Arkansas, and the remainder to be deposited with the Southern Trust Company, of Little Rock, Arkansas, who agrees to pay 3% interest on Daily Balance, and the funds shall be subject to checks drawn by proper officials of said Road Improvement District, accompanied by Engineer's estimates as the work is being done.

"It is also agreed and understood that said Gunter & Sawyers shall place the proceeds derived from the sale of said bonds in the hands of said depository within ten days after the bonds have been approved by their attorneys.

"It is also agreed and understood that as an evidence of good faith on the part of the purchasers herein named, they shall deposit a certified check to the

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amount of Three Thousand Dollars ($3,000), payable to the Board of Commissioners of Grant County Road Improvement No. 1. The receipt of said check is hereby acknowledged by the Board of Commissioners of said Road Improvement District with the understanding that said check is not in payment of any part of the purchase price of said bond issue, but is being deposited only as an evidence of good faith of the purchasers and as a guarantee of compliance with this contract.

"It is also agreed and understood that the acceptance of these bonds by the purchasers herein named is conditioned upon the bonds and their legality being approved by their attorneys.

"It is also agreed and understood that the Commissioners of said Road Improvement District No. 1, Grant County, Arkansas, shall allow Gunter & Sawyers 4,500 Dollars for legal opinion of their attorneys and for printing and lithographing said bonds.

"It is also agreed and understood that the said Commissioners shall furnish promptly all information required for the preparation of these bonds, and their failure to do so shall not release them of this contract unless it can be proven that it is beyond their power to furnish said information.

"However, in case the proceedings leading up to the issuance of these bonds are not approved by the attorney for said Gunter & Sawyers, this contract shall become null and void and in no way binding for and upon anyone herein mentioned.

"Witness our hand and seal this 19th day of March, 1915.

"GUNTER & SAWYERS,
"BY J. O. GUNTER.
"J. L. WEST,
"M. W. ELKINS,
. . . . . .
"J. W. KELLEY,
"W. H. KEMP."

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Appellants were requested to meet the board in August to arrange for furnishing some money. Afterwards the district sold and delivered its bonds to James Gould and appellants brought this suit, alleging the terms of the contract, their willingness to comply with it, that the commissioners had broken the contract without authority and were personally liable also and prayed judgment for $4,500 plus $825 interest, less the cost of printing the bonds and the attorney's fee.

The answers admitted that the contract was made but alleged that at the time it was made it was publicly announced to all bidders present that the purchaser would be required to advance the board $3,000 for preliminary expenses and that any contract entered into for the sale of the bonds would be subject to said advancement; that appellants agreed thereto and to pay the same when demanded; that they failed to do so and thereby forfeited the contract. That they failed to have the attorneys named in the contract to render an opinion upon the validity of the bonds, which also avoided the contract; denied ability of appellants to sell the bonds at par and that they were damaged in any sum.

It appears from the testimony that the bid was made and accepted and the contract enterd into and executed as already set out, and that the certified check for $3,000 was duly deposited with the commissioners of the district in accordancewith the terms of the contract. J. O. Gunter, one of the appellants, stated that instead of buying the bonds at 95 or 96 cents, they bought at par, as the board preferred it, the board allowing the $4,500 plus one month's interest; that they were to pay the cost of printing the bonds and the attorney's fee for the opinion upon the validity of the bonds, which would have been $300 under the original agreement, or $500 after the other attorneys, Rose, Hemingway, Cantrell, Loughborough & Miles were substituted by agreement for the attorneys named in the contract. Stated he sold the bonds at par to Jno. H. Blessing & Co., bond buyers at St. Louis and his prof-

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its would have been $4,825. That after the bonds were bought, an injunction suit was brought against the district to test its validity; the new firm of lawyers was then agreed upon and further proceedings as to the printing and issuance of the bonds were suspended awaiting the decision of the Supreme Court on what is herein termed the "friendly test case."

On July 2nd, the attorney of the district wrote mentioning the status of the suit and saying the district would like to get the money on the note executed by appellants for the payment of preliminary expenses that had to be made. On the 9th, he wrote again, stating the time preferred for the running of the bonds and the amount thereof and suggesting that appellants, as soon as the decision was rendered, if favorable, should proceed accordingly, saying also, "We hope as soon as this opinion is handed down, you will let the district have $3,000 as we are in great need of it. On July 10th, appellant answered it had not received from the district's other attorney the detailed maturity of the bonds and relative to the loan of $3,000 to your road district, we will say we see no reason why this can not be made with safety to all concerned, if the Supreme Court ruling is favorable." On the 14th West, one of the commissioners wrote appellants they were trying to get some money for preliminary work of the organization and that some of the commissioners favored re-letting the contract. On August 9, Posey wrote that the board regarded the contract abrogated as the money for preliminary expenses had not been advanced and requested them to come down on the 13th for a conference. On the 10th appellants replied that they had not agreed to furnish $3,000 for preliminary expenses; that the only requirement was a certified check as a guarantee which had been put up; that they did not want the contract cancelled and could not see where it would be of any advantage to come down as the bonds were tied up pending the court's decision and if the district preferred they would have the bonds printed and executed and placed in escrow with the

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Southern Trust Company, that they might be cleared immediately upon the handing down of the court's decision, if it was favorable. If the district would stand the expense of certifying in case the decision was unfavorable, that they would pay for the printing of the bonds as it was a part of the contract.

The district sold and delivered the bonds to Mr. Gould before the court's decision was rendered.

The testimony on the part of appellees tends to show that it was stated at the time the contract of sale was entered into that it would be subject also to the payment of $3,000 from the successful bidder for preliminary expenses of organization. The engineer, several of the commissioners and one of the attorneys of the district testified over appellants objections that after the bids were opened and before the contract was awarded and executed, it was stated to the bidders that the successful bidder would be expected to advance $3,000 for payment of preliminary expenses of the organization of the district.

Dr. Butler stated he was a commissioner and was present when the bonds were sold to Gunter & Sawyers and Gunter & Sawyers were required to put up $3,000 for faithful performance. "And then we decided that we would have them put up Three Thousand Dollars for preliminary work. We did not have any money, and could not do anything." We notified Mr. Gunter to that effect and they agreed to advance it. When the contract was afterwards drawn up and presented to me for signature, I refused to sign it, because it didn't have the $3,000 in it, but the rest of them signed it.

Appellant tried to make arrangements to get $3,000, provided we signed a note. The case was then in court. During all this time, the case was in the Supreme Court, and it is true Mr. Gunter said we could have our money as soon as the case was decided, but we wanted $3,000 then, and if the case was lost it was simply their risk as the district would not have paid it back, for they were just taking chances when they offered it to us.

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West stated he was present when Mr. Gunter was asked if he would furnish $3,000 for preliminary expenses and he replied it was all right, and the contract was let with that understanding and he did not furnish it. Gunter said he was awaiting the Supreme Court's decision.

The secretary of the board stated he kept the minutes, that at the letting of the contract there was something said about whoever got the contract should furnish the board $3,000, he did not know whether the matter was brought to Mr. Gunter's attention or how it was discussed, but Mr. West presided and made the remark and asked each bidder about it, but did not know whether this was before or after the bids were opened, but it was before the contracts were awarded. That he was present when the contract was abrogated; that he went to see Mr. Gunter once about the $3,000, that they went to the Southern Trust Co. and Mr. Vinson told us he would let us have the money, but he did not do it and I advised the board if the Supreme Court knocked it out, they would be liable for it personally. He said at the time he would let us have the money. The case was then in the Supreme Court. We abrogated the contract with Gunter before the Supreme Court passed on the validity of the organization of the district.

All the testimony relating to conversations between Mr. Gunter of appellant firm and the commissioners with reference to the contract sued on made prior to the execution and delivery of it, was objected to and exceptions saved to the rulings thereon, and appellant then moved that all such evidence be stricken from the record and withdrawn from the jury, which motion was overruled and exception saved. From the judgment against appellants, this appeal was duly prosecuted.

*Chas. Jacobson*, for appellants.

All testimony to show that the successful bidder would be required to pay $3,000.00 before the contract

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would become operative and binding, was incompetent, because its effect was to vary and contradict the written contract entered into by the parties. The principle is thoroughly established that "Antecedent propositions, correspondence and prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject matter of such antecedent negotiations, when it is free of ambiguity and complete." 83 Ark. 283; 104 Ark. 488. See, also, 82 Ark. 219; 99 Ark. 223; 71 Ark. 408; 91 Ark. 383; 2 Page on Contracts, 1822, § 1190; 97 Tenn. 469; 37 S. W. 543.

In the Whittaker case, 100 Ark. 360, relied on by appellee, the parol evidence was admitted, not to add to or vary the terms, but to show that the contract was not actually entered into, and the court in that case said, p. 365: "A written contract, actually entered into, which is unconditional in its terms, cannot be varied by parol testimony, which tends to add a condition as one of the terms of the contract. But parol testimony is admissible to show that a written instrument was not signed or delivered as a concluded contract," etc.

*E. M. Ross* and *H. K. Toney*, for appellee; *Nathan T. Nall*, on the brief.

The question of admissibility of parol testimony to show that a written instrument was not signed or delivered as a concluded contract but was only signed and delivered to be held pending the happening of a contingency or the performance of some condition, is well settled contrary to the contention of appellants.

The testimony complained of by appellants was not introduced to vary or contradict the terms of the written contract, but to show that it was signed and delivered conditionally, *i. e.*, to be held pending the payment of the $3,000.00 for preliminary expenses. 82 Ark. 219, cited by appellants, is clearly against their contentions and supports the position of the appellees, also 128 U. S. 590-595, therein cited. See also 99 Ark.

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223; 55 Ark. 115; 88 S. W. 899; 88 Ark. 383; 100 Ark. 360.

KIRBY, J. (after stating the facts). It is contended for appellants that the court erred in allowing the introduction of the oral testimony to vary and contradict the terms of the written contract for the sale of the bonds and the contention must be sustained.

It is admitted that the bid was submitted and the contract as set out for the purchase of the bonds duly executed by the parties and it is not claimed that there was any fraud in its procurement and cannot be claimed that there is any uncertainty or ambiguity in its terms. The oral testimony was contemporaneous with the making of the contract, which was written and executed thereafter and makes no mention even of any agreement on the part of appellants to furnish $3,000 for expenses of preliminary work and Mr. Gunter of appellant firm denies that there was any such agreement although he admits that afterwards when the commissioners desired an advance of that sum he was willing to procure and furnish it upon the execution of such a note by them as would be satisfactory.

(1) Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument (1 Greenleaf on Evidence, Sec. 275) and as said in *Barry-Wehmiller Machine Co.* v. *Thompson*, 83 Ark. 283, "Antecedent propositions, correspondence and prior writings, as well as oral statements and representations are deemed to be merged into the written contract which concerns the subject matter of such antecedent negotiations, when it is free of ambiguity and complete." See also *D. K. & S. Rd.* v. *M. & N. A. Rd.*, 104 Ark. 488.

It is true it has been held that parol evidence is admissible to explain an indefinite term in a written contract, to add to a written contract some term or provision where the writing on account of fraud or mistake does not contain all of the contract. "But where the written contract is plain, unambiguous and com-

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plete in its terms, it has been uniformly held by this court, that parol evidence is not admissible to contradict, to vary or to add to any of its terms." *Cox* v. *Smith*, 99 Ark. 218; *Collins* v. *Southern Brick Co.*, 92 Ark. 504; *Lower* v. *Hickman*, 80 Ark. 505; *Johnson* v. *Hughes*, 83 Ark. 105.

(2) The written contract sued on is complete in its terms and unambiguous and appellees by said parol contemporaneous evidence attempted to engraft another provision or condition upon it and then forfeit the contract for appellant's alleged failure to comply with such provisions not embraced and included in the contract, which was executed and delivered after the discussion of this matter, according to their statement, and which contains no mention even of it.

Such provision would be an addition to the written contract and vary its terms and the testimony relating thereto was incompetent and the court erred in permitting its introduction.

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

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## WESTBROOK GRAIN & COMMISSION CO. *v.* RICE.

Opinion delivered October 23, 1916.

1. PRINCIPAL AND AGENT—AGREEMENT AS TO SALARY—CHANGE IN DUTIES—PRESUMPTION.—Where appellee was employed by appellant at a definite salary, in the absence of any further agreement in regard to salary, although appellee's place of employment was changed and additional duties placed upon him, it will be presumed that he continued his employment at the original salary.
2. PRINCIPAL AND AGENT—CHANGE OF AGENT'S DUTIES—SALARY.—In the absence of an express agreement, a change or addition in the duties of an agent or employee, will not require the employer to pay the employee an increased salary.

Appeal from Jefferson Chancery Court; *J. M. Elliott*, Chancellor; reversed and dismissed.

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*Crawford & Hooker*, for appellant.

The courts will not make contracts for parties who are *sui generis* and on an equal footing. Before the court could have been justified in fixing appellee's compensation on a *quantum meruit* basis proof should have been made, and the burden of proof rested on appellee, that there had been no contract fixing his compensation.

*Nixon & Levine*, for appellee.

Counsel discuss the evidence and conclude that the chancellor was justified in finding that there was no definite salary, nor any basis for determining the salary, agreed upon by the parties, and that the salary fixed by the court upon a *quantum meruit* was supported by the evidence. There is nothing in this case to justify a deviation from the rule that the findings of a chancellor on questions of fact will not be disturbed unless clearly contrary to a preponderance of the evidence.

SMITH, J. Appellee brought this suit to restrain appellant from interfering with the business of the City Feed Company, and alleged in his complaint that he was the owner thereof, having purchased the business from appellant, who, notwithstanding the fact that he had sold the business to appellee, claimed to be the owner thereof and was attempting to oust appellee from its control and management. Before the submission of the cause there was an amendment to the complaint in which appellee prayed, if the court should find that he was not the owner of the business, that additional compensation be allowed him for his services during the time it had been under his management.

Appellant denied appellee's ownership or his right to additional compensation.

Appellee was employed by appellant's father for five years and was employed by appellant himself after he succeeded his father in the control of the business for a period of about two years, and until the time of the

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institution of this suit. The Westbrooks had been engaged in both the wholesale and retail business, which was conducted as a single enterprise, but when appellant succeeded to its management he separated his retail business from his wholesale business, and put appellee in charge of this retail business, which was thereafter conducted under the name of the City Feed Company. Upon taking charge of this business appellee executed to the order of the Westbrook Grain & Commission Company, which was the name under which the wholesale business had been and was thereafter conducted, a note for $7,900.00. This note was signed by appellee as manager, and appears to represent the stock of goods on hand and other charge items which the retail business owed the wholesale business. Thereafter, there was a complete severance of the business of the two concerns, and appellee was left in sole charge of the retail business.

The court found there had been no sale of the retail business to appellee, and also found that there was no agreement fixing his salary, and that the fair and reasonable value of his services was $200.00 per month and rendered judgment accordingly, and appellant alone has appealed from this decree.

Prior to being put in charge of the retail business appellee had been paid a salary of $125.00 per month and he gave the following testimony concerning its increase. "Q. What salary did you draw there as manager of the City Feed Company? A. A salary; I drew $125.00 a month. Q. You had been drawing that before as an employee of the Westbrook people, had you not? A. Yes, sir. Q. And you continued to draw it after you were manager, did you not? A. Yes, sir. Q. You have drawn that up until the time of the filing of this suit? A. Yes, sir, I drew $135.00 a month. Q. Under an agreement with Mr. Westbrook or just on your own motion? A. Yes, sir, on my own motion. Q. At the time you purchased this property you think you drew out of the business a hundred and thirty-five dollars a month? A. Yes, sir, a hundred

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and thirty-five. Q. When he put you in charge of the business in June did he tell you then what he agreed to pay you? A. No, sir. Q. Did he ever in his life, when he put you in charge, or at any other time, ever come to any agreement about how much he would pay you? A. No, sir; he never did; the business went right on after his father's death. Q. Never did have any stipulated price after you took charge, and assumed responsibility of the business? A. No, sir." In other portions of his testimony he stated an increase of salary was promised if the businesses were profitable and the business had proven profitable.

Appellant testified as follows: "Q. At the time that Mr. Rice was drawing $125.00 a month; at the time he took charge of the business; was anything said about an increase in salary? A. Mr. Rice asked me what I thought it would be worth up there, and I told him just continue along like we had been, and if the business justified it, we would be willing to grant him an increase in salary; something was said about that the business would show something like five or six thousand dollars profit a year, and I told him if it did and the figures show up that way, we would be glad to increase his salary. Q. But nothing was definitely decided on? A. Nothing except that he was to continue at the salary he was getting, that was definitely fixed. Q. So, if the business made good, you would give him a raise of salary? A. I said we would discuss the question, if the profits showed an increase of five to six thousand dollars a year."

He denied that the business showed this increase, and stated that there was no other conversation or agreement in regard to any increase in the salary, and that he did not know that appellee was taking credit for any larger amount than $125.00 per month and that appellee's action in crediting himself with $135.00 a month was done without his knowledge or consent.

We think this evidence does not warrant the court's finding. This is not the case of one man entering another's service without any agreement as to com-

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pensation. In such a case the court might inquire the value of similar services and award compensation *quantum meruit*. Here appellee had been employed for five years at a definite salary, and in the absence of any agreement in regard to salary the presumption would be that he continued his employment at the same salary notwithstanding he changed his place of employment and assumed some additional duties. Appellee says there was no agreement except as above stated and we think the finding that the prior contract was rescinded and a new one implied is contrary to the preponderance of the evidence. And the fact that appellee may have earned a larger salary and expected to receive a larger salary would not support a recovery therefor unless there was some agreement, either expressed or implied, on appellant's part to pay it.

The decree of the court below is, therefore, reversed and the cause dismissed.

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## ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* MURPHY.

### Opinion delivered October 23, 1916.

1. RAILROADS—INJURY TO PERSON CROSSING TRACKS—"LOOKOUT STATUTE"—CONTRIBUTORY NEGLIGENCE.—The duty of either a traveler or trespasser to exercise care for his own safety when crossing railway tracks is not changed by Act 284 of Acts of 1911, known as the "Lookout Statute."

2. RAILROADS—INJURY TO PERSON CROSSING TRACKS—DEFENSE OF CONTRIBUTORY NEGLIGENCE—EFFECT OF LOOKOUT STATUTE.—Contributory negligence on the part of a traveler or trespasser, is a valid and sufficient defense to a suit for damages for injuries sustained at a railway crossing, unless, notwithstanding the contributory negligence, the operatives of the train discover or, in the exercise of ordinary care, should discover the presence and peril of the person injured in time to avoid injuring him by the exercise of reasonable care.

3. DAMAGES—PERSONAL INJURIES—DAMAGE TO PROPERTY—AMOUNT.—Appellee was struck by one of defendant's engines while driving across defendant's tracks. *Held*, where one mule, valued at $225.00, was killed, the wagon valued at $70.00, was demolished, appellee incurred a doctor's bill of $75.00, and sustained injuries causing much

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pain, confining him to his bed, rendering him unable to work for a month, and caused an impairment of his capacity to labor, a verdict for $1,150.00 is not excessive.

Appeal from Pulaski Circuit Court; Third Division. *G. W. Hendricks*, Judge; affirmed.

*Edw. A. Haid, F. G. Bridges and W. T. Wooldridge*, for appellant.

1. The court erred in refusing to submit to the jury the duty of a traveler at a public railroad crossing or the question of his negligence in that regard. The amendatory act to the lookout statute, Acts 1911, p. 275, does not relieve a traveler from the duty to stop, look and listen for the approach of a train at a railroad crossing. 112 Ark. 542, 460; 117 Ark. 457, 463, 464; 78 Ark. 355; 118 Ark. 36, 41.

2. The judgment is clearly excessive.

*Geo. F. Jones* and *R. L. Floyd*, for appellee.

The court's instructions follow the law as recognized by this Court in practically every case tried here on appeal since the amendment to the lookout statute. If there was any negligence on the part of appellee, which is not conceded, this would not relieve appellant of liability, if they failed to keep a lookout as provided under the law, and, had such lookout been kept, they could, by the exercise of ordinary care, have avoided injuring appellee. 113 Ark. 353; 112 Ark. 401; 110 Ark. 444; 116 Ark. 514; 123 Ark. 94; 108 Ark. 327, 334.

SMITH, J. Appellee recovered judgment for damages to compensate an injury sustained by him as a result of a collision between one of appellant's switch engines and his wagon in which he was driving at the time. The collision occurred at a crossing near the city of Argenta and as a result of it, in addition to his own injury, one of appellee's mules was killed and the other was injured and his wagon demolished. There was a judgment at the trial below in appellee's favor for $1,150.00, and appellant now says that, not only

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should no recovery whatever have been permitted, but that the recovery was for an excessive amount.

Appellant chiefly complains of the action of the court in refusing to charge the jury upon the subject of appellee's contributory negligence, and sets out in its brief a correct declaration of the law on this subject as it has been announced in many opinions of this court.

(1-2) There is nothing in Act No. 284 of the Acts of 1911, page 275, commonly known as the "Lookout Statute," which changes the duty of either a traveler or a trespasser to exercise care for his own safety when crossing or when upon the railroad tracks, as that duty has been frequently declared by this court. And contributory negligence on the part of the traveler or the trespasser is still a valid and sufficient defense to a suit for damages for an injury unless—notwithstanding this contributory negligence—the operatives of the train discover or, in the exercise of ordinary care should discover, the presence and peril of the person injured in time to avoid injuring him by the exercise of reasonable care after the discovery of such peril.

The operatives of the train testified that appellee drove his wagon upon the track at the crossing so near the engine that the engineer and fireman in charge thereof did not see and could not have seen the wagon in time to avoid striking it and at appellant's request the court gave an instruction numbered 4 which reads as follows:

"If you believe from the evidence that the wagon and team in which plaintiff was riding came so suddenly upon defendant's track at the crossing and so near the switch engine that the engineer and fireman in charge of said engine did not see and could not have seen the perilous position of such wagon and team by the exercise of ordinary care to have stopped the train in time by the exercise of ordinary care to have prevented the engine from striking such wagon and team and causing plaintiff's injury, then your verdict should be for the defendant."

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Appellant is, therefore, in no position to complain of the action of the court in refusing to charge upon the question of appellee's contributory negligence. Under the instructions set out above that question passed out of the case. The instruction told the jury to find for the railroad company unless the engineer and fireman saw or could have seen the perilous position of the wagon in time to have stopped the train and to have prevented the collision and if the peril was so discovered then it was no defense that appellee was guilty of negligence contributing to his injury.

Other instructions in the case, including those given at appellee's request, predicate the right of recovery upon the fact that appellee's presence and peril were discovered or, in the exercise of ordinary care, could have been discovered in time to have avoided his injury by the exercise of reasonable care thereafter, and no error was committed, therefore, in refusing to declare the law upon an immaterial question.

(3) We are unable to say that the damages awarded are so excessive that we must reduce the judgment. Appellee testified that his mule which was killed was worth $225.00, and that his wagon cost him $70.00, and that he incurred a doctor's bill of $75.00, and sustained injury to his side and back which caused him much pain and confined him to his bed for ten days and rendered him unable to do any work for a month, and had caused an impairment of his capacity to labor from which he was still suffering to some extent.

The judgment of the court below is, therefore, affirmed.

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## BAIRD v. BRAY.

Opinion delivered October 23, 1916.

1. MUNICIPAL CORPORATIONS—DRUMMING FOR HOTELS, ETC.—POLICE POWER.—A city ordinance prohibiting the owners or proprietors of hotels, rooming or boarding houses, etc., from drumming or soliciting upon the streets of the said city, except within certain defined limits, is a valid exercise of the power given to municipal corporations in Kirby's Digest, § 5438.

2. MUNICIPAL CORPORATIONS—POLICE POWER—ENFORCEMENT.—A city has the power to prevent the evasion of the provisions of an ordinance, authorized by the Legislature.

Certiorari to Garland Circuit Court; *Scott Wood*, Judge; affirmed.

*James E. Hogue*, for petitioner.

The ordinance is void, being in conflict with the State Constitution, Art. 2, Sec. 18, and with the 14th Amendment of the Federal Constitution. It is also in direct conflict with that part of Section 5438, Kirby's Digest, which provides that "Any *bona fide* owner or proprietor of any hotel or boarding house may solicit patronage to his hotel or boarding house without being required to wear a badge or pay license therefor."

*A. J. Murphy*, for appellee.

The statute, Kirby's Dig., § 5438, authorizes the city council to regulate soliciting to hotels, etc., by owners and proprietors as well as to regulate soliciting by hired drummers, the only exceptions in favor of owners being that they may not be required to wear badges or to pay license.

The presumption is that the council are the best judges of the enactment of the law, in the light of their familiarity with the mischief to be remedied. 64 Ark. 152. And unless it is void on its face, or the proof shows that it is an unreasonable regulation, the Court will presume that it is reasonable. 52 Ark. 312. See also 84 Ark. 522; 85 Ark. 465. The ordinance is not in conflict with Sec. 18, Art. 2, State Constitution, nor

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with the 14th Amendment, but is a proper exercise of police power. 85 Ark. 465.

MCCULLOCH, C. J. The petitioner, Dick Baird, was arrested for violation of an ordinance of the City of Hot Springs regulating drumming by proprietors of hotels, rooming houses, etc. A fine was imposed by a judgment of the police court, and petitioner obtained from the judge of the circuit court a writ of *habeas corpus* to inquire into the legality of his imprisonment under the judgment of conviction. The case was heard by the circuit judge on the return of the writ, and an order was made remanding the petitioner to the custody of the chief of police. The judgment is brought here, on certiorari, for review.

An attack is made on the validity of the ordinance, and that is the only question that we can consider, for we must indulge the presumption in this proceeding that there was evidence sufficient to sustain a finding as to a violation of the ordinance in question.

The ordinance reads as follows:

"Section 1. That hereafter it shall be unlawful for any owner or proprietor of any hotel, rooming house, boarding house, furnished apartment, or furnished cottage, to drum or solicit for his or her hotel, rooming house, boarding house, furnished apartment or furnished cottage on the streets of the city of Hot Springs, Arkansas, or in other public places except as hereinafter provided.

"Sec. 2. It shall be lawful for any one owner of a hotel, rooming house, boarding house, furnished apartment or furnished cottage to drum or solicit for his or her hotel, rooming house, boarding house, furnished cottage or furnished apartment at any place on the streets of the said city of Hot Springs, Arkansas, within fifty feet of his or her hotel, rooming house, boarding house, furnished apartment or furnished cottage.

"Sec. 3. Any soliciting or drumming as aforesaid at any place outside the fifty feet as aforesaid shall constitute a misdemeanor and any person convicted

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thereunder shall be fined in any sum not less than ten dollars, nor more than twenty-five dollars.

"Sec. 4. The word to 'drum' or to 'solicit' as used in this ordinance shall be construed to mean any word, deed, or act or acts, whereby such persons shall endeavor to persuade, induce, influence, or prevail upon any stranger or person who does not reside in this city to patronize any hotel, rooming house, lodging house or furnished apartment in this city or to visit any such hotel, rooming house, lodging house or furnished apartment with a view of patronizing or stopping at same."

The authority of the city of Hot Springs to pass the ordinance in question must be found, if at all, within the scope of the legislative delegation of power to municipal corporations "to regulate drumming or soliciting persons who arrive on trains, or otherwise, for hotels, boarding houses, bath houses or doctors; to license such drummers, and to provide that each drummer shall wear a badge plainly exposed to view, showing for whom and for what he is drumming or soliciting patronage, and to punish by fines any violation of this provision; provided, that any *bona fide* owner or proprietor of any hotel or boarding house may solicit patronage to his hotel or boarding house, without being required to wear a badge or pay license therefor." Kirby's Digest, Sec. 5438.

It will be observed that the ordinance under consideration is directed at the owners or proprietors themselves. Whether or not it also includes hired drummers, we need not stop to inquire. We assume, however, that there is another ordinance of the city regulating mere drummers, that is to say, those who are not owners or proprietors, but who act as drummers or solicitors for the owners, and regulating them and requiring them to procure license and wear a badge.

It is contended that the city had no authority under the statute to regulate drumming or soliciting

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by the owner or proprietor of a hotel or boarding house, etc. The decision of this court in *Taylor* v. *Moore*, 99 Ark. 412, seems to be against that contention, for the ordinance there was directed at proprietors of hotels and we held that it was a valid ordinance. It will be observed that the statute confers the power generally to regulate drumming for hotels, bath houses and doctors, and then follows the authority to license such drummers and to require each of them to wear a badge. The proviso which then follows in the statute is that the owner or proprietor of any hotel or boarding house may solicit patronage to his hotel without being required to wear a badge or pay a license The exception in the statute in favor of the owner or proprietor does not reach to the power of regulation, but merely forbids any requirement that he shall obtain a license or wear a badge.

The lawmakers evidently intended to confer upon municipalities the power to regulate soliciting patronage for hotels and boarding houses even by the proprietors themselves, but that in addition to that, those who are not owners may be required to obtain a license and wear a badge. It was thought unwise or unnecessary to impose that burden upon owners themselves, but the Legislature intended to confer a power to regulate in other respects. We are of the opinion that the ordinance in question falls clearly within the scope of the authority conferred by the Legislature and that it is not an unreasonable exercise of the power conferred. The activities of the owners of hotels in soliciting for their business is, indeed, restricted within very narrow bounds under this ordinance, but it must be remembered that the ordinance only undertakes to regulate soliciting on the streets or in any public places of the city, and the owner is not allowed to solicit in those places except within fifty feet of his own hotel or boarding house.

We decided in *Williams* v. *State*, 85 Ark. 464, that it was a proper matter of police regulation to prohibit

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drumming on the trains, for the reason that those places constituted public ways, and it was within the power of the Legislature to protect travelers from the importunities of drummers. The decision of this court, construing that statute and upholding it, was affirmed by the Supreme Court of the United States (217 U. S. 79). For the same reason we ought to uphold the power of the Legislature to protect travelers on the streets and in other public places from such annoyances. If the Legislature possesses such power itself, it may delegate it to the municipalities, and we think it has done so in this instance.

The statutory authority to regulate is confined to drumming or soliciting "persons who arrive on trains or otherwise," and in *Taylor* v. *Moore*, *supra*, we said that it was not intended to regulate drumming or soliciting generally for hotels. We construed the ordinance then under consideration to apply only to those arriving on trains, and the ordinance now before us may be so interpreted. We think, however, on further consideration, that the language just referred to was unnecessary to the decision and perhaps went beyond what we ought to have said concerning the power of regulation under this statute. While it was the clearly expressed purpose of the Legislature to confer authority to regulate only the business of soliciting "persons who arrive on trains or otherwise," yet it must be implied that the municipality may do whatever is necessary in order to carry out that purpose. There might be found no other way to prevent evasions of the law, and we are therefore of the opinion that an ordinance prohibiting the owners or proprietors from soliciting upon the streets is a valid exercise of the power, for it does in fact prevent evasions of the regulation and obviates the necessity of proving in every instance that the particular person solicited is a new arrival. The power to prevent evasions of authority expressly conferred must be implied. *State* v. *Brewer*, 114 Ark. 149; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31.

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Our conclusion is, therefore, that the ordinance in question is valid, and that the judgment of the circuit judge in refusing to release the petitioner on the hearing of the *habeas corpus* was correct.

Affirmed.

KIRBY, J, dissents.

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## KANSAS CITY SOUTHERN RY. CO. *v.* LESLIE, ADMR.

Opinion delivered October 23, 1916.

1. APPEAL AND ERROR—AMENDMENT TO COMPLAINT—REVIEW OF DISCRETION.—A trial court has a large discretion in permitting amendments to be made to pleadings, which will not be controlled, unless it is clearly shown that the discretion has been abused.
2. DAMAGES—WRONGFUL DEATH—RULE FOR ASSESSING DAMAGES.—In an action against a railway company to recover damages for the negligent killing of the deceased, *held*, the jury was properly instructed on the question of damages for deceased's pain and suffering, and on the right of his widow and child as to their pecuniary loss.
3. TRIAL—ACTION FOR WRONGFUL DEATH—ARGUMENT.—In an action against a railroad company for damages growing out of the negligent killing of the deceased, it is not error to fail to exclude argument of counsel in which he merely expressed his opinion of the case made out by the testimony.

Appeal from Little River Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

*James B. McDonough*, for appellant.

1. The court erred in permitting the plaintiff to amend his complaint so as to charge concurrent negligence, after plaintiff had closed his evidence and after defendant had filed a motion to require the plaintiff to elect upon which cause of action or act of negligence he would rely.

There is no evidence tending to establish any act of negligence, unless it be the absence of end handholds on the refrigerator car, and the absence of additional handholds on the tank car, and there is, in fact, no proof of negligence in that respect. The ruling of the Court, therefore, in the presence of the jury,

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authorizing the plaintiff to allege concurring negligence, and that all the acts of negligence concurred in producing the death, was tantamount to a declaration by the Court to the jury that there was some evidence on each allegation in the complaint, and was reversible error.

2. The Court erred in its instruction, numbered 10, on the measure of damages, because (1) It leaves the jury without a guide as to the finding on the subject of conscious pain and suffering. (2) It authorizes the jury to find a lump sum in favor of the widow and child, and then to apportion that sum.

The measure of damages as to the child is different from that of the mother. Under the decisions of the Supreme Court of the United States the widow and child are only entitled to recover upon their actual pecuniary loss. The instruction does not so limit their recovery. 238 U. S. 599; 227 U. S. 59; *Id.* 145; 228 U. S. 173; 232 U. S. 248; 235 U. S. 625.

3. The court erred in refusing to exclude from the jury's consideration that part of the argument of plaintiff's counsel to the effect that zinc car should have been put in some other part of the train. There is no testimony whatever in the record upon which to base such an argument. 82 Ark. 562; 81 Ark. 231; *Id.* 25; 87 Ark. 515; 89 Ark. 58; 103 Ark. 356; 104 Ark. 94.

*W. P. Feazel*, for appellee.

1. The allowance of amendments to pleadings lies within the discretion of the trial court, and is not a ground for reversal unless it affirmatively appears that there has been an abuse of that discretion. 104 Ark. 276.

2. The court's instruction on the measure of damages has not been expressly passed on by this court, but it conforms in every particular to the opinion of the Supreme Court of the United States. 238 U. S. 844; 227 U. S. 145; 22 U. S. 173; 232 U. S. 248; 235 U. S. 625; 237 U. S. 648.

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3. There is no merit in the objection to counsel's argument. He had the right to express his opinion in his argument to the jury as to the duty of appellant in making up its train. 76 Ark. 286; 93 Ark. 564; 96 Ark. 547; 76 Ark. 39.

KIRBY, J. This is the second appearance of this case in this court, it having heretofore been appealed from the judgment rendered against the railway company and affirmed by an opinion in 112 Ark. 306, where a sufficient statement of it appears. It was taken on a writ of error to the Supreme Court of the United States, where the judgment was reversed for error in the giving of instruction number 10, and remanded for further proceedings. 238 U. S. 599. That court in its opinion said: "Three substantial assignments of error demand consideration," and after reviewing and deciding that said assignments 1 and 2 were without merit, sustained the third assignment relative to the rule for the measure of damages recoverable, and reversed the case for the giving of instruction No. 10.

Upon the trial anew, virtually the same testimony was introduced, the error indicated being avoided by another instruction and from the judgment recovered against it, the railway company prosecutes this appeal, stating in its brief: "The evidence in this case is substantially the same as it was at the former trial, with some slight changes each way. There may be some little difference in the testimony of A. C. Holt, and also in the testimony of one or two others, but that difference is not sufficient to take the case to a jury. The suit is one under the Federal law. It is a Federal question, as to whether or not the facts shown in the record establish a cause of action under the Federal law. Therefore, in deciding that question, it is respectfully submitted that the court must follow the decisions of the Federal courts.

"For several reasons which are given below, it is respectfully submitted that under the construction of

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the Federal Employers' Liability Act, as made by the Federal courts, there can be no recovery in this cause."

Many errors are assigned which we do not consider because of their having been determined adversely in the former decision, to appellant's contention.

(1) It is insisted now that the court erred in permitting the amendment of the complaint by appellant, in giving instruction No. 10 on the measure of damages, and in allowing an improper argument by appellee's counsel. At the conclusion of the introduction of appellee's testimony, appellant moved the court to require him to elect upon which allegation of negligence he relied for recovery, and thereupon he amended his complaint by leave of the court, by adding to the allegations of the second paragraph "That all the acts of negligence hereinbefore complained of either concurring or single, were the approximate cause of defendant's fall, injury and death." It is not shown wherein any prejudice resulted by permitting this amendment, it not being claimed that appellant was surprised thereby or did not have all of its witnesses available to meet and refute the allegations of the complaint. The court has large discretion in granting or permitting amendments of the pleadings, which will not be controlled unless it is shown that its discretion has been clearly abused, which is in no wise apparent here. *American Bond. Co.* v. *Morris*, 104 Ark. 276.

(2) The instruction complained of, No. 10, reads as follows:

"If you find for the plaintiff on the deceased's cause of action, that is for the conscious pain and suffering he endured, if any, by reason of the injury, you will assess the damages in a separate verdict on this element of recovery at such a sum as you find from the testimony would be a fair and just compensation for the conscious pain and suffering which you find from the testimony the deceased underwent on account of the injury, from the time of the injury to his death. And if you find for the plaintiff on the question of

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financial loss to the widow and child by reason of the deceased's death you will assess the damages in a separate verdict on this element of recovery at such a sum as you find from the evidence would be the present worth of what the deceased would have reasonably contributed to them in a financial way had he lived, limiting the child's right of recovery under this element to such a sum as you find would be the present worth of what the deceased would have contributed to it in a financial way up to the time it arrived at its maturity and the widow's recovery under this element to such a sum as you find from the evidence would be the present worth of what the deceased would have contributed to her in a financial way during his life. You may assess the damages under this element of recovery if you find for the plaintiff, in a lump sum, but when you have done so, if you do, you will then apportion the same between the widow and child, giving the child such a sum as you find from the evidence would be the present worth of what the deceased should have contributed to it in a financial way up to the time it reached its majority, and to the widow such a sum as you find from the evidence would be the present worth of what the deceased would have contributed to her in a financial way had he lived, during his life."

It is insisted that this instruction furnishes no guide to the jury for assessing damages on the subject of pain and suffering and does not base the right of recovery for the widow and child upon their actual pecuniary loss, and that it is contrary to the rule for measuring damages as laid down by the Supreme Court of the United States.

We do not agree to this contention, and if the error had been called to our attention on the first appeal, there had been no need for taking the case to the United States Supreme Court for its correction, but we think the instruction as given is in conformity to the rule for the measurement of damages as announced by said court, and that there was no error

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committed in giving it. *K. C. Sou. Ry. Co.* v. *Leslie*, 238 U. S. 599; *Mich. Cent. Ry. Co.* v. *Vreeland*, 227 U. S. 159; *G. C. & S. F. R. R.* v. *McGinnis*, 228 U. S. 173; *N. C. R. R. Co.* v. *Zachary*, 232 U. S. 248; *Norfolk & Western R. R.* v. *Holbrook*, 235 U. S. 625; *St. L., I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648.

(3) It is next contended that the court erred in not excluding from the jury the argument of appellee's counsel that the zinc car should have been put in some other part of the train, back with the other tank cars near the caboose.

The court upon objection being made to this argument said: "The jury has heard the testimony as to the arrangement of these cars, and it is for them to determine whether or not defendant exercised ordinary care in the making up of that train. They will determine that fact from the testimony," which remark was also excepted to.

Appellant insists there was no testimony in the record upon which the argument could be based and that the court should have excluded it on that account. It does not pretend to be a statement of a fact outside the record, but is only an argument or reason of appellant's counsel, upon the facts as presented in evidence, that if this car had been with the others of like kind there would have been one less instance requiring the employees to go up and down from a higher to a lower or flat car upon the ladders and grab irons provided for such purpose.

It was only counsel's view of the matter, upon the condition existing and the case as made by the testimony, or expression of his opinion thereon in argument, and no error was committed in the court's ruling. *Byrd* v. *State*, 76 Ark. 286; *Reese* v. *State*, 76 Ark. 39; *St. L., I. M. & S. R. Co.* v. *Rogers*, 93 Ark. 564; *St. L., I. M. & S. R. Co.* v. *Evans*, 96 Ark. 547.

Appellant files an additional voluminous brief in reply to appellee's motion to advance and affirm, and points out with great particularity certain differences in the testimony of witnesses as introduced

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at the last trial, but after a careful review of the whole record, we do not regard such differences as sufficiently important and material as to require different rulings by this court to those made on the former appeal, but rather agree with appellant's counsel in his said statement that the testimony is substantially the same as at the former trial, with some slight changes each way that are not material.

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

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## THE G. F. HARVEY COMPANY v. HUDDLESTON.

Opinion delivered October 30, 1916.

1. EXECUTIONS—FAILURE TO LEVY—LIABILITY OF CONSTABLE.—Kirby's Digest, § 3286, penalizing a constable for failure to levy an execution, is highly penal, and the party seeking to enforce the penalty, must bring himself within both the letter and the spirit of the statute.
2. EXECUTIONS—FAILURE TO LEVY—DEFENSE OF CONSTABLE.—An officer can defend against a violation of the provisions of § 3286 of Kirby's Digest, when sued by the plaintiff in execution, by showing that his omission to perform the duty was due to the conduct or instructions of the plaintiff or of his attorney of record.
3. EXECUTIONS—CONTROL BY PLAINTIFF.—The plaintiff, having obtained a judgment, controls his own execution, and he cannot first disarm the officer, and then hold him liable for not executing the writ in accordance with the statute.

Appeal from Pike Circuit Court; *Jefferson T. Cowling*, Judge; affirmed.

*W. T. Kidd*, for appellant.

The court erred in not giving a peremptory instruction in favor of the appellant. The constable's failure to make a return on the execution rendered him and his bondsmen liable for the amount of money specified in such execution. Kirby's Digest, Sec. 3286.

Conduct of the plaintiff which falls short of showing that the non-return of the execution resulted from his acts and instructions, is not sufficient to excuse the

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officer. 47 Ark. 373-8; 22 Ark. 524. Failure to make the return within the time required by the statute is a palpable dereliction, and there is no escape from the plain mandate of the law. 118 Ark. 271. An agreement by plaintiff that the sale of property levied on, be postponed, does not excuse the officer for failure to make a return. 35 Cyc. 1725; 95 Tenn. 424.

Instruction number one given by the court was misleading—there being two issues involved. 112 S. W. 956.

*W. S. Coblentz*, for appellee.

There was sufficient evidence to justify the submission of the case to the jury. 87 Ark. 614.

The execution is the property of the judgment creditor and is at all times subject to his control. He in person, or by his attorney or agent, may direct the officer, not to levy, stop the sale or not to make return of the execution. 74 Ark. 416; 97 Ark. 149.

The evidence justified submitting to the jury the issue whether the language and action of the attorney for the judgment creditor was such as to lead the officer to infer that it made no difference whether the execution was returned or not. 87 Ark. 625; 89 Ark. 111; 74 Ark. 16; 70 Ark. 136; 51 Ark. 467; 67 Ark. 47; 74 Ark. 478.

Instruction numbered one correctly stated the law, the issues not being in conflict.

A general objection will not reach an error in the form of an instruction, and can only be reached by a specific objection setting out the things complained of. 76 Ark. 348. Objections to instructions, going to their form rather than substance should be specially made below in order to be reviewable. 146 S. W. (Tex.) 624. Where instructions are conflicting, the party aggrieved thereby should call the court's attention specifically, general objections being insufficient. 101 Ark. 376.

HART, J. The G. F. Harvey Co. sued N. N. Huddleston, as constable, and the sureties on his bond, for

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his neglect or refusal to execute or levy an execution, and also for failing to make a return on said execution on or before the return day therein specified. The constable and his sureties answered admitting that the execution came into the constable's hands, and the failure to levy or make a return, and as a defense to the action claim that the failure to levy and the non-return of the execution resulted from the act or instructions of the plaintiff's attorney. The material facts are as follows:

The plaintiff, the G. F. Harvey Company, is a corporation organized and doing business under the laws of the State of New York. It recovered a judgment against J. R. Neel in Pike County, Arkansas, and had execution issued thereon. The execution was placed in the hands of N. N. Huddleston, a constable in said county, by the attorney of the plaintiff.

Huddleston testified that the plaintiff's attorney told him to levy on some pool tables; that he went over to make the levy and Neel told him not to levy on them; that there was a prior lien on them. That Neel asked him to wait a few days until he could sell the pool tables and that he told him he could not do that; that he told Neel to see the plaintiff's attorney and that if it was all right with him he would wait; that Neel went off to look for plaintiff's attorney; that he then met plaintiff's attorney and was told by him that it was all right to hold up the execution; that plaintiff's attorney never gave him any further instructions after he told him to hold up and not make the levy.

Before the trial Neel had left the State and it was admitted that if Neel were present he would swear that plaintiff's attorney told him that the constable was instructed to levy on the pool tables; that there was a lien on the pool tables and that they were not subject to execution; that such information was communicated to the attorney for the plaintiff, who then told the constable to hold up on the execution. On the other hand the attorney for the plaintiff denies that he told the constable to hold up on the execution,

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but says that he instructed him to make the levy and never gave him any further instructions about the execution. He also denies that he even talked with the defendant, Neel, after the execution was placed in the hands of the constable. There was a verdict and judgment for the defendant and the plaintiff has appealed.

(1-3) It is first insisted by counsel for the plaintiff that the court erred in refusing to direct a verdict for the plaintiff. The action is a summary proceeding under section 3286 of Kirby's Digest, which provides that an officer neglecting to levy an execution or failing to return it on or before the return day therein specified, shall be liable for the whole amount of the money in the execution specified. The statute is highly penal, and the party seeking to enforce it must bring himself within both the letter and spirit of the statute. *Craig* v. *Smith*, 74 Ark. 364. The rule is settled in this state that the officer can defend against a failure of duty under this statute, when sued by the plaintiff in execution, by showing that his omission to perform the duty was due to the conduct or instructions of the plaintiff or his attorney of record. *Brickham* v. *Kosminsky*, 74 Ark. 413, and cases cited. This is in application of the principle that the plaintiff controls his own execution and he cannot first disarm the officer and then hold him liable for not executing the writ in accordance with the statute. In short, it is well settled that where the failure to levy or to make the return is due to the conduct or instructions of the plaintiff or his attorney, the officer is not liable under the statute. Under the facts of this case the question of whether the constable failed to make the levy or to make a return on the execution was due to the instructions of the plaintiff's attorney, was a jury question and it was submitted to the jury under instructions concerning the correctness of which no complaint is made.

The only objection urged by counsel for the plaintiff to the instruction is that instruction number 1 was misleading because the failure to levy and the failure

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to make a return on the execution were both submitted to the jury under this instruction. Counsel contends that they were separate issues and should have been submitted to the jury under separate instructions. We do not think, however, this objection is tenable. It is true both issues were submitted to the jury under an instruction numbered 1, but the two issues were submitted under separate paragraphs which were as distinct as if they were separate instructions. The two issues were submitted to the jury separately and the jury could not have been confused in regard to the issue.

The judgment will therefore be affirmed.

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## HOLLAND v. BOND.

Opinion delivered October 30, 1916.

MARRIED WOMAN—DEBT OF HUSBAND—LIABILITY.—Under Act 159, p. 684, Acts of 1915, a wife may bind herself by a joint promise with her husband, to a third person in the same manner as if she was a *femme sole*.

Appeal from Lonoke Circuit Court; *Thomas C. Trimble*, Judge; affirmed.

*Trimble & Williams*, for appellant.

The Act (159, Acts 1915) is not susceptible to the construction that a married woman's estate can be subjected to the debts of her husband, because such a construction would be directly in conflict with section 7, Art. 9, of the State Constitution.

*Grover C. Morris*, for appellee.

Appellee relies upon Act 159, Acts 1915. Appellant's contention that the act has reference only to the statute of limitations, administrations, etc., is contrary to this court's interpretation of the statute in *Fitzpatrick* v. *Owens*, 124 Ark. 167. There is nothing in section 7, Art. 9, of the State Constitution indicating an intention to prohibit married women from contracting, neither is there anything in the Act

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159 to indicate that the Legislature intended that a married woman's estate should be subject to the debts of her husband.

The Act is not in violation of the Constitution. 86 Ark. 486-89; 102 Ark. 326-40; 43 Ark. 163; 107 Ark. 462-6; 58 Ark. 484.

HART, J. John B. Bond, Jr., sued Mrs. Willie B. Holland on certain promissory notes and an open account. The consideration of the notes and of the open account was a debt of the husband to the plaintiff and not money expended on the separate property of the wife. The notes were executed on July 24, 1915, by Mrs. Willie B. Holland, and M. Holland, her husband. After that time she gave a written order to the plaintiff for the goods furnished her husband on the account. The court gave judgment for the plaintiff and defendant has appealed.

The correctness of the judgment depends upon the construction of the "Act to Remove the Disabilities of Married Women in the State of Arkansas," passed by the Legislature of 1915. Section 1 of the Act reads as follows:

"Section 1. That from and after the passage of this act, every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and in equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a *femme sole.*" Acts of 1915, p. 684.

Prior to the passage of this act a married woman would not be liable as surety on a promissory note for her husband because contracts could only be made by a married woman in reference to her separate property or business. *McCarthy* v. *Peoples Savings Bank*, 108 Ark. 151; *Culberhouse* v. *Hawthorne*, 107 Ark. 462. But the act of 1915 just referred to, has removed that restriction and in the broadest terms enables a married woman to sue and be sued, to contract and be contracted with and in law and equity to enjoy all rights

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and be subjected to all the laws of this State as though she were a *femme sole*. *Major* v. *Holmes*, 124 Mass. 108. This construction also results from the reasoning of the court in *Fitzpatrick* v. *Owens*, 124 Ark. 167, 186 S. W. 832, where we held that the statute meant to give the wife the right to maintain an action against her husband either upon contract or for tort.

Again it is insisted that the act contravenes Art. 9, Sec. 7, of the Constitution of 1874, providing in effect, that the property of a married woman shall not be subject to the debts of her husband. This provision in the constitution and the subsequent legislation on the subject were designed to secure to married women the separate use and disposition of their property. *Walker* v. *Jessup*, 43 Ark. 163. Under this clause of the constitution (and before the act now under consideration was passed), the court has frequently held that a married woman may convey by mortgage her property in order to secure the debts of her husband. *Goodrum* v. *Merchants & Planters Bank*, 102 Ark. 326, and cases cited. The clause of the constitution in question did not prevent a married woman from pledging or conveying her property to secure the debts of her husband but only meant that her property should not be subject to the debts of her husband without some affirmative act on her part to make her liable. Under the act in question the wife may bind herself by a joint promise with her husband to a third person in the same manner as if she was a *femme sole*.

It follows that the judgment must be affirmed.

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## HADDON v. FINLEY.

Opinion delivered November 6, 1916.

SALES—AUTOMOBILE—CONDITIONS IMPOSED BY BUYER—BREACH—RESCISSION.—Appellant agreed to purchase an auto truck from appellee, stipulating that the same be put in a condition satisfactory to the appellant. *Held*, the jury should be instructed that if they found this to be the contract of the parties, that the sale was not completed unless appellee put the car in a condition satisfactory to the appellant, and that, although appellant took the car into his possession, that he might rescind the contract, if the conditions imposed were not fulfilled by the appellee.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; reversed.

*J. F. Wills*, for appellant.

There is evidence on appellant's part that appellant declined to accept the automobile for the reason that it had not proved satisfactory as guaranteed by appellee.

If it is assumed that appellant agreed to take the car in the first instance, there is evidence clearly showing that he rescinded the agreement to purchase the car, and that appellee accepted the rescission.

The court therefore clearly erred in refusing to give the instructions requested by appellant based upon this evidence. Const., Art. 7, § 23; 87 Ark. 243, 280-281; *Id.* 531; 69 Ark. 137; 80 Ark. 454; 80 Ark. 440; 76 Ark. 233; 90 Ark. 247; 98 Ark. 17, 21-22.

SMITH, J. Appellant brought suit upon an account against appellee, the correctness of which is not disputed; but after admitting the correctness of the demand against him appellee filed a counterclaim in which he alleged that he had sold appellant an automobile for $220.00, and he prayed for, and recovered, a judgment for the excess of his counterclaim over appellant's demand against him.

In support of his counterclaim appellee testified that the car was in first-class shape and, after a demonstration of it, appellant said it was all right and that he would take it at the agreed price of $220.00. That

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the car was delivered to and accepted by appellant, who commenced to use it, but broke a flywheel, whereupon appellant sent the car to appellee, who is a mechanic, to be repaired, and after keeping the car in his possession for three weeks, during which time he was waiting for the new flywheel to be shipped from the factory, appellee returned the car in good condition to appellant, who then denied he had ever bought it.

Appellant testified that appellee proposed to sell him the car, and he went to the home of appellee to see it. That appellee said he would put a new motor in the car, and make other repairs, which would put it in first-class shape, and that the car would be delivered for trial, and that upon trial the car proved to be worthless, and witness saw appellee and told him he would not keep it, whereupon appellee said, "Very well, the old car fooled me," and appellee took the car away from appellant's place of business.

Other testimony was offered which tended to support appellant's contention that there was no sale and that such trade as was made was rescinded by the return of the car.

Appellant asked a number of instructions, all of which were refused by the court, whereupon the court charged the jury as follows:

"Gentlemen of the jury: This is a suit brought by Haddon against Finley for the collection of an account amounting to eighty-five dollars due on a grocery bill. The defendant does not deny the correctness of the account but claims a set-off and counterclaim in the nature of a purchase price of an automobile. The sole question for you to determine is whether or not Finley sold an automobile to Haddon, and, if you find that he did sell it, why then he would be entitled to set this off against the claim of Haddon; and, if it exceeds the amount sued for he would be entitled to a judgment in his favor for the excess amount. Of course, it is a question of fact there for you to determine whether or not there was a sale; that is all the court sees in the case.

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"Plaintiff contends that there was no sale and Finley contends that he did buy it; that is all there is to it. The burden should be on the defendant, as he claims there wasn't a sale."

Appellant now complains, not of the correctness of the instruction given by the court, but of the court's refusal to give instructions specifically declaring the law applicable to the defenses which he interposed. These were, first, that there was no completed sale, for the reason that the car was not in the satisfactory condition which it was agreed it should be, and that even though there was evidence sufficient to support a finding that a sale had been made, there was also evidence that this sale had been rescinded. As presenting these two issues appellant asked instructions numbered 2 and 7, which read as follows:

"2. You are instructed that if Finley agreed to put the automobile truck in a condition satisfactory to Haddon the contract of sale was not complete until it was put in such satisfactory condition and delivered to and accepted by Haddon in such condition. If it was not put in such condition and delivered to and accepted by Haddon then there was no sale, and your verdict should be in favor of Haddon."

"7. You are instructed that if you believe from the evidence that the defendant, Finley, failed to put the auto truck in the condition as agreed to by him with the plaintiff, then the plaintiff had a right to rescind the contract, even though he took the machine into his possession to ascertain whether or not it fulfilled the warranties of Finley."

We think both of these instructions should have been given as presenting concretely the law applicable to appellant's defenses to the counterclaim, as the instruction given by the court, while containing a correct statement of the law, was not sufficiently specific to present these issues.

In one respect the case is similar to that of *Ward Furniture Mfg. Co.* v. *Isbell*, 81 Ark. 560, in that here, as there, the contract specifications were not mere

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warranties, but were conditions precedent and, as such, gave appellant the choice of three remedies as there stated, first, to reject the car, second, to accept the car and bring a cross-action for breach of warranty when sued for the purchase price; or, third, without bringing cross-action after breach of warranty to use the breach by way of reduction or recoupment in the action by the vendor for the price.

Appellant had testified that he had rejected the car for the reason that it did not meet the contract specifications, and if such was the case he had the right to exercise the first of these options and say that no sale had been made.

And we are also of the opinion that instruction numbered 7 should have been given, as appellant had the right to rescind the sale if the jury found from the evidence that a sale was made, if his evidence in regard to the agreement was true.

For the error indicated the judgment will be reversed and the cause remanded for a new trial.

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## VAN CAMP v. STATE.

### Opinion delivered October 16, 1916.

1. CHANGE OF VENUE—EXAMINATION OF AFFIANTS—DISCRETION OF TRIAL COURT.—The action of the trial court in refusing to grant a change of venue will not be disturbed on appeal, unless a clear abuse of its discretion is shown.

2. TRIAL—EXAMINATION OF JURORS—REMARKS OF TRIAL JUDGE.—In the trial of a criminal prosecution for the crime of perjury, a remark of the trial judge, in the presence of a venireman, that the issues were the same in this prosecution as in the civil trial at which it was alleged that defendant had sworn falsely, the venireman having been present during a portion of the civil trial, *held* not to be prejudicial.

3. PERJURY—SUFFICIENCY OF THE EVIDENCE.—The evidence held sufficient to show that defendant was guilty of the crime of perjury.

4. EVIDENCE—PROSECUTION FOR PERJURY—CONSPIRACY—STATEMENTS OF CONSPIRATORS.—In a prosecution for the crime of perjury, where it appeared that defendant and one J. entered into a conspiracy to defraud S. and V., it is proper to permit S. and V. to relate any statements made by either defendant or J. in carrying out the conspiracy.

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5. EVIDENCE—PERJURY—CONSPIRACY TO DEFRAUD.—Defendant with another, agreed to purchase certain horses from witness, and conspired to defraud witness out of the same; a bill of sale was prepared and handed to defendant. *Held*, it was proper to permit witness to explain why he permitted defendant to leave the room where the negotiations were had, without receiving payment of the consideration agreed upon.

6. PERJURY—IMPROPER INSTRUCTION—HARMLESS ERROR.—In a prosecution for perjury, a charge to the jury that a conviction may be had upon the uncorroborated testimony of a single witness, while erroneous, will not be held prejudicial, where more than one witness testified concerning the falsity of the defendants' statements.

Appeal from Garland Circuit Court; *Scott Wood*, Judge; affirmed.

*M. S. & Arthur Cobb*, for appellant.

1. The petition for change of venue should have been granted. The court abused its discretion in denying it. 36 Ark. 286; 54 *Id.* 243.

2. In the examination of Wm. Sumpter, the remarks of the court and its instruction were prejudicial. In making the statement and in its instruction, the court assumed facts which were solely for the consideration of the jury. 43 Ark. 289; 45 *Id.* 165; 53 *Id.* 381; 55 *Id.* 244; 58 *Id.* 108; 25 S. W. 282.

3. Testimony as to conversations had with John E. Jones relative to the transaction in the absence of appellant, was not admissible and prejudicial. It is useless to define *res gestae* or cite authorities.

4. It was error to permit the witness, Strite, to detail the rules of the Racing Association, and then refuse to let the witness say whether or not he relied on those rules to prove that he did not sell "Encore."

5. To constitute perjury, the swearing must be absolute, as well as false and material. Underhill on Ev., p. 761; Elliott on Ev., Vol. 4, p. 385; 55 Ark. 529; 85 *Id.* 195. Instruction No. 2 given was erroneous.

6. Instruction No. 3 is inherently wrong. 53 Ark. 395. Corroboration of the falsity of the evidence is always required. 51 Ark. 138; 88 *Id.* 115; 53 *Id.* 395; 77 *Id.* 455; 91 *Id.* 505.

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7. The court erred in permitting evidence as to the value of the horses and in refusing instruction "A" asked by defendant. Also in refusing "B," etc.

8. The verdict is contrary to the evidence.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

1. The petition for a change of venue was properly overruled. No abuse of discretion is shown or appears. 98 Ark. 139; 76 *Id.* 279; 80 *Id.* 361; 107 *Id.* 30; 120 *Id.* 309.

2. There is no error in the court's charge. No. 2 is correct and No. 3 is copied from 53 Ark. 398; 88 *Id.* 117; 91 *Id.* 509. Strite was fully corroborated. 91 Ark. 509.

3. There was no error in the court's action on instructions 5a and 5b. 58 Ark. 353; 54 *Id.* 489. Courts are not required to repeat instructions already given. 101 Ark. 120; 101 *Id.* 569; 103 *Id.* 352.

4. There was no error in the admission of evidence. 43 Ark. 99; 88 *Id.* 579; 100 *Id.* 269. The conversations were intimately connected with the transaction; they emanated from the trade and were a part of the crime speaking for itself. 43 Ark. 99; 88 *Id.* 579; 100 *Id.* 269. As to the Racing Rules, appellant can not complain. The explanation was drawn from the witness on cross-examination.

5. There was no error in the form of the verdict. 96 Ark. 196; 95 *Id.* 168; 76 *Id.* 550. The objection can not be raised for the first time on appeal. 26 Ark. 536; 28 *Id.* 188.

6. The verdict was responsive to the testimony. The State fully substantiated every charge in the indictment and proved every material ingredient of perjury.

MCCULLOCH, C. J. This is an appeal from a judgment of the circuit court of Garland County convicting appellant of the crime of perjury, which said offense was alleged in the indictment to have been committed by false swearing in a civil suit tried in the Garland Cir-

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cuit Court wherein appellant Van Camp was plaintiff, and J. T. Strite and A. L. Valentine were defendants.

Strite and Valentine were the owners of four horses said to be racers, and they brought their horses to the city of Hot Springs to attend races held there in the month of March, 1916. Appellant and one Jones resided in Hot Springs, and they applied to Strite and Valentine to get them badges which would pass them to the race track so that they could encourage betting. During the progress of the races, negotiations were opened up by appellant and Jones with Strite and Valentine for the purchase of the horses, and an agreement was finally reached for the sale of the horses or some of them to appellant and Jones. There is a conflict in the testimony concerning the terms of the sale. Strite and Valentine testified that they agreed to sell only three of the horses, named, respectively, Envy, Cooster and Cherry Seed, and that the other horse, named Encore, was not to be included in the trade. They also testified that only the horses were to be sold, and none of the racing equipments or the covers or bridles or saddles were to be included. Appellant and Jones both testified that the sale was to include all four of the horses and the blankets, saddles and bridles and other equipments. The price agreed upon was $1,500, and there is no dispute about that.

It appears from the testimony that the terms of the trade were finally agreed upon on a certain evening, and that appellant was to prepare the bill of sale, and the parties were to meet the next morning for the purpose of consummating the sale. They met the next morning and in the meantime appellant had prepared the bill of sale, which Strite and Valentine read over carefully, and they testify that the writing did not include the name of the horse Encore or the other property, except the names of the other three horses. According to the testimony of Strite and Valentine, Jones left the parties to go to one of the banks to get the remainder of the money he needed to make the payment of $1,500, and on his return they repaired to the office of a

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justice of the peace, and when they reached there, Strite and Valentine signed the instrument, and their signatures were witnessed by the justice of the peace and a constable who happened to be present.

There is a sharp conflict in the testimony as to what occurred immediately afterward concerning the payment of the money. Strite and Valentine both testified that as soon as the bill of sale was signed, appellant picked it up and left the room; that Jones ran his hand into his pocket and walked into the next room, and when Valentine and Strite followed him Jones remarked that Van Camp wanted a commission for selling the horses; that they refused to allow any commission, and that Jones refused to pay the money except in the presence of appellant. Each of these men testified that the agreed purchase price was not paid then or at any other time. On the other hand, appellant and Jones each testified that the money was handed over to Strite and Valentine in the office of the justice of the peace, and that that ended the transaction. The bill of sale as exhibited at the trial shows that the horse Encore and the blankets, bridles, saddles, etc., were included therein, but Strite and Valentine testified that those things were not in the bill of sale at the time it was signed. The testimony of the justice of the peace and constable to some extent corroborates the testimony of appellant and Jones, but they do not swear positively that the money was actually paid over in the office or that the writing included the horse Encore or the other items in dispute. Strite and Valentine testified that after making considerable effort, without success, to get appellant and Jones together so that they could get the money, they went out to the race track where the horses were, and that later appellant came out there with an officer and tried to get the horses. They refused to give up the horses and a replevin suit was brought in the name of appellant.

In the trial of that cause in the circuit court, appellant testified as a witness and his testimony was

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substantially the same as that given in the trial of the present case. He testified in both trials that the horse Encore and the blankets, saddles, bridles, etc., were included in the trade and were described in the bill of sale, and that the price, $1,500, was paid in the office of the justice of the peace. The charge of perjury set forth in the indictment is predicated on the testimony given in the trial of the civil case which is alleged to be false. There is little, if any, controversy as to the substance of the testimony given by appellant in the trial of the civil case, the real controversy being over the question of the truth or falsity of that testimony concerning the alleged sale of the horses.

(1) Appellant filed a petition for a change of venue, supported by the affidavits of three persons, all of whom were examined in open court except one. We must, of course, treat the one who was not examined as being a credible person (*Whitehead* v. *State*, 121 Ark. 390), and the testimony must be reviewed in order to determine whether or not the court abused its discretion in finding that none of the other affiants were credible persons within the meaning of the statute. The trial court is, of course, in better position than we are to determine a question of this sort, and it has been the invariable rule here to uphold the trial court's exercise of discretion in such matters unless an abuse thereof has been shown. All of the affiants were examined at considerable length concerning their knowledge of the state of feeling toward appellant, and it was shown that many of the witnesses had but little, if any, knowledge of the feeling outside of the city of Hot Springs. Of course, it is easy to see that there was no abuse of discretion by the court in holding that those persons were not credible within the meaning of the statute. Several of the affiants, however, showed a knowledge to some extent outside of the city of Hot Springs. When the fact is considered that the transaction, out of which the civil action arose, occurred less than a month before the trial of the present case, thereby giving very little time for the incident to become sufficiently notorious to

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arouse the prejudice of the inhabitants of the whole county to the extent that a fair and impartial trial could not be obtained, together with the somewhat vague and uncertain statements of the witnesses concerning their actual knowledge of the condition of public feeling outside of the city of Hot Springs, we can not say that there was an abuse of the court's discretion. The testimony of the affiants does not in fact make out a case of such general prejudice existing in the minds of the inhabitants of Garland County as would prevent a fair and impartial trial, and the court was, we think, justified in reaching the conclusion that they made the affidavits upon insufficient information on the subject and that they were not to be treated as credible persons. We decline, therefore, to disturb the ruling of the court in refusing to grant the change of venue.

The assignments of error are very numerous and many of them are not of sufficient importance to call for discussion. Only those which are deemed important will therefore be mentioned.

(2) In the examination of veniremen concerning their qualifications to serve as jurors in the case, there arose a controversy between counsel for the State and for the defendant concerning certain questions to be propounded to one William Sumpter who had been summoned as a juror. A colloquy took place between the trial judge and counsel in the case in which the court made the following statement: "The issue there (in the civil suit) was practically the same in a way as it would be here because one side there claimed that he bought the four horses and the other side claimed that he did not." Sumpter, it seems, had been present during a part of the trial of the civil action, and this statement was made in response to questions from counsel as to how far they could go in interrogating Sumpter concerning impressions formed from what he had heard in the trial of the other case. Counsel for appellant excepted to the remark made by the court. We do not see how the remark of the court could have

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had any prejudicial effect for, as was subsequently developed in the trial, the principal issue turned out to be the same in both cases, that is to say, whether or not the bill of sale included four horses or only three. It does not appear from the record that any jurors had been accepted at that time, and that any of them were present to hear this remark of the court; but even if they were, we do not think that it had any prejudicial effect for the issues were, to the extent indicated in the court's remark, the same in both trials. There was, as before stated, no controversy in the testimony as to what the issues were in the civil case, nor was there any substantial controversy as to what the testimony of appellant was upon those issues.

(3) It is contended by appellant that the evidence in the present case does not show definitely that he testified in the former case that the sum of $1,500 was actually paid over to Strite and Valentine by Jones, but we are of the opinion that the testimony does show that conclusively. It is true appellant stated in his testimony in the civil case that the money was not actually counted in his presence, but he stated that Jones went off to the bank to get the balance of the money, and that after his return they went to the office of the justice of the peace where the bill of sale was signed, and that Jones then handed over to Strite and Valentine a large roll of money containing bills of $20 and other denominations, and that it was counted and accepted by Strite and Valentine. The effect of his testimony was that the agreed price of $1,500 was in fact paid in his presence. The court, therefore, might very well have eliminated from the consideration of the jury all question as to what the issues were in the civil case, and what the testimony of appellant was concerning those issues, and limited the consideration of the jury to the sole question in the case, whether or not the testimony so given was true or false. That was really the only issue in the present case, and the jury in finding appellant guilty necessarily reached the conclusion that the horse Encore and the saddles, bridles, blankets,

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etc., were not embraced in the bill of sale, and that the price was never paid over to Strite and Valentine, and that the testimony of appellant was therefore false.

(4) Appellant objected to the testimony of Strite and Valentine concerning the statements made to them by Jones in appellant's absence, the statements claimed by Strite and Valentine to have been made by Jones when he went off into the rooms adjoining the office of the justice of the peace. The statement of Jones, to which they testified, was that appellant claimed a commission, and that he (Jones) would not pay over the money in the absence of appellant. The testimony of Strite and Valentine was sufficient to establish a conspiracy on the part of Jones and appellant to swindle Strite and Valentine out of their property, and that the alleged statements of Jones were made pursuant to that conspiracy and prior to its consummation. One of the issues in the case was whether or not the money was in fact paid over, and it was proper to permit the witnesses to relate any statements made by either appellant or Jones in carrying out the conspiracy.

(5) Another exception relates to the ruling of the court in permitting witnesss Strite to explain certain rules of the racing association. The statement of the witness was given in response to a question propounded on cross-examination as to why the witness had permitted appellant to leave the room with the bill of sale in his possession before the money was paid, and the substance of the statement was that there were certain rules of the racing association which provided for an adjustment of all differences between its patrons and to exclude from the track all persons found to be guilty of disreputable practices, and that the witness relied upon these rules as a protection against fraud and that such reliance induced him to permit the appellant to take the bill of sale away with him before the money was actually paid. This is the substance of the explanation given by the witness concerning the rules of the association, and we think that the court was justified in allowing him to make the statement in response

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to the attack made on his credibility on account of his admission that he had let appellant take the bill of sale before the money was paid.

Counsel for appellant then asked the witness whether or not he relied upon the rules of the association for a conviction in the case, and to prove that he did not sell the fourth horse, Encore, but the court refused to permit the cross-examination to proceed any further along that line, and we are of the opinion that the ruling of the court was correct. The question was really frivolous and the court properly stopped the cross-examination along that line.

Objection was made to an instruction given by the court submitting the question whether or not appellant purchased from Strite and Valentine four horses, naming them, "or any other horses," it being contended that the undisputed testimony shows that three horses were purchased, and that that question should not have been submitted to the jury. It may be said, in the first place, that there is no dispute about the negotiations for the sale of the three horses nor for the price to be paid, and that there could not be any prejudice in that part of the instruction objected to, but what the court meant to submit there was whether the purchase of any horses at all had in fact been consummated by payment of the money. There was a sharp conflict in the testimony as to whether or not there had been a consummation of the sale which the undisputed testimony showed had been negotiated. That was one of the issues in the case which affected the question of the truth or falsity of appellant's alleged testimony.

(6) Error of the court is also assigned in giving an instruction which reads as follows: "In order to convict defendant for perjury, it is not necessary for the State to make proof by any certain number of witnesses, but a conviction may be had upon any legal evidence of a nature and amount sufficient to disprove, beyond a reasonable doubt, the testimony upon which perjury is assigned." The contention is that the instruction permits a conviction to be had upon the uncorroborated

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testimony of one witness. That criticism of the instruction is, we think, sound, but it had no prejudicial effect in the present case for the reason that two witnesses testified concerning the falsity of appellant's testimony, and that was sufficient to sustain a conviction if the testimony satisfied the jury beyond a reasonable doubt of the guilt of the defendant. Conceding, therefore, the instruction to be erroneous, it is not prejudicial and does not call for a reversal. *Brooks* v. *State*, 91 Ark. 505.

It is insisted that the evidence is not sufficient to justify a conviction—that the testimony of Strite and Valentine was of such a character that it ought to have been entirely disregarded by the jury. We think, however, that that was a question for the jury, and that there was sufficient evidence to sustain the conviction.

The judgment is therefore affirmed.

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## LINDSEY *v.* STATE.

Opinion delivered October 16, 1916.

HOMICIDE—SECOND DEGREE MURDER.—Defendant and deceased, after a disagreement expressed the intention, each of killing the other; defendant went home, procured a gun, and returning, killed deceased. *Held*, under the evidence that a conviction of second degree murder was proper.

Appeal from Jefferson Circuit Court; *Daniel Taylor*, Special Judge; affirmed.

STATEMENT BY THE COURT.

The appellant, L. E. Lindsey, was convicted of the crime of murder in the second degree in killing one Josh Benedict, and he appeals.

On the morning of the 26th day of July, 1914, the appellant and several others, including Josh Benedict, met at a commissary at Marion's mill, in Jefferson County, Arkansas. They drank several quarts of cider, and some of the crowd got very drunk. Josh Benedict and the appellant had a quarrel and a fight, and appellant also

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got into a fight with John Wilson. Appellant stated that he was going home and get his gun and kill both of the d—n s—s of b—s. He made threats that he would kill both of them before the sun went down, stating in the presence of one witness that he could kill them and come clear for a thousand dollars. Appellant went home, got his gun and came back to the commissary.

During the quarrel and fight between Benedict, Wilson and appellant, appellant told Benedict and Wilson that it was a damn cowardly trick to beat him up—both of them being young and stout—and for them to take his knife. Thereupon, appellant said that he would go home and get his gun and come back and make both of them run like a spotted ape. Appellant was asked at this point by Benedict if he was armed, and appellant told him no. When this information was obtained, Benedict told appellant to go home and get his gun; that what had been said to him was an insult that he (Benedict) never would take; and if appellant was not back within an hour he would be at appellant's gate. When appellant returned with his gun, he rode back somewhere near the commissary, and hitched his mule and expressed himself to the effect that if he was going to have trouble, he didn't want to be on a mule. Later Benedict got on appellant's mule, rode the same to the home of Leo Burgess, got his gun, and was returning to the commissary; and on his way he was advised by a witness not to go where he said he was going. To this Benedict replied that "that kind of advice was as good as his mother could give him, but he just could not accept it; that he was going down there and kill the s— of a b— or get killed."

Appellant, after his return with his gun, had stopped on the road to assist one Ashcraft, who was very drunk and very sick. As Benedict approached the place where appellant and Ashcraft were situated, appellant was seen in a position to shoot and Benedict was getting down off of the mule. Appellant was telling Benedict to turn the mule loose, that he didn't

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want to kill the mule. Benedict was trying to keep the mule between himself and appellant, and appellant was trying to get a shot at him. As soon as the mule passed out of the way, appellant shot.

The witness who observed this testified that after the first shot, Benedict fell. There had been one shot fired before that that the witness didn't see. There had been two shots fired when the witness got to where they were, and the witness stated that Benedict was wounded in his breast and through his right wrist at that time. When witness walked up, he saw that appellant was getting ready to shoot again, and asked him not to shoot any more, telling appellant that Benedict was dead anyway; whereupon appellant said: "I have done started into this thing, and I will make a clean finish of the job." And he shot him again in the back of the head; then he walked around Benedict's side and fired two more shots right in his side. Witness saw appellant fire four shots. This witness stated that Benedict did not have a gun in his hand as he was getting off of the mule. After appellant had finished shooting, he said: "There lies the s— of a b—, and there lies his gun. He fired the first shot and I killed him. I had to do it."

It was shown that the wound in Benedict's hand blew off the fleshy part of the hand at the wrist, unjointing it and leaving the thumb and fingers. The above is substantially the testimony adduced on behalf of the State.

On behalf of the appellant, the testimony tended to show that he had a quarrel and fight with Benedict and Wilson. Benedict called appellant a liar and appellant started toward him to strike him with his fist, when he saw that Benedict was going after a piece of timber, the appellant pulled his knife. Wilson knocked appellant down with a pole. Benedict had hold of appellant's left hand. Appellant told them he was going home and get his gun, and he did so and came back. He hitched his mule a short distance from the commis-

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sary, and after talking with one Mr. Pennington a few minutes, he made up his mind to drop it and go home.

He was asked to assist Ashcraft and went out to where he was, putting his gun down by the side of a sapling. After he had been assisting Ashcraft for a minute or so, he heard a gun fire, raised his eyes and saw Benedict on his (appellant's) mule between ten and twelve feet away. Benedict at that time was taking his gun down from his shoulder to reload it. Appellant then ran to his gun and Benedict kept the mule turned between himself and appellant. Appellant asked him to turn the mule loose and let it get out of the way. Benedict made no reply. The mule ran backward a couple of steps, exposing Benedict, whereupon appellant fired, and appellant then continued to shoot him as fast as he could work his gun. Appellant confessed that when a witness asked him to desist, he stated: "I have commenced it. I am going to make a good job of it."

Among other instructions, the court gave to the jury instruction No. 17, at the request of the State, which is as follows:

"17. If you believe from the evidence, beyond a reasonable doubt, that prior to the killing of the deceased, the defendant, L. E. Lindsey, and deceased had had a difficulty, and after such difficulty went off and armed themselves with deadly weapons and returned to renew the contest, and did renew the contest, in which the deceased was killed by the defendant, then you should convict the defendant of murder in the second degree, or manslaughter.

"Murder in the second degree if sufficient time had elapsed for passion to cool and reason to be restored.

"Manslaughter, if the difficulty was renewed and the deceased was killed, not in a spirit of revenge, but in the heat of passion caused by a provocation apparently sufficient to render the passion irresistible, and before a sufficient time had elapsed for reason to be restored."

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

"21. If you believe from the evidence that the first shot fired by this defendant killed Benedict, and that it was fired by the defendant in apparently necessary self-defense, then the defendant should be acquitted; and the further fact, if proven, that he afterward fired several shots into Benedict's dead body, should not be considered by you."

The court modified this prayer by adding to it the following:

"But if you believe from the evidence, beyond a reasonable doubt, that the first shot fired by the defendant did not produce death, and would not of itself have produced death, but rendered deceased incapable of doing defendant any serious bodily harm, and that defendant observed and knew the nature of the wound first inflicted—that it was not sufficient to produce death, and that deceased was no longer capable of doing him any serious bodily harm, and with this knowledge again fired into the body of deceased, killing him, then you should convict the defendant of some degree of crime charged in the indictment, as explained to you in these instructions."

The appellant objected to the refusal of the court to grant his prayer as asked and in giving the same as modified.

*E. J. Kerwin* and *Caldwell & Triplett*, for appellant.

1. The court erred in giving instructions Nos. 17 and 21 as modified. 37 Ark. 238. The rule is that an instruction, though it is a correct statement of the law in the abstract, which is not applicable to the evidence, should not be given. 84 Ark. 128; 99 *Id.* 648; 82 *Id.* 324; 34 *Id.* 469; 36 *Id.* 242; 54 *Id.* 336; 13 *Id.* 317.

2. The court erred in giving the second clause of instruction No. 21. Deceased fired the first shot and appellant fired in self-defense.

*Wallace Davis*, Attorney General, and *Hamilton Moses*, Assistant, for appellee.

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There is no error in the court's charge. This was simply a renewal of a fight when sufficient time had lapsed for cooling and makes a case of murder. The jury let the defendant off light. The verdict is neither contrary to the law nor the evidence. 50 Ala. 166; 24 Cal. 17; 65 Cal. 129; 2 Clark (Pa.) 467; 85 Ark. 536; 41 S. W. 816; 62 Ark. 306; 95 *Id.* 432.

WOOD, J. (after stating the facts). 1. The court gave correct instructions covering the degrees of homicide included in the indictment and applicable to the evidence adduced. There was testimony to warrant the court in giving instruction No. 17. It correctly declared the law applicable to the testimony adduced on behalf of the State and tending to show that appellant was guilty of the crime of murder or manslaughter, and also the testimony on behalf of the appellant tending to show that the killing was done in self-defense.

2. The modification to appellant's prayer for instruction No. 21 was also correct. There was substantial evidence from which the jury might have found that appellant wilfully killed Benedict after he discovered that Benedict had been disabled, having his wrist broken and having dropped his gun—that appellant wilfully and maliciously fired into the body of Benedict three times after he discovered Benedict's disabled and helpless condition.

The testimony warranted the verdict, and the law was correctly declared. The judgment is therefore correct, and it must be affirmed.

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## SIMMONS *v.* CARTER & COMPANY.

Opinion delivered October 16, 1916.

1. GUARDIAN AND WARD—SALE OF WARD'S LAND—SUFFICIENCY OF BOND.—Where a guardian's bond is executed in a sum insufficient to cover the transactions required in the management of the ward's estate, that fact is a mere irregularity, and when the bond has been approved by the court, its insufficiency will not affect the validity of a sale of the ward's land.

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2. GUARDIAN AND WARD—"EDUCATION AND MAINTENANCE" OF CHILD.—A sale of a minor's land, when the petition recited that the sale was "for the purpose of maintaining and educating" the said minor, will be upheld, because a child must be maintained while being educated, and maintenance is therefore a necessary expense in the education of the minor.

3. GUARDIAN AND WARD—SALE OF WARD'S LAND—PROCEEDS—PROPER EXPENDITURE.—The purchaser of property belonging to a minor is not bound to see that the purchase money is properly employed.

4. GUARDIAN AND WARD—SALE OF WARD'S LANDS—NOTICE.—Where a minor's lands are to be sold, notice thereof given pursuant to Kirby's Digest, § 190, or in conformity with Kirby's Digest, § 4923, is sufficient.

5. GUARDIAN AND WARD—SALE OF WARD'S LANDS—AFFIDAVIT OF GUARDIAN.—The report of the guardian, showing that his ward's lands had been sold to a certain company, accompanied by an affidavit reciting "that I am not interested in said sale in any manner," held sufficient to render the sale valid.

6. SALE OF MINOR'S LAND—APPRAISED VALUE.—The court is without authority to confirm any sale of a minor's property which does not bring the required percent of the appraised value, and confirmation of the sale cannot supply this failure.

7. SALE OF MINOR'S LAND—AMOUNT SOLD FOR—REVIEW.—Under Kirby's Digest, § 3793, notwithstanding the probate court has confirmed the sale of a minor's land, the court may, on appeal, inquire whether the provisions of the statute concerning probate sales, have been substantially complied with.

Appeal from Monroe Chancery Court; *Jno. M. Elliott*, Chancellor; affirmed.

*C. F. Greenlee*, for appellant.

The sale was void because not in substantial compliance with statutory provisions. Kirby's Digest, § 3793.

1. The statutory bond was not executed by the guardian. Kirby's Digest, § § 3780-1-2-3; 116 Ark. 361-8-9.

2. The probate court had no authority to order the sale for maintenance, but only for the education of the minor. *Ib.*, § 3794.

3. The court did not fix the time and place of sale and direct proper notice and the guardian did not give proper notice. *Ib.*, § § 3795, 190-1; 67 Ark. 80, 83; 75 *Id.* 6; 87 *Id.* 284-289.

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4. The guardian did not make the affidavit as prescribed by Kirby's Digest, § 192.

5. The probate court had no authority to confirm the report for the reason that it states that the land sold for two-thirds of the appraised value. Kirby's Digest, § 3796; 106 Ark. 563; 52 Ark. 341; 96 *Id.* 222; 115 *Id.* 572; *Ib.* 385.

*Manning, Emerson & Morris*, for appellees.

1. The bond was substantially as required by the statutes and approved by the court. All defects were cured by confirmation. But a failure to execute the bond would not invalidate the sale. Kirby's Digest, § § 3780, 3782, 3819; 116 Ark. 361; 89 *Id.* 284-8.

2. The court had authority to order the sale for the maintenance and education of the minor. 85 Ark. 556.

3. Due notice was given. 89 Ark. 284-8-9.

4. The whole record and report shows that the guardian was not the purchaser at the sale. The affidavit is a substantial compliance with the statutes. Kirby's Digest, § § 192, 3795.

5. The land sold for three-fourths its value. 52 Ark. 341. The whole proceedings were in accordance with law. Besides the confirmation cured all formal defects, and this is a collateral attack after the appellant had received the benefits and ratified the sale after maturity.

SMITH, J. Appellant brought this suit to set aside a conveyance made by her guardian of a forty-acre tract of land which she had inherited from her mother. She alleged that the sale and conveyance to appellee, who was the defendant below, was void for the following reasons: First, that the guardian had failed to execute a sufficient bond. Second, that the sale was not ordered solely for the purpose of her education. Third, that the sale was void because the notice of sale was not given as required by law. Fourth, that in reporting the sale no proper affidavit was made by

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the guardian reciting that he was not interested in the sale. Fifth, that the court had no authority to confirm the report of sale because it recited that the land had been sold for two-thirds of its appraised value. These questions will be discussed in the order in which they have been stated.

First: It is admitted that the guardian executed a bond conditioned as required by the statute; but it is said that inasmuch as its penalty was only $100, it must be assumed that in its execution no account was taken of the value of the land, and that a bond should and would have been required in this amount if only the personal property had been taken into account. The bond, of course, should have been executed for a larger sum; but there was a bond, and it was conditioned as required by law, and its sufficiency was a question which addressed itself to the sound discretion of the court, and the failure to execute a larger bond is a mere irregularity which can not now affect the validity of the sale.

Second: The petition for the order of sale does allege that the minor was without means with which to "clothe, feed and educate herself," and the petitioner did pray that the order of sale be made "for the purpose of maintaining and educating his said ward." At the time of this petition the minor was of school age, and it was, therefore, proper for the probate court to determine whether or not this sale was necessary for her education under section 3794 of Kirby's Digest. It is conceded that the sale was had under the authority of that section; but it is urged that counsel placed too narrow a meaning upon the word "education" there employed. It is true that this section authorizes a sale only for the primary purpose of educating the minor, but a child must be maintained while it is being educated, and maintenance is, therefore, a necessary expense in the education of the child. The word education as here employed must be regarded as including those expenses necessarily incident to one's schooling. *Harper* v. *Smith*, 89 Ark. 288.

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In this connection it is urged that the proceeds of the sale were not devoted to the minor's education. But the purchaser at the sale is not bound to see that the money is properly employed. Nor is his purchase invalidated because it is diverted from the purpose for which it was intended. *Harper* v. *Smith*, *supra*.

Third. The notice of sale was given by publication in a newspaper and no notices were posted as provided by sections 190 and 3795 of Kirby's Digest. Long subsequent to the enactment of these statutes the Legislature enacted what is now section 4923 of Kirby's Digest, and while this section has not been treated as repealing section 190 of Kirby's Digest, it has been regarded as providing an optional method of giving such notices, and we have held that notice given pursuant to section 190 of Kirby's Digest, or in conformity with section 4923 of Kirby's Digest, was such a substantial compliance with the statutory provisions that a sale made upon notice given in either manner would not be held void after confirmation. *Harper* v. *Smith*, 89 Ark. 289; *Landreth* v. *Hansen*, 116 Ark. 369.

Fourth. We do not agree with learned counsel that this sale is void because the guardian did not return with his report of sale a proper affidavit that he was not a purchaser of the land nor interested in any manner in the purchase thereof. The guardian's report does show that the land was sold to A. C. Carter & Company, and the affidavit of the guardian recites "that I am not interested in said sale in any manner." This, we think, is a substantial compliance with the requirements of the statute on this subject.

Fifth: It is finally urged that the court was without jurisdiction to confirm the guardian's report of sale because it contained the recital that the property had sold for two-thirds of its appraised value. Section 3796 of Kirby's Digest provides that no real estate of any minor shall be sold for less than three-fourths of its appraised value, and this requirement is jurisdictional. The court is without authority to confirm any sale of a minor's property which does not bring the required

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per cent. of the appraised value, and confirmation of the sale can not supply this failure. *Mobbs* v. *Millard*, 106 Ark. 563. Section 3793 of Kirby's Digest provides that all probate sales of real estate made pursuant to proceedings not in substantial compliance with statutory provisions shall be voidable, and we have construed the word "voidable" as here used to mean "void." *Mobbs* v. *Millard*, *supra*. And since the enactment of this statute, we may—notwithstanding there has been an order confirming a sale—inquire whether the provisions of the statute concerning probate sales have been substantially complied with. It is not contended that the land did not sell for three-fourths of its appraised value. It is only urged that the report of sale recited a sale for two-thirds of the appraised value. There is nothing in the order of confirmation showing a sale for two-thirds of the appraised value, and it affirmatively appears from the recitals of the deed, which was approved by the court, that the land sold for three-fourths of its appraised value, and the recitals of this deed are made *prima facie* evidence of the facts there recited. Section 3799 of Kirby's Digest.

We must conclude, therefore, that before confirming the report of sale the court ascertained the truth of the matter, as it should have done, although it did not order any correction made of the erroneous recital contained in the report. The purpose and effect of section 3793 of Kirby's Digest is to throw open for investigation and inspection the question whether probate sales have been made in substantial compliance with statutory provisions, notwithstanding they may have been confirmed, and when that investigation was made by the court below, the fact appeared that the land did sell for three-fourths of its appraised value, and the truth of that finding is not now questioned.

Evidence was offered which strongly tends to show that appellant did not derive the anticipated benefits from that sale, and that the sale has not been to her advantage. But this evidence, if true, can not defeat the sale, if it was made in substantial compliance

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with the statutes, and as we are of the opinion that it was so made, the judgment of the court below will be affirmed.

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## McCALL v. NORTH PINE BLUFF REALTY CO.

### Opinion delivered October 23, 1916.

1. PLEADING AND PRACTICE—DEMURRER—AMENDMENT TO COMPLAINT. Where a demurrer was filed to a complaint, and before the same was passed upon, the plaintiff filed an amended complaint, the filing of the amendment will constitute a confession of the inadequacy of the original complaint, and will dispose of the demurrer so far as it concerns the original complaint, and it becomes the duty of the defendant to then plead to the complaint as amended either by demurrer or answer.

2. PLEADING AND PRACTICE—FILING ANSWER—TIME—DISCRETION OF TRIAL JUDGE.—Under the facts as set out above, it is within the discretion of the trial judge to refuse to permit the filing of an answer after the lapse of the proper time for filing the same.

3. PLEADING AND PRACTICE—COMPLAINT—DESCRIPTION OF LAND—VARIANCE.—In an action to obtain possession of certain lands, the lands were described as in the "Spanish Survey," and in a certain "Private Survey." *Held* this was merely a clerical misprision, and would not be sufficient to disturb a default judgment, rendered in favor of the plaintiff.

4. JUDICIAL NOTICE—SHIFTING CHANNEL OF THE ARKANSAS RIVER.—This court will take judicial notice of the shifting channel of the Arkansas River, but not of the extent of the encroachments of the river upon adjoining lands.

Appeal from Jefferson Circuit Court; *W. B. Sorrells*, Judge; affirmed.

*R. L. Floyd* and *J. P. Kerby*, for appellant.

1. The default judgment was erroneous as there were undisposed of issues before the court. The answer was in the custody of the clerk and the court refused to allow it to be filed. 23 Cyc. 750, 751; 17 Ark. 454.

2. The default judgment was erroneous; the complaint fails to set up a cause of action. 58 Ark. 39, 43. The complaint does not allege that the possession of its grantors was either actual or exclusive. Adverse pos-

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session must be "actual, open, continuous, hostile, exclusive, etc." 43 Ark. 486.

3. The description of the lands is not legally sufficient. Courts take judicial notice of accretions and erosions of land. 9 Wheat. 374; 7 Peters, 342; 34 Ark. 224; 53 *Id.* 48; 68 *Id.* 462; 86 *Id.* 172; 89 *Id.* 568; 90 *Id.* 599; 93 *Id.* 604. For cases of judicial cognizance, see 106 Cal. 257; 116 *Id.* 397; 58 Am. St. 183; 46 Am. St. R. 237, 242.

*M. Danaher* and *Palmer Danaher*, for appellee.

1. The filing of the amendment to the complaint was a confession that the demurrer was well taken. The answer did not reach the clerk in time for filing. 66 Ark. 312.

2. The answer set up no defense. 102 Ark. 433; 99 *Id.* 404. It was a mere general denial. 52 Ark. 298; 43 *Id.* 296; 73 *Id.* 225; 74 *Id.* 417.

3. Defendant was a mere squatter without any right or title whatever. The answer set up no defense. 74 Ark. 417; 99 *Id.* 404; 102 *Id.* 433.

4. The complaint is sufficient. 80 Ark. 181; 90 *Id.* 84; 74 S. W. 199. Any defect was cured by the answer. 77 Ark. 1; 67 *Id.* 444.

McCULLOCH, C. J. This is an appeal from a judgment by default in an action to recover possession of certain land. Appellee (plaintiff below) alleged in its original complaint that he was the owner of a large tract of land, describing it, known as Boyd's plantation, situated across the river from the city of Pine Bluff, and that appellant was wrongfully in possession of a portion of it, which is described in the complaint and alleged to contain 40 acres. Appellee did not, in the complaint, deraign title back to the United States government, but began his chain of title with a commissioner's deed executed in the year 1903.

The action was commenced on May 31, 1915, and on June 4 appellant appeared and filed a demurrer on the ground that the complaint did not show on its face

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that plaintiff had title to the land in controversy, nor that the lands in controversy are included in the lands to which the plaintiff claims title. No action was taken by the court on the demurrer, but on June 7, 1915, appellee filed an amendment to the complaint. The complaint, as thus amended, still failed to deraign title back to the government, but it alleged a patent by the United States to James Scull in 1828, and then begun appellee's chain of title from a deed from Culpepper to Johnson executed in January, 1892. The amendment also contains an allegation that appellee and its grantors had been in open, notorious, adverse possession from the year 1892 down to July, 1914, when appellant wrongfully took possession of the 40 acres in controversy.

(1) On October 22, 1915, the court entered a judgment by default in favor of appellee and ordered a writ of possession. The judgment entry concludes with a recital that the defendant tendered an answer which had been mailed to the clerk of the court on September 21, 1915, but that the court refused to allow it to be filed. It is contended that the court abused its discretion in refusing to allow the answer to be filed, and in rendering judgment notwithstanding appellant's tender of his answer. The court did not expressly rule on the demurrer, but the filing of the amendment to the complaint constituted a confession of the insufficiency of the original complaint, and thus disposed of the demurrer so far as concerned the original complaint. The question then was whether or not the complaint as amended was sufficient, and it was the duty of appellant to plead to the amended complaint either by demurrer or answer. When the court reconvened at the October term, the court declined to allow to be filed the answer which the record recites had been mailed to the clerk in vacation and rendered judgment by default.

(2) We can not say that the court abused its discretion in refusing to permit the answer to be filed at that time. Appellant had to take notice of the fact that an amendment to the complaint had been filed,

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so as to perfect the statement of appellee's cause of action, and the duty rested upon him then to plead to the amended complaint or to show cause for extension of the time. The answer was not filed within time, and it was a matter of discretion with the court whether it would allow the answer filed out of time. No excuse is shown in the record for the delay.

(3) It is further insisted that the judgment is erroneous for the reason that the allegations of the complaint are still insufficient. In the first place, the point is made that the statement in the complaint describing the land owned by the plaintiff describes it as "all of the Spanish survey No. 2426 (and other lands)," whereas, the allegation concerning the particular portion of the land of which appellant is alleged to be in possession describes the land as a part of "private survey No. 2426." The contention is, therefore, that the land of which appellant is alleged to be in possession is not part of the lands owned by appellee according to the description in the complaint. This was, we think, an obvious misprision and not important, for it is plain that the descriptive words "Spanish Survey No. 2426," and "private survey No. 2426" were used as meaning the same thing.

(4) There is also the contention that the court, in testing the sufficiency of the complaint, should take judicial notice of the extent of the encroachments of the Arkansas River upon the body of land owned by appellee, and it is stated here to be a fact that the land charged to be in possession of the defendant has in fact been washed away by such encroachments and that we should take judicial knowledge of this fact. We held in *Little* v. *Williams*, 88 Ark. 37, that "the courts take judicial cognizance of the general system of government surveys, and that lands are surveyed and platted into sections and parts of sections and into fractional sections where they abut on streams or other bodies of water." It has also been held that we should take judicial cognizance of the natural boundaries of counties and of municipalities. *Cox* v. *State*, 68 Ark.

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462; *Crow* v. *Roane*, 86 Ark. 172; *McKenzie* v. *Newton*, 89 Ark. 564.

We may also take judicial notice, as is so forcibly argued by counsel, of the shifting of the channel of the Arknasas River, but it is quite another thing to say that we ought to take notice of the extent of the encroachments of the river upon adjoining lands, so as to determine, without the aid of extrinsic evidence, how far such encroachments have cut away particular tracts of land. That must necessarily be left to the proof adduced in each case, and is not a matter of which we can take judicial cognizance. In other words, we take notice of the fact that the river frequently changes its course and washes away land on one side, and forms accretions on the other. We might also take notice of a great convulsion whereby the channel of the river broke through and left certain natural objects on one side which theretofore had been located on the other side of the channel of the river. But, as before stated, it is necessarily a matter of proof to determine to what extent accretions have been formed. We have never had called to our attention a case where a court took judicial knowledge of the extent of accretions or erosions.

The complaint was therefore sufficient on its face to warrant the default judgment.

Affirmed.

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## SAILOR *v.* RANKIN.

Opinion delivered October 23, 1916.

1. ELECTION CONTESTS—REJECTION OF AN ENTIRE POLL.—The power to reject an entire poll should be exercised only in extreme cases, where it is impossible with reasonable certainty to ascertain the true vote.

2. ELECTION CONTESTS—FRAUD—REJECTION OF ENTIRE POLL.—Where, in a given precinct, it is shown that fraud was promiscuously committed by the election officials which affected the result to an extent, the exact limits of which it is impossible to ascertain from the testimony, and which fairly draws into question the integrity of the whole return, the same should be thrown out entirely and omitted from the

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count, leaving each party the opportunity to prove by other evidence the number of legal ballots actually cast.

3. ELECTION CONTESTS—FRAUD—EXCLUSION OF ENTIRE RETURN.—The evidence held sufficient to justify a finding that the entire returns from an election in certain townships should be rejected as unworthy of credit.

4. REMOVAL OF COUNTY SEAT—RESULT OF ELECTION.—In an election to determine the removal of the county seat of Perry County, *held*, that the vote was in favor of a removal from the present county seat, but that the election did not determine to what place the county seat should be removed.

5. ELECTION CONTEST—REJECTION OF ENTIRE POLL—BURDEN OF PROOF. Where an entire poll is rejected, it devolves upon each party to the contest to adduce proof, other than the certificates of the returns, to establish the number of legal votes cast.

6. ELECTION CONTEST—REMOVAL OF COUNTY SEAT—PLACE OF REMOVAL—JURISDICTION OF CIRCUIT COURT.—Where the contest is heard in the circuit court on appeal from an order of the county court, and it is adjudged there that a majority of the votes were for removal, but not for either place proposed, the circuit court has jurisdiction to order an election to determine the place to which the removal shall be made.

Appeal from Perry Circuit Court; *G. W. Hendricks*, Judge; affirmed in part and reversed in part.

*Sellers & Sellers*, for appellants.

Nothing done to the returns after the election will affect the election or change the burden of proof. *Webb* v. *Bowden*, 141 Pac. 652. The pleadings were too indefinite. 33 S. W. 669; 83 Pac. 393; 11 Am. St. 857; 1 Brewst. 26; 49 N. E. 488; 33 S. E. 718; 95 S. W. 676. When amended pleadings setting up new facts may be filed. 6 W. Va. 713; 23 Pac. 84; 159 S. W. 632; 159 S. W. 641; 111 Ark. 398; 61 Ark. 253; 58 Am. St. 239. When the whole poll must be cast out. 61 Ark. 111. The evidence of the ballots overcomes the returns. 79 N. W. 1018; 86 Ark. 269; 93 N. E. 291; 19 S. E. 557; 53 S. E. 706; 82 S. W. 1023. The result of an election should not be lightly set aside. 70 S. W. 668; 68 S. W. 1076; 70 S. W. 673. The ballots *prima facie* reflect the result of the election. 94 Ark. 482; 166 S. W. 762; 61 Ind. 392; 24 Pac. 258; 36 Ark. 446. They constitute the best evidence. 28 Cal. 124; 65 Cal. 58; 2 Pac. 737; 67

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Cal. 303; 7 Pac. 738; 108 Cal. 101; 41 Pac. 454; 49 Am. St. 68; 29 L. R. A. 673; 27 Mich. 116; 114 Ky. 312; 70 S. W. 52; 75 S. W. 257; 89 S. W. 1; 94 Ill. 515; 91 Md. 626; 46 Atl. 1025; 108 Ill. App. 631; 8 N. D. 484; 79 N. W. 1018; 184 Ill. 552; 56 N. E. 1012; 64 N. E. 292. The presumption is that public officers do their duty. 11 Ark. 212; 22 Ark. 79; 24 Ark. 407; 31 Ark. 39; 32 Ark. 772; 45 Ark. 298; 25 Ark. 314; 5 B. & Adol. 546; 12 Wheat. 69; 94 Ark. 221; 95 Ark. 438; 96 Ark. 477; 50 Ark. 276. It will not be presumed that one violated the law. 67 Ark. 278; 34 Ark. 518; 97 Ark. 212; 82 S. W. 1023.

2. The burden is upon the contestant to show that the ballots have been tampered with. 7 Pac. 739; 28 Cal. 133; 2 Pac. 727; 79 N. W. 1021; 12 S. W. 107; 27 Mich. 116. The presumption arising from the identity of names is overcome by the presumption in favor of the regularity of official action. 60 S. W. 129; 42 N. E. 727; 4 Wend. 283; 22 S. W. 333; 5 Mon. 422; 2 Ill. 128; 8 Me. 75; 7 Cal. 279; 94 Ark. 481; 73 Ark. 187; 50 Ark. 85. Presumption as to genuineness of the ballots. 49 Ark. 24; 9 R. C. L. 1164; 50 Ark. 95; 30 Cal. 325; 2 Swan. 68; 22 Barb. 72; 77 Am. St. 306. To prove a vote illegal, the evidence must be conclusive. 22 Pac. 225; 61 Ind. 392; 33 La. Ann. 398; 133 Am. St. 939; 4 Wis. 420; 12. Wis. 551; 16 Wis. 146. It can not be proved that the voter intended to vote for one man when the ballot was cast for another. 5 Denio 409; 27 N. Y. 45; 84 Am. Dec. 242; Cooley's Const. Lim. 611; 25 Am. St. 215; 10 Am. St. 318; 35 S. W. 544; 33 S. W. 400. Burden on contestant to show disqualification of voter. 108 Ark. 301; 39 Pac. 327; 84 Am. Dec. 268; 78 Ill. 170; 60 How. Pr. 471. Failure to call judges to show irregularities. 61 Ark. 256; 73 Ark. 193. Where the returns are impeached, they are evidence of nothing. 119 Pac. 220; 63 Ill. 405.

*Mehaffy, Reid & Mehaffy, John L. Hill* and *J. H. Bowen*, for appellee.

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When returns will be thrown out for fraud. 69 Ark. 501; McCrary on Elec. 449. A voter may contradict a ballot. 94 Ark. 483. The ballots are primary evidence of the result and must stand until impeached. 94 Ark. 478; *Bowden* v. *Webb*, 124 Ark. 244. Burden of maintaining the legality of the official count. 63 Ark. 175; 86 Ark. 259.

*Sellers & Sellers*, in reply.

MCCULLOCH, C. J. This is an appeal from the judgment of the circuit court of Perry County in a proceeding instituted to contest the result of an election held for the purpose of voting on the proposed removal of the county seat of that county from Perryville. There were two towns to which a removal was proposed, Perry and Bigelow, and each of those places received a very substantial number of votes. The county election commissioners rejected the returns from four precincts and omitted them from their return to the county court. On the hearing of this contest in the circuit court on appeal from the county court, it was conceded by both sides to the contest that the elections held in those four townships, and two others, were void, and that the returns from the six townships should be entirely excluded, which the circuit court accordingly did.

The face of the returns, with those six townships excluded, showed the following result: Total vote, 1869; for removal, 1,264; against removal, 594; for Bigelow, 1,175; for Perry, 635. The clerk's certified list of persons who had paid poll tax for the preceding year showed a total of 2,004 qualified electors. It thus appeared from the face of the returns that a majority of the votes cast at the election and also a majority of the total vote according to the number of poll taxes paid, was in favor of the proposal to remove the county seat and to establish the same at the town of Bigelow. Certain citizens thereupon instituted a contest in the county court on behalf of the town of Perry over the question of removal to Bigelow, and subsequently the appellees instituted a like proceeding on behalf of the

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town of Perryville contesting the vote on said removal, and the vote in favor of Bigelow.

Appellants filed their response on behalf of the town of Bigelow, and also a counter contest asking for the exclusion of the returns from the six townships already referred to. Each of the contests was based on alleged irregularities and frauds in four townships, constituting separate voting precincts, viz.: Casa, Roland, Houston and Perry, the last named township being the one in which the town of Bigelow is situated.

When the case was called for trial in the circuit court, the contestants on behalf of the town of Perry, withdrew their contest, and the cause proceeded to trial upon the contest of appellees on behalf of the town of Perryville. The court sustained the returns as made by the election officers in Houston and Perry townships, but excluded the vote from the other two townships, holding that the charges of fraud had been sustained. The circuit court decided, however, that the contestees had established the validity of 30 votes cast in Roland Township in favor of removal and in favor of Bigelow, and also had established the validity of 13 votes in Casa Township. It was therefore adjudged that the proposal to remove the county seat from Perryville, and the votes in favor of Bigelow, did not constitute a majority of the electors, and that both propositions had been lost. The contestees thereupon prosecuted the appeal to this court.

It is only necessary for us to review the decision of the court with respect to the election in Casa and Roland Townships, for in all other respects the decisions of the trial court were in favor of appellants.

It is contended, in the first place, that neither the pleadings nor the testimony warranted the judgment of the court excluding the returns from Casa and Roland townships. It is argued that the petitions for contest only attack the validity of specifically mentioned ballots in those two townships, and did not question the integrity of the returns as a whole. We find, however, on examination of the petition, that it is charged

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therein that the judges "committed such fraud and misconduct in the holding of said election in each of said precincts as to render the election therein void," and that the fraud and misconduct consisted of permitting a large number of persons to vote who were not qualified electors, some of whom did not reside in the precinct or county; that the election officers in said township electioneered with voters in the polling places, and that they fraudulently registered as voting certain persons who did not appear at all at the polls, and that they fraudulently changed the ballots of voters who cast their ballots against removal, so as to show that the same had been cast in favor of removal.

While the rule is that pleadings in a special statutory proceeding of this kind should be construed with some strictness, that does not mean that there should be such a technical construction of the pleadings as would defeat the obvious meaning and intention of the pleader. It was obviously the intention of the contestants to attack the validity of the whole return in each of the four townships mentioned, and it would be a very narrow interpretation of the language used in the petition to say that it was only intended to exclude certain votes. This intention is very plain when considered in connection with the fact that substantially all of the votes in those four townships were in favor of removal, and in favor of the town of Bigelow, and the effort of contestants was to show fraud of a general nature which would destroy the integrity of the returns of the election officers.

(1-2) In support of the contention that the proof is insufficient to show such fraud as would warrant an exclusion of the whole poll of the two townships mentioned, learned counsel rely upon the rule which the authorities cited in their brief show to be well established, to the effect that the power to reject an entire poll being a dangerous power, "it should be exercised only in extreme cases, that is to say, in a case where it is impossible to ascertain with reasonable certainty the true vote." McCrary on Elections, section 523; *Patton* v.

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*Coats*, 41 Ark. 111; *Webb* v. *Bowden*, 124 Ark. 244. On the other hand, it is equally well settled that where, in a given voting precinct, it is shown that fraud was promiscuously committed by the election officers which affected the result to an extent, the exact limits of which it is impossible from the testimony to ascertain, and which fairly draws in question the integrity of the whole returns, the same should be thrown out entirely and omitted from the count, leaving each party the opportunity to prove by other evidence the number of legal ballots actually cast. *Rhodes* v. *Driver*, 69 Ark. 501.

(3) We have here a finding of the trial judge to the effect that the fraud was sufficiently proved to justify the exclusion of the whole of the returns from Casa and Roland townships, and our sole inquiry here is directed to the question whether or not the testimony is legally sufficient to support the findings of the trial court. *Schuman* v. *Sanderson*, 73 Ark. 187.

An analysis of the testimony shows that there was proof tending to establish the following with respect to Casa township; that each of the election officers were partisans of the proposition to remove from Perryville to Bigelow; that some of the election officers on the day of the election left the polling place and went to the residence of a certain voter who was ill and received his ballot there and carried it back to the polling place and deposited it in the ballot box; that the officers permitted six persons to vote who were not qualified electors; that the returns showed that 11 persons voted who did not attend the election at all, and that the ballots of 8 voters were changed after they were handed in by the respective voters to the election officers. A recount of the ballot also shows that Bigelow was returned as receiving 4 more votes, and Perry received 4 less votes, than shown in the certified returns. There was also testimony tending to show that the poll books were rewritten and substituted after the election, so as to show the change of the names of 42 electors. One of the witnesses introduced by appellees

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testified that he procured the poll books from the election officers and in their presence made a copy of the same, and when this copy was compared with the returns on file with the election commissioners it was found that 42 names had been changed. The total number of votes shown by the returns to have been cast in Casa township was 145, and the testimony just referred to, if accepted as true, was sufficient to show frauds of such general nature as affected the validity of the whole returns.

The proof with respect to Roland township tends to show that out of the total poll of 110 votes, there appeared 34 names of persons who had not paid their poll taxes in the county; that the election officers placed in the box ballots purporting to be those of five persons who did not appear at all at the polling place; the officers concede that this is true as to two of the ballots; that two other persons were permitted to vote who were not qualified electors and who so informed the election officers at the time, but that the officers insisted that they go ahead and vote. This testimony, if given full credence, was legally sufficient to warrant a finding that the entire returns from the township should be rejected as being unworthy of credit.

It is contended finally that upon the findings of fact made by the court, even with the exclusion of the two townships, a majority of the votes were in favor of removal from Perryville and in favor of Bigelow, and that the judgment should have been against the contestants. After careful consideration of the findings of the court, we are of the opinion that this contention is sound with respect to the vote for removal from Perryville, but that the contention can not be sustained as to the finding in respect to the vote in favor of Bigelow.

The Constitution of 1874 provides that "No county seat shall be established or changed without the consent of a majority of the qualified voters of the county to be affected by such change, nor until the place at which it is proposed to establish or change such county

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seat shall be fully designated." (Art. XIII, section 3.) The statute now in force provides that "the number of the persons who have paid their poll tax, as shown by the list of persons who have paid their poll tax as filed with the county clerk by the collector," shall govern the county court in ascertaining the number of qualified voters of the county in a proceeding for the removal of the county seat. Kirby's Digest, section 1125.

(4-5) The validity of a somewhat similar statute, prescribing, however, a different test, was upheld by this court, as being not in conflict with the Constitution, in the case of *Vance* v. *Austell*, 45 Ark. 400, where the court held that the statute and the Constitution, when construed together, created a double test requiring that the votes in favor of removal must constitute a majority of those actually voting at the election, and also of the list prescribed by the statute. Now, the proof shows in the present case that there were 2,004 poll taxes paid in the county, a majority of which would be 1,003. The total vote actually cast was, according to the findings of the trial court, less than the number on the certified list of paid poll taxes. That is to say, taking the returns of the townships, exclusive of the six that were thrown out, and then deducting the total vote from Casa and Roland townships and adding the 43 legal votes shown to have been cast in those townships, makes a total of 1,657 votes cast at the election. The total vote being less than the number of certified poll taxes, the latter controls. Therefore, we must accept that as the proper test of determining the number of votes necessary to constitute a majority. There were returned in favor of Bigelow 1,175 votes, including Casa and Roland townships, and after deducting the total number (240) cast in favor of Bigelow in those townships and adding the 43 votes found by the court to have been legally cast in those two townships in favor of Bigelow, it makes the total in favor of Bigelow 978, which is 25 votes less than is necessary to constitute

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a majority according to the certified list of poll taxes paid in the county.

It is contended by learned counsel that under the pleadings and undisputed facts, 54 more votes should be counted in favor of Bigelow, but this contention is predicated upon the view that those votes should be counted in computing the result for the reason that they are not successfully attacked in the proof. The rule is, however, that when the entire poll is rejected, it devolves upon each party to adduce proof, other than the certificates of the returns, to establish the number of legal votes cast. *Rhodes* v. *Driver*, *supra*. The burden was therefore on appellants to prove the number of votes cast in favor of Bigelow in those two rejected townships, and they have failed to prove more than the number found in their favor by the court. So we can not sustain the contention that the undisputed proof shows a majority in favor of removal to Bigelow.

The state of the case is different, however, with respect to the vote on the question of removal from Perryville. There were 1,264 votes returned in favor of the removal proposition, exclusive of the six townships which were rejected from the returns. Out of this number a total of 239 were in favor of the removal in Casa and Roland townships, and after deducting this number from the total and adding the 43 votes found by the court to have been legally cast in favor of the proposition, it leaves a total of 1,068 votes in favor of removal, which constitutes a majority of the voters who paid poll taxes and of the votes actually cast at the election. We are of the opinion, therefore, that the court erred in its judgment declaring that the vote in favor of removal had failed to carry. The statute provides that "if such majority of the qualified votes, although given in favor of a change or removal from the existing location, be not given for the place (or one of the places, if more than one place be submitted), to which the change or removal is proposed to be made, the proposition shall be considered as rejected,

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and it shall be the duty of the county court, at its next regular meeting, to order a new election, to be governed in all respects like the first, except at the second election the original county seat and the one receiving the next highest vote at the first election shall be put in nomination and voted for at said second election." Kirby's Digest, section 1121, as amended by Act of May 31, 1909, p. 891.

(6) Where the contest is heard in the circuit court on appeal from an order of the county court, and it is adjudged there that a majority of the votes were for removal, but not for either place proposed, the circuit court has jurisdiction to order an election to determine the place to which the removal shall be made. *Neal* v. *Shinn*, 49 Ark. 227.

The judgment of the circuit court is therefore affirmed insofar as it declares that a majority did not vote in favor of either of the two places proposed for removal; but the judgment declaring that the proposed removal from Perryville failed to carry is reversed, and the cause remanded with directions to the circuit court to enter a judgment in accordance with the statute, ordering a new election to determine the location of the county seat as between Perryville, the old county seat, and Bigelow, the other candidate.

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## REINMAN v. WORLEY.

Opinion delivered October 23, 1916.

1. APPEAL AND ERROR—SPECIFIC OBJECTION TO AN INSTRUCTION—FALSE SWEARING.—The defect in an instruction, that if the jury believed any witness had testified falsely to any material fact, that they might disregard such testimony altogether, in failing to use the word "wilfully," is not prejudicial, and an objection thereto must be made specifically.

2. NEGLIGENCE—INJURY TO ANIMAL.—Defendant has no right to use excessive force in driving trespassing cattle from his pasture, and defendant's liability is not based upon whether he acted wantonly or maliciously.

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3. NEGLIGENCE—KILLING ANIMAL.—Defendant held liable for the killing of plaintiff's cow, which had strayed into defendant's pasture, where the defendant severely beat the cow, in driving her from the pasture, which beating resulted in her death.

Appeal from Pulaski Circuit Court, Third Division; *Thos. C. Trimble*, Judge on Exchange; affirmed.

*Mehaffy, Reid & Mehaffy*, for appellant.

1. The court erred in instructing the jury: "If you believe any witness has testified falsely to any material fact, you can disregard *that testimony altogether*, or you may accept such of his testimony as you believe to be true, and disregard such as you believe to be false." The second clause gives the jury the option of disregarding the *entire* testimony or only such portion as they believe to be false. 94 S. W. 47.

2. The 4th instruction requested by appellants is correct, and ought to have been given. If appellants' agent drove the cow from their land, they were not liable to appellee unless the agent used more force than was necessary or used unreasonable means. 3 Corpus Juris. 134; 2 Cyc. 399.

*L. C. Maloney*, for appellee.

MCCULLOCH, C. J. This is an action instituted by Mrs. Mary Worley against the defendants, Reinman & Wolfort, to recover the value of a cow whose death is alleged to have been caused by the wrongful act of defendants' agent. The jury returned a verdict in favor of the plaintiff and defendants have appealed.

Defendants operate a livery stable in Little Rock and maintain a pasture in Argenta for the purpose of pasturing mules. The pasture is located on the bank of the Arkansas River and is fenced on three sides. The fences running at right angles with the river are built up to the high water mark, but there is no fence along the river bank, and when the water is low there is a space between the ends of the fences and the river. There is, according to the testimony of the witnesses, a space of 46 feet, and cows which run at large can easily

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go around the ends of the fences and thus enter the pasture. It appears from the testimony that plaintiff owned cows which ran at large and often got into this pasture. Defendants had a man who looked after the pasture for them and the testimony shows that when he came there to look after the mules from time to time he would run the cows out. Testimony was admitted, without objection, to the effect that this man on other occasions besides the one now under investigation ran the cows out and beat them.

Plaintiff's cow was in good order and was turned out during the forenoon after having been milked. She was heavily with calf and was next seen during the afternoon standing near the river bank and was giving birth to the calf. One witness testified that he saw the cow driven out of the pasture and that the head of the calf was hanging out at that time. The calf died and the cow was driven up to plaintiff's house where she died in a short time. Numerous witnesses testified that the cow had been badly beaten and that there were stripes, knots and scars about her body, indicating that she had been recently beaten with a whip or pole. Defendants' agent in charge of the pasture admitted that he was there that afternoon and drove the cattle out of the pasture, but he denied that he whipped any of them or that he drove this particular cow. He said he observed this cow there near the edge of the pasture in the act of giving birth to the calf, and that he made inquiry about the ownership.

The case was submitted to the jury on the issue whether or not the death of the cow was caused by the wilful act of defendants' agent, and the verdict of the jury settled that issue in plaintiff's favor. While the evidence is largely circumstantial, we are of the opinion that it is sufficient to sustain the verdict. There is abundant testimony to warrant a finding that the cow was badly beaten, to the extent that the inference might have been drawn that this caused her death. No other person was seen there at the pasture driving the cows, but, on the other hand, defendants' agent admits that

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he was there and drove the other cows out of the pasture. We think the jury was warranted, from all the circumstances, in concluding that defendants' agent beat the cow and caused her death.

The court gave the following instruction on its own motion:

"Gentlemen of the Jury: You have heard the statements and facts connected with this case. The plaintiff sues the defendants for wilfully killing a cow, and asks for damages in the sum of $100. The burden of proof is upon the plaintiff to make out its case by a fair preponderance of the evidence. If the defendants' agent who had charge of the property upon which this cow was found wilfully killed the cow, then it would be your duty to find for the plaintiff. If you find for the plaintiff you will assess her damages at such sum as you believe has been proved by the evidence you have heard. If you don't believe that the plaintiff has made out a case by a preponderance of the evidence, then it will be your duty to find for the defendant. In other words, gentlemen of the jury, the court has nothing to do with the evidence in this case. The court gives you the law on every phase of the case, and you are simply to apply the evidence to the law. If you believe any witness has testified falsely to any material fact, you can disregard that testimony altogether, or you can accept such of his testimony as you believe to be true, and disregard such as you believe to be false. If you find for the plaintiff, you will find: 'We, the jury, find for the plaintiff, and assess her damages at such an amount as you think will justify you in doing so.' If you find for the defendant, you will say: 'We, the jury, find for the defendant.' You may retire, gentlemen."

The record recites that defendants saved exceptions to "the action of the court in giving the above instruction and each paragraph thereof." The following portion of the instruction is urged as reversible error: "If you believe any witness has testified falsely to any material fact, you can disregard that testimony altogether, or you can accept such of his testimony as you

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believe to be true, and disregard such as you believe to be false."

(1.) It is contended that this part of the instruction is erroneous in two particulars, viz.: First, that it omits the word "wilfully" and permits the jury to reject the testimony of a witness simply because some material portion of it is found to be untrue; and, second, that it permits the jury to discard all of the testimony of the witness, even that part which the jury might believe to be true. The instruction is, indeed, open to those objections, but they ought to have been pointed out specifically so that the objections could have been obviated. Evidently the court meant to tell the jury that it was within their province to discard the testimony of a witness found to have wilfully made false statements, but that they should accept that part of his testimony which they believed to be true. In the absence of specific objections to the instructions on those grounds, the error does not call for a reversal. *Bruder* v. *State*, 110 Ark. 402.

(2-3.) The court refused to give the following instruction requested by defendants: "4. You are instructed that if you find from the evidence in this case that the plaintiff's cow was on the land of the defendant without permission from the defendant, it was a trespasser, and the defendant owed it no duty except to refrain from wantonly or maliciously injuring it. You are further instructed that the defendant had a right to drive the cow from its premises, using any reasonable means."

It was not shown that the pasture was enclosed with a lawful fence. In fact the proof is that the fences did not extend to the river so as to prevent stock from entering. Defendant had no right to resort to excessive force or means in driving trespassing cattle from the pasture and the requested instruction was erroneous in telling the jury that there was no liability for the damage unless the injury was wantonly or maliciously inflicted. *Bennefield* v. *State*, 62 Ark. 365.

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The instruction given by the court was as favorable to defendants as they were entitled to. We need not determine whether or not the criminal statute (Kirby's Digest, Sec. 1893) applies to civil actions for damages.

Judgment affirmed.

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## DANIELSON *et al. v.* SKIDMORE *et al.*

Opinion delivered October 23, 1916.

1. CONTRACTS—EXCHANGE OF LAND—FALSE REPRESENTATIONS—REMEDIES.—A person who has been induced to enter into a contract for the purchase or exchange of lands by false representations concerning the quantity or quality, may have either of the following remedies: (*a*) he may rescind the contract and by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract; (*b*) he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of his damages would be the difference between the real value of the property in its true condition and the price at which he purchased it; or (*c*) to avoid circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agreed to pay.
2. EXCHANGE OF LANDS—FRAUD—ACTION FOR DAMAGES—LIMITATIONS.—Where plaintiff was induced to exchange lands with the defendant because of the latter's false representations, plaintiff may bring an action for damages at any time within the period of time allowed by law, but the measure of damages becomes fixed when plaintiff first discovers the fraud which he claims was perpetrated upon him.
3. CONTRACTS—EXCHANGE OF LAND—FRAUD—ACTION TO RESCIND—PROPER FORUM.—The proper forum for an action for damages, when plaintiff was induced by fraud to exchange lands with defendant, is in the circuit court, but when the same was tried in chancery without objection, the objection to jurisdiction will be deemed to have been waived.

Appeal from Fulton Chancery Court; *C. D. Frierson*, Chancellor; affirmed.

*Townsend & Smith*, of Kansas City, Mo., for appellants.

Counsel review the evidence and urge that there is not a preponderance in appellees' favor, but rather

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that the preponderance of the evidence is against the decree of the chancellor, citing 41 Ark. 292; 76 Ark. 282; *Id.* 292; 42 Ark. 522; 114 Ark. 121; 55 Ark. 116.

To justify the chancery court in cancelling a contract on the ground of misrepresentations, there must be clear and satisfactory evidence that there was such misrepresentation as to a material fact which was relied upon by the plaintiff and that he was induced thereby to enter into the contract, 82 Ark. 20-24; 11 Ark. 66; 19 Ark. 582; 47 Ark. 164; 101 Ark. 608. See also 2 Am. St. Rep. 345-351; 81 *Id.* 374; 95 Am. Dec. 628; 77 Ark. 355; 11 Ark. 378. Where the means of information are open to both parties alike, they will be presumed to have informed themselves, and the party failing to do so must abide the consequences of his own carelessness. 31 Ark. 170; 30 Ark. 686; 26 Ark. 28; 11 Ark. 58; 19 Ark. 522; 95 Ark. 523; *Id.* 131.

Skidmore used no diligence to inform himself. 46 Ark. 247; 38 Ark. 334.

*Lehman Kay*, for appellees.

The preponderance of the evidence sustains the decree. Citation of cases in its support not necessary.

HART, J. On the 12th day of September, 1914, appellees instituted this action in the chancery court against appellants to recover damages on account of certain false representations of appellants to appellees in the exchange of lands between the parties. In March, 1912, appellee, Effie Skidmore, was the owner of a house and lot in Kansas City, Missouri, and appellant Emma Danielson was the owner of 160 acres of land in Fulton County, Arkansas. Both parties resided with their husbands in Kansas City, Missouri. On the 25th day of March, 1912, the parties entered into a contract for the exchange of their lands and appellee, Effie Skidmore, agreed to pay $600 in addition. The parties made deeds to each other to the lands exchanged and in addition, Effie Skidmore executed a mortgage to appellant, Emma Eva E. Danielson, on the Fulton County lands

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to secure the payment of the $600. The husband of each of the parties acted as agent for his wife in making the trade.

W. H. Skidmore testified substantially as follows I represented my wife in making the exchange of lands: At the time the exchange of lands was made the value of the house and lot owned by my wife in Kansas City was between $3,000 and $3,500. The size of the lot was forty by one hundred and twenty feet. The house on the lot was a two-story, seven room, modern house. It was plastered and papered on the inside and the woodwork was painted both on the inside and on the outside. Neither my wife nor myself had ever seen the Fulton County property before we traded for it. The husband of Mrs. Danielson represented to me that there was a good four room cottage and log house on it and a good orchard and between fifty and sixty acres in cultivation. That there were eighty acres of it under fence and that it would produce as much wheat, corn and oats per acre as any Missouri or Illinois farm. That all of the land could be put in cultivation except twenty or twenty-five acres which contained valuable minerals. That the merchantable timber on the land was worth more than he was asking for the land and that it was only two hour's drive from Mammoth Spring and that the land was smooth and clear of rocks. I traded for this land for my wife upon these representations because I thought they were true. The representations turned out to be false. The land and improvements were only worth $600. There is no valuable timber on the land. I made a crop on the land in the years 1913 and 1914 and there was almost a total crop failure.

Another witness testified that he lived close to the Fulton County land and had known it for twenty years, that a fair market value of the land in 1912, was $350.00.

Another witness who had a lease on the land at the time the exchange was made, testified that Mr. Danielson asked him if he would write any prospective

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purchaser that there were six hundred and forty acres of land near this that recently sold for $10,000 and that the Danielson land was as good or better than it. That witness refused to agree to do this, because such was not the fact.

On the other hand Danielson testified that he told Skidmore that the Fulton land was a typical hilly, gravelly quarter section. That he had seen the land but once and that it was lacking in soil, but that they seemed to raise some cotton and other crops on it. That Skidmore told him that he had been through that section of Fulton county before and was familiar with the character of the soil there. That he seemed to know all about the soil in that part of Arkansas and made the exchange for the land on his own judgment. Danielson also stated that there was a mortgage of $1,100 on the house and lot in Kansas City which fell due soon after the exchange was made and that he tried to renew the mortgage but failed to do so. That he then tried to obtain a new mortgage but was unable to do so because the house was in such a dilapidated condition. He also testified that there was a great hole in the corner of the yard which required filling up and that he was at once put to great expense in repairing the house and filling up this hole. Danielson was corroborated in his testimony by a real estate agent who knew both parties. Another real estate agent testified that the house and lot in Kansas City was worth from $1,700 to $1,800 in 1912. Another person who bought the house and lot from Danielson in 1914, said it was then worth $2,500 or $2,800 and was in first-class repair. He stated that he would not take $2,500 cash for it.

The chancellor found in favor of appellees and the case is here on appeal.

(1) A person who has been induced to enter into a contract for the purchase or exchange of lands by false representations concerning the quantity or quality, may have either of these remedies which he conceives most to his interest to adopt. He may rescind the contract and by returning or offering to return the

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property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract. Again he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of his damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. Lastly to avoid circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money and is entitled to have the same recouped from the price he agreed to pay. *Matlock* v. *Reppy*, 47 Ark. 148; *Ft. Smith Lumber Co.* v. *Baker*, 123 Ark. 275, 185 S. W. 277.

(2) In the present case appellees elected to sue for damages but waited two years after the exchange of lands was made before bringing suit. They had the right to bring their action at any time within the period of time allowed by law but their measures of damages were fixed when they first discovered the fraud which they claimed had been perpetrated upon them. *Ft. Smith Lumber Co.* v. *Baker*, *supra*.

(3) The proper forum for such an action was in the circuit court, but no objection was made to the chancery court trying the case and any objection which might have been made on that account will be deemed to have been waived and need not be considered on appeal. The only issue then raised by the appeal is whether or not the findings of fact made by the chancellor are sustained by the evidence.

It is well settled in this state that the findings of fact made by a chancellor will not be disturbed on appeal unless they are against a preponderance of the evidence. Tested by this rule we think the decision of the chancellor should be upheld. Practically all the testimony, and certainly a preponderance of it, shows that the Fulton county land was a rocky hillside farm about five hours drive, instead of two hours, from the town of Mammoth Spring. That it was of very little value and at the time the exchange was

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made neither Skidmore nor his wife had seen the land. It is true Danielson testified that Skidmore told him that he had been through Fulton County and knew the character of land there. Skidmore denied this, however, and he is corroborated by other circumstances in evidence. He had a right to rely upon the representations of Danielson as to the quality of the soil, and according to his testimony he did rely upon them.

While Danielson testified that the Kansas City property was in a dilapidated condition he is flatly contradicted by Skidmore who testified that the property was in first-class condition and had on it a house with modern improvements. He stated that the hole in the lot could be filled up with dirt taken from the adjoining property at no cost when that property was graded. He is corroborated by the person who purchased the property from Danielson. He stated that the property was in good repair when he purchased it, and that he would not consider a cash offer of $2,500 for it.

We think that when all the facts and circumstances adduced in evidence are read and considered in the light of each other, it cannot be said that the chancellor erred in finding for appellees.

The decree will therefore be affirmed.

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## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO. v. CUNNINGHAM COMMISSION CO.

Opinion delivered October 23, 1916.

1. CARRIERS—DAMAGE TO INTERSTATE SHIPMENT.—The initial carrier of an interstate shipment of freight, who issues its bill of lading therefor, is liable for damages caused by it or by any connecting carrier over whose line it passed before it reached its destination.

2. CARRIERS—DAMAGE TO FREIGHT—PRESUMPTION AND LIABILITY—CONNECTING CARRIERS.—Freight, which appellee shipped over defendant railway's line, was rejected by the consignee, and was reshipped to appellee, the freight having passed over the line of a connecting carrier. The freight was in a damaged condition when received back by the appellee. *Held*, the delivering carrier was liable

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for the damage, for in the absence of proof to the contrary the law presumes the damage occurred on account of the negligence of the delivering carrier.

3. CARRIERS—DAMAGE TO FREIGHT—CONNECTING CARRIERS.—Where goods were consigned from Little Rock, Arkansas, to Corpus Christi, Texas, and passed over the lines of connecting carriers, and the consignee at Corpus Christi refused to accept the same because they were in a damaged condition, and the goods were reshipped to the consignor who sued the receiving carrier, who was also the delivering carrier, for the damage, the burden is upon the said carrier, in order to escape liability to show that the transit of the shipment had terminated in Corpus Christi, and that the damage occurred because of the negligence of the consignee in failing to receive and unload the shipment after it arrived at its destination.

4. CARRIERS—DAMAGE TO FREIGHT—BURDEN OF PROOF.—Where goods are delivered to a carrier in sound condition, and it issues its bill of lading therefor, and the shipment is damaged before delivery, the burden rests upon the carrier, if it would escape liability, to show that at the time of loss, that its liability as a common carrier had terminated.

Appeal from Pulaski Circuit Court; Third Division. *G. W. Hendricks*, Judge; affirmed.

*E. B. Kinsworthy* and *W. G. Riddick*, for appellant.

The evidence is not sufficient to show authority in Fullenwider to bind appellant by agreements with reference to either of the cars involved in this case.

Neither the fact of agency nor its extent or authority is established by declarations of the agent. 80 Ark. 298; 92 Ark. 315; 90 Ark. 104. Authority of the agent is never proven by the mere fact that the person claiming the power has exercised it; it must also be proved that the person to be charged as principal assented to such act. 105 Ark. 446; *Id.* 111; 24 N. E. 827.

*Chas. Jacobson*, for appellee.

Fullenwider was general freight claim agent of appellant at Little Rock. He had handled many claims for appellee under identical conditions as this case, and in no instance had his authority to make settlement been questioned. The evidence also shows that by wiring and correspondence he satisfied himself

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in the matter, then gave appellee orders what to do. 105 Ark. 111, 113-114; 179 S. W. (Tex.) 887; 114 Ark. 303.

HART, J. Appellee sued appellant to recover damages to two cars of chops shipped over the latter's line of railroad from Little Rock, Ark., to Corpus Christi, Texas. The material facts are as follows:

Appellee, Cunningham Commission Company, is a domestic corporation engaged in selling grain by wholesale at Little Rock, Ark. In November, 1911, appellee received an order to ship two cars of chops to Corpus Christi, Texas. The order was accepted and the two cars were delivered to appellant for shipment over its line of railroad. The cars were consigned to shipper's order and drafts attached to the bills of lading.

The two cars were shipped respectively November 20 and 22, 1911. Both cars were consigned to M. Bennett Grain Company, Corpus Christi, Texas, with directions to notify Taylor Grain & Hay Co. of the same place. Appellant issued its bill of lading to appellee, and the latter paid the freight on the shipment. The shipment was carried over appellant's line of railroad and its connecting carriers in order to reach its destination.

The agent for the terminal carrier testified that both cars according to his recollection arrived at destination about the last of November, 1911. That Taylor Grain & Hay Company was notified of its arrival. That said company would not receive the cars until it was allowed to inspect same. That after an examination of the cars was allowed and made, it refused to receive same on the ground that the grain had become wet and damaged. The agent stated that one of the cars had a leaky roof. That one of the cars was shipped back to Little Rock.

The officers of appellee testified that they sent the bill of lading with draft attached to the consignee for each of the two cars; and that the consignee refused

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to take up the drafts on the ground that the chops were damaged in transit. That they took the matter up with Mr. Fullenwider, the freight claim agent of appellant with whom they had taken up dozens of such claims before. That it was finally agreed between them that the claim would be settled. That according to the agreement, the consignee received one car with a reduction of $100.00. That pursuant to the direction of Fullenwider the other car was shipped back to Little Rock, and delivered to appellee to be sold to the best advantage. That Fullenwider expressly agreed to pay appellee the damages sustained by it. They also testified that an examination of the car when it was returned to Little Rock showed that it had holes in it and that the chops had been damaged by rain leaking in on the chops. They also testified to the amount of the damages. The car was shipped back to Little Rock during the first part of January, 1912.

The case was tried before the circuit judge sitting as a jury. From a judgment in favor of appellee, appellant prosecutes this appeal.

Counsel for appellant urges that the evidence is not legally sufficient to sustain the finding of the court. The damage to the chops and the amount thereof was shown by evidence, which was not disputed. The record also shows that appellee shipped 2 cars of chops over appellant's line of road from Little Rock, Ark., to Corpus Christi, Texas, consigned to M. Bennett Grain Co., with directions to notify Taylor Grain & Hay Company. The chops were carried over connecting lines of appellant to reach their destination. Subsequently one of the cars was shipped back to Little Rock under the direction of appellant's freight claim agent. The car of chops was delivered to appellant in good condition and was damaged when it was returned to Little Rock.

(1) The shipment was an interstate one. Appellant was the initial carrier and issued its bill of lading

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for the chops consigned to Corpus Christi. It thereby became liable to the lawful holder of the bill of lading for any damage to the chops caused by it or any connecting carrier over whose line it passed before it reached its destination. *K. C. So. Ry. Co.* v. *Mixon*, 107 Ark. 48. So if the corn was damaged while en route to Corpus Christi, appellant is liable.

(2) Again the undisputed testimony shows that one of the cars of chops was shipped back to Little Rock and re-delivered to appellee and that it was in a damaged condition when appellee received it. So if the chops were damaged between Corpus Christi and Little Rock on the return trip, appellant is liable because in the absence of proof, the law presumes that the damage occurred on account of the negligence of the delivering carrier. *St. L. I. M. & S. Ry. Co.* v. *Hudgins Produce Co.*, 118 Ark. 398; *St. L. I. M. & So. Ry. Co.* v. *Home Oil & Manufacturing Co.*, 122 Ark. 201.

(3) But it is insisted by counsel for appellant that the damage might have occurred at Corpus Christi through the negligence of the consignee. The station agent of the terminal carrier testified that the consignee refused to receive the corn because it was in a damaged condition, and said he did not have any personal recollection as to whether or not the corn was in a damaged condition when it arrived at Corpus Christi.

The burden was upon the appellant to show that the transit of the corn had terminated and that the loss or damage occurred because of the negligence of consignee in failing to receive and unload the corn after it arrived at destination.

(4) While the burden was upon appellee to make out its cause of action, when it was once shown that appellant received the corn in good condition and issued its bill of lading for the corn consigned to some person at Corpus Christi, the relation of common carrier was shown, and the burden was shifted to appellant to show that at the time of loss its liability as such common carrier had terminated. *Peoria & Pekin*

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*Union Railway Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348. No evidence was introduced by appellant on this question. Hence under the undisputed evidence the court was warranted in finding for appellee.

Counsel for appellant also insists that there is no competent testimony to show that Fullenwider had authority to settle this claim and that the court erred in admitting testimony to the effect that Fullenwider had agreed to settle the claim. It is also claimed that the court erred in admitting other testimony. Having reached the conclusion that the appellee is entitled to recover under the undisputed evidence, it is unnecessary to consider these assignments of error. For if the appellee was entitled to recover under the undisputed evidence, which is competent, appellant could not have been prejudiced by the admission of other evidence, even if incompetent.

The judgment will, therefore, be affirmed.

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## BUFFALO ZINC & COPPER COMPANY v. MCCARTY.

### Opinion delivered October 30, 1916.

1. BOUNDARIES—DISPUTE OF SURVEYOR'S RECORDS—BURDEN OF PROOF. When a party to a controversy over a certain boundary line, under Kirby's Digest, §§ 1142, 1143, introduced the surveyor's record in evidence, making a *prima facie* case, it becomes the duty of the other party to show that the location of the true line was otherwise than as shown in the survey thus certified.

2. BOUNDARIES—DISPUTED SURVEYOR'S RECORDS.—The official records of each survey of the same line made by different surveyors, are of equal dignity, and in case of a conflict, there is no shifting of the burden to go forward with evidence, as where only one certificate is introduced and its correctness disputed.

3. BOUNDARIES—DETERMINATION OF LOCATION.—The location of a boundary is to be determined like any other issue, by a preponderance of the testimony adduced.

4. BOUNDARIES—PROOF OF—DUTY OF SURVEYOR.—In an action involving a disputed boundary line, an instruction that it is "the duty of the county surveyor in subdividing any section or part of a section of land originally surveyed under the authority of the United States, to make his survey conformably to the original survey," held proper.

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Appeal from Marion Circuit Court; *John I. Worthington*, Judge; affirmed.

*J. C. Floyd*, for appellants.

1. The statutes both State and Federal, prescribe certain rules by which surveyors are to be governed in establishing land lines and in locating corners to sections, and subdivisions thereof. Kirby's Dig., § 1136; Rev. Stat. U. S. § 2395, *et seq.*; 88 Ark. 37; 97 Ark. 193; 39 Mich. 60. As to regulations concerning restoration of lost or obliterated corners, see Revision of June 1, 1909, General Land Office, pp. 22, 23.

A certified copy of the record of any county surveyor, under the hand of the surveyor, shall be admitted as *prima facie* evidence in any court of record. Kirby's Dig. § 1142. This applies not only to the records of a county surveyor while in office, but with equal force to the surveys of all former surveyors who made records of their surveys while in office and duly certified the same.

The only effect the statute, sec. 1142 *supra*, gives the county surveyor's certificate is to make it *prima facie* evidence of its correctness. 44 Ark. 287; 50 Ark. 63; 53 Ark. 411. No act or record of a county surveyor is conclusive, but may be reviewed in any competent tribunal in any case where the correctness thereof is disputed. Kirby's Dig., § 1143.

2. Instruction No. 2 given over appellant's objections is erroneous and misleading because the survey of county surveyor Patterson has no more sanctity as evidence, is no more *prima facie* evidence that it is the correct line, than that of any other county surveyor who made a survey of the line and corner in dispute and introduced in evidence. It was error to single out Patterson and tell the jury that they might take the line surveyed by him and the corner located by him as the true line and corner.

It is further misleading in that it leaves it open to the jury to conclude, from the qualifying phrase used,

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that it devolved upon the defendants to show where the true line is located, whereas the burden was on them only to show that the Patterson line and corner are not the true line and corner, in order to defeat recovery by appellees.

3. Since the Patterson survey was based on the assumption that the section corner in question was lost, it was error to refuse to instruct the jury as to the rules and regulations provided by law for establishing lost or obliterated corners. Revision of General Land Office, June 1, 1909, pp. 22, 23.

4. Instruction 7 requested by appellants was proper in view of the evidence and should have been given. It is not an instruction on the weight of evidence.

5. Appellants contend that the corner in question is a known corner heretofore established conformably to the original survey. It is well settled that lines and corners located and marked by the return of the Surveyor General, however erroneous, cannot be collaterally attacked, but the authority to correct such errors or mistakes rests wholly in the Land Department of the Federal government. 128 U. S. 691; 17 How. 23; 197 U. S. 510; 88 Ark. 37; 114 Mo. 426; 2 S. D. 269.

6. The presumptions of law in favor of the correctness of the Patterson survey, were overturned by a clear preponderance of the evidence. The method pursued by him in making the survey and in establishing the section line and corner is not in keeping with the law governing in such cases. The survey was not made conformably to the original survey made by the Government nor in keeping with the rules and regulations prescribed for the establishment of lost or obliterated lines and corners. 97 Ark. 193; Revised Statutes, U. S. 2396; Kirby's Dig., § 1136; 59 Mich. 338; 3 Ky. Law Rep. 533.

*Williams & Seawel*, for appellees.

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1. Instruction 2 is not open to the objections urged by appellants. The records made by the surveyors other than Patterson were not made for the purpose of preserving the location of the corner and lines in dispute in this case, but for preserving evidence of the location of the corner and lines of other lands and not including the lands in dispute. The instruction is merely a declaration of law that the Patterson survey has a certain probative effect by virtue of the statute and not by reason of any intrinsic merit of its own as a fact. This is the law, 44 Ark. 287; 97 Ark. 96. If the instruction is subject to the criticism offered by appellants, it was cured by instruction 4 given at their request. 84 Ark. 241; 87 Ark. 396. The case first cited above, 44 Ark. 287, also disposes of appellant's second objection as to the burden of proof. See also 53 Ark. 377; 68 Ark. 376.

2. The only restriction imposed by our statute upon the county surveyor relative to the establishment of corners and subdivisions of land is found in section 1136, Kirby's Digest, to the effect that he shall "make his survey conformably to the original survey," —*i. e.*, the original Government survey. The court instructed the jury in the language of this statute as to the duty of the surveyor. And by virtue of section 1142, Kirby's Digest, and the decisions *supra*, the record introduced was *prima facie* evidence that the surveyor did make his survey conformably to the original survey.

3. Instruction 7 requested by appellants was properly refused, because it is an instruction on the weight the jury should give to evidence of certain character; because it limits the location corner either by identification mounds, pits, buried memorials, witness trees or other permanent objects noted in the field notes or by evidence of citizens as to the place it formerly occupied, and because it is in conflict with the instruction making the record of the county surveyor *prima facie* evidence of its location.

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MCCULLOCH, C. J. Appellants and appellees are the owners, respectively, of adjoining tracts of land in Marion County, Arkansas, the boundary between the two tracts being along section lines. There arose a dispute between the said parties as to the true location of the boundary line, and this is an action instituted by appellees to recover possession of a strip of ground thirty-four feet wide claimed to be situated within appellee's boundaries. The case was tried before a jury and there was a verdict in favor of appellees.

There was a sharp conflict in the testimony. Appellees introduced in evidence a certified copy of a survey made by the county surveyor, and also introduced witnesses, including the county surveyor and numerous other persons, in support of the correctness of his survey. On the other hand, appellants introduced testimony tending to show that the true boundary line, according to the original government survey, threw the disputed strip of land on their side of the boundary. It is very earnestly contended that the evidence of witnesses introduced by appellees should not be accepted for the reason that the survey was made on the wrong basis, and that said testimony is palpably in conflict with the obvious facts with respect to the true location of the section line. We are of the opinion, however, after careful consideration of the testimony, that there was sufficient on each side to make a case for the jury, and that we must treat the verdict as a settlement of the issue of fact in favor of appellees.

Error of the court is assigned in giving the following instruction:

"2. I instruct you that the record of the survey made by Fulton Patterson as county surveyor of Marion County as a matter of law constitutes the *prima facie* evidence of the correct line and correct corner to the land in dispute so far as it appears from the survey; and must be taken by you as the true line and corner to the land in controversy unless you find from a preponderance of the evidence in this case that

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some other line and some other corner is the true line and corner."

The court also gave, at the request of appellants, the following instruction:

"4. The court also instructs the jury that the records of former county surveyors form the same *prima facie* evidence as would that of any other surveyor, all of which are records of the same character."

(1) It is contended that these two instructions are directly conflicting, and that the first one quoted above is prejudicial in that it puts the burden on appellants of overcoming the *prima facie* case made by the certificate of the county surveyor, notwithstanding the fact that appellants also introduced official certificates of former county surveyors showing that the line they contend for is the true one. As applied to the evidence in this case, we think there is no conflict in the two instructions. The statute provides that a county surveyor shall keep a record of all his surveys, and that a certified copy of such record "under the hand of the surveyor, shall be admitted as *prima facie* evidence in any court of record," but that no record of any surveyor "shall be conclusive, but may be reviewed by any competent tribunal in any case where the correctness thereof may be disputed." Kirby's Digest, sections 1142-1143. This court, in construing the statute referred to above, decided that when a party to a controversy introduced in evidence the surveyor's record, making a *prima facie* case, it threw the burden upon the other party of showing that the location of the true line was otherwise than as shown in the survey thus certified. *Smith* v. *Leach*, 44 Ark. 287.

(2) The official records of each survey of the same line made by different surveyors are of equal dignity, and in case of such conflict there would be no shifting of the burden of proof from one side to the other as in the case of introduction of one certificate. But we understand that in the present case the certificates of former surveys did not reach to the par-

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ticular line now in controversy, but stopped short of reaching that point. They were records of surveys of other tracts of land, and were of value in this particular controversy as tending to show the direction of the correct boundary line between these two tracts, but they did not in fact constitute a survey of the line now in dispute. Therefore those former surveys, while constituting a *prima facie* case as far as they went, did not shift the burden on the appellees of showing the true boundary nor nullify the *prima facie* effect of the official record of the last survey made by the county surveyor. Our conclusion is that these two instructions were not conflicting, but were properly given in the case, and that the last survey, which was along the disputed boundary line, made out a *prima facie* case in favor of appellees, and that the burden of proof then shifted to appellants to establish the true boundary lines.

(3) The court refused appellants' request to give the following instruction:

"7. The jury are instructed that identification of mounds, pits, buried memorials, witness trees or other permanent objects noted in the filed notes of surveys are admissible in evidence as means of locating the missing corner in its original position. If this cannot be done, clear and convincing testimony of citizens as to the place it originally occupied should be considered if such can be obtained. In any event whether the locus of the corner be fixed by the one means or the other, such locus should always be tested and confirmed by measurements to known corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases and much must be left to the skill, fidelity and good judgment of the surveyor in the performance of his work."

This instruction was objectionable for the reason that it invaded the province of the jury in determining the weight of the evidence. The location of a boundary is to be determined like any other issue,

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by a preponderance of the testimony, and it was incorrect to tell the jury in effect that only "clear and convincing testimony of citizens" could be considered in determining the identification and location of missing corners in the government survey.

(4) There are several other assignments of error with regard to instructions given and requests for instructions refused, but we are of the opinion that the court placed the issues before the jury upon correct instructions, and that there was no error committed. There was a clear-cut issue of fact in this case as to the location of the section line, and the court correctly instructed that it is "the duty of the county surveyor in subdividing any section or part of section of land originally surveyed under the authority of the United States to make his survey conformably to the original survey." Now, the disputed boundary was, as before stated, a section line, and under this instruction it was the duty of the surveyors to follow out the lines of the original government survey, and both sides in the testimony attempted to show that they had done so. This made a question for the jury upon directly conflicting testimony, and there was enough testimony on each side to sustain a verdict.

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

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## SMITH v. PRICE.

### Opinion delivered October 30, 1916.

1. SPECIFIC PERFORMANCE—DISCRETION OF CHANCELLOR.—Specific performance is not always granted as a matter of right, but rests in the sound discretion of the chancery court.

2. SPECIFIC PERFORMANCE—DISCRETION OF CHANCELLOR.—A. agreed to sell certain land to B. for a certain sum, but before the trade was consummated B. discovered that the land was subject to two mortgages. B. purchased one of the outstanding mortgages, foreclosed the same and purchased at the sale; thereafter A. redeemed from the said sale, said redemption being resisted by B. *Held*, under the facts, it was not

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an abuse of his discretion where the chancellor, at the suit of B. refused to order a specific performance of the original contract in his favor.

Appeal from Prairie Chancery Court; Southern District; *John M. Elliott*, Chancellor; judgment modified.

*R. J. Smith*, of Iowa, and *Manning, Emerson & Morris*, for appellant.

1. Appellant is entitled to specific performance. The contract is plain and unambiguous, appellant paid the cash payment called for by it, and, as appears by the undisputed evidence, he is and has at all times been ready, willing and able to perform his part of the contract. The court's authority to grant the relief is beyond dispute. Pomeroy, Eq. Jur., 3d ed., § 1402; 36 Cyc. 552. There has been no default on appellant's part. On the contrary, it is shown that he exerted every effort to get the deal closed, whereas, as a matter of law he was only required to hold himself in readiness to perform. 36 Cyc. 706; Pomeroy, Eq., Jur., 3d ed., 1407, and note.

Tendering a deed and good abstract and the payment of $1,500.00 were concurrent acts, and such abstract not having been tendered, appellant cannot be said to be in default. *Supra;* 22 Pac. 951-3 and cases cited.

The contention that appellant is barred by laches cannot be maintained. There is no such unreasonable or unexcused delay on his part in the enforcement of his rights as to constitute laches. 20 R. I. 202, 37 Atl. 804-5; 49 Pac. 769-772; 100 Ark. 399-403.

2. If specific performance cannot be decreed, appellant is entitled to damages for loss of rent, to a return of the sums paid on the purchase price, and to the difference between the contract price and the market value of the land. Pomeroy, Eq. Jur., 3d ed., §§ 181, 231; 75 Ark. 52; 77 Ark. 570-576; 111 Ark. 329; 113 Ark. 100.

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*John L. Ingram*, for appellee.

1. Appellant is not entitled to specific performance.

The proof shows that while appellant was insisting upon an unencumbered title, he was exerting himself to prevent appellee from removing the encumbrances, even trying to acquire title to the land in the name of his daughter-in-law.

There has never been any actual tender of the purchase money.

In the exercise of a sound discretion courts of equity generally refuse to grant specific performance where the case is not clear or where the complainant is in the wrong or there are considerable countervailing equities. 34 Ark. 663; 12 Ark. 421 and 451; 1 Pomeroy's Eq., 2d ed., §§ 138, 400; *Id.* § 1405.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Prairie county by appellant, R. B. Smith, against appellees to require the specific performance of a contract executed by him and appellee, W. M. Price, for the sale and purchase of a tract of 240 acres of land situated in said county.

Price owned the lands in question, which were encumbered by two mortgages to secure amounts aggregating about $4,000.00, neither of which mortgages were, however, executed by Price. The mortgages were executed by Price's grantors prior to his purchase. Price entered into a written contract with appellant, dated October 31, 1906, for the sale of the land at the price of $9,500.00 of which $500.00 was paid. The contract contained an agreement that Price would rent the lands for a period of five years at an annual rental of $6.00 per acre, and that he would build on the land a pumping plant at a cost of $2,000.00. The contract specified that appellant was to pay the price as follows: "$500.00 down; $1,500.00 when deed and title are accepted by second party; $2,000 when rice pump and plant of that cost are put on said premises in acceptable manner for the purposes of

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rice culture thereon, but not prior to January 1, 1907, balance purchase price payable in five equal payments fo $1,100 each on November 10 of each year hereafter until all are paid with interest at the rate of 5 per cent. per annum from November 10, 1907, until paid."

The $500.00 cash payment was, as before stated, paid, and appellant executed his notes to Price in conformity with the contract, and the notes, together with the deed, were placed in a bank at Stuttgart in escrow until an abstract of title could be furnished and examined by an attorney. The contract made no reference to the prior mortgage liens, but their existence was disclosed by the abstract and the attorney who examined the title declined to approve it until the liens should be removed. The papers were sent by the Stuttgart bank to another bank at appellant's home in the State of Iowa, negotiations being pending between the Iowa bank and Price for the sale of the notes. The Iowa bank made inquiry of appellant about the validity of the notes, and he called attention to the fact that there were mortgage liens on the property which had to be removed before the sale would be consummated, and that he would not consent to a sale and delivery of the notes until those liens were discharged. Correspondence took place between appellant and Price about allowing the notes to be sold and the mortgage liens discharged out of the price to be received from the notes, but Price would not consent to that when requested and the notes were not sold.

Subsequently appellant's son, who was acting as his attorney and agent, purchased one of the mortgages and proceeded to foreclose the same under the power contained therein, and the lands were purchased at the mortgage sale by the wife of appellant's son. The evidence shows that the purchase was really made for the benefit of appellant himself. Within one year from the date of the sale, Price attempted to redeem, from the mortgage sale by tendering the amount of the debt, interest and cost of sale to the purchaser, but the

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tender was refused, and Price thereupon brought suit in the chancery court of Prairie county to compel an acceptance of the amount in redemption of the land from the mortgage sale. Appellant was made a party to that action and appeared and resisted Price's effort to redeem, but the chancery court decreed the redemption and that decree was affirmed by this court on appeal. 102 Ark. 367. The record in that case shows that appellant, in his effort to resist Price's right to redeem, set up in a cross-complaint the latter's contract with him for the sale of the land. The cross-complaint was stricken out by the court, and that ruling was the basis of the appeal to this court. It was held here that the counter-claim did not set up any matter connected with the foundation of the plaintiff's claim, and was, therefore, not properly a matter for relief in that action.

(1) The present action was instituted on October 5, 1911. On final hearing of the cause the chancery court denied the prayer for specific performance, but decreed the recovery by appellant of the sum of $500, the cash payment made under the contract. We think the decree of the chancellor was correct in so far as it denied specific performance of the contract. It has been held by this court that specific performance is not always granted as a matter of right, but rests in the sound discretion of the chancery court.

In *Watkins* v. *Turner*, 34 Ark. 663, this court said: "Decrees for specific performance were not originally granted in any case as matter of course. They rested in the sound discretion of the chancellor upon all the equities of the particular case, the manifest right of complainant, the hardship of the case, and the inadequacy of the legal remedy. Afterward, when the principles upon which this kind of relief was usually granted became established, it came to be considered the duty of the courts to grant it, upon clear cases coming within the principles, but they have always reserved the right of sound discretion, and generally refuse the specific relief, where the case is not clear, or where the

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complainant is in the wrong, or there are considerable countervailing equities. In such cases, it remains competent for courts of equity to refuse to interfere, but to leave the parties to those rights and remedies at law established for the general administration of justice."

Professor Pomeroy, in his work on Equity Jurisprudence, said: "It is sometimes said that the remedy of specific performance rests with the discretion of the court; but rightly viewed, this discretion consists mainly in applying to the plaintiff the principle, he who comes into a court of equity must come with clean hands, although the remedy, under certain circumstances, is regulated by the principle, he who seeks equity must do equity. The doctrine, thus applied, means that the party asking the aid of the court must stand in conscientious relations toward his adversary; that the transaction from which his claim arises must be fair and just, and that the relief itself must not be harsh and oppressive upon the defendant." Pomeroy's Eq., Vol. 1 (2 ed.), section 138.

(2) Appellant had the right to insist that the mortgage liens be discharged or that he be protected therefrom before the consummation of the trade, and he was entirely within his rights in refusing to consent to a delivery and sale of his notes until those liens were discharged. He was likewise within his rights in purchasing the outstanding mortgage lien for the purpose of protecting the lands from foreclosure. But we are of the opinion that appellant put himself in an inconsistent attitude toward the performance of the contract when he foreclosed the mortgage and bought in the land, and refused to allow a redemption, thus cutting off Price's title and permitting performance of the contract. His attitude in purchasing the title under the foreclosure, which the proof shows he did by taking the title in the name of his son's wife, was inconsistent with his rights under the contract for the reason that the divestiture of title out of Price by the foreclosure put it beyond his power to perform the contract by conveying the land. The fact that appellant's effort to secure the

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title under the foreclosure failed, on account of Price's redemption from the sale, did not restore appellant's abandoned right to a specific performance of the contract. Having thus put himself in an inconsistent attitude, it was a fair exercise of the chancellor's discretion to say that he can no longer invoke the equitable remedy of specific performance.

We are of the opinion, however, that the court erred in not decreeing to appellant, in addition to the $500 paid, the further sum of $492.70, which was earned by appellant as commission on sale of other land, and which was in fact credited by Price on the notes. This constituted a payment as much as did the actual payment of the sum of $500, and we see no reason why a distinction should be made between the two payments.

The decree, so far as it denies the specific performance of the contract, is affirmed. But judgment will be entered here in appellant's favor for the sum of $492.70, with interest from date of credit on the notes, in addition to the recovery of the $500 allowed by the chancellor. It is so ordered.

KIRBY, J., dissenting.

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# APPENDIX

## I.

### OPINIONS NOT REPORTED.

Watson *v.* State; appeal from Lafayette Circuit Court; George R. Haynie, Judge; affirmed June 19, 1916, *per* McCulloch, C. J.

York & Sons *v.* Powell; appeal from Prairie Circuit Court, Northern District; T. C. Trimble, Judge; reversed June 26, 1916, *per* Wood, J.

St. Louis S. W. Ry. Co. *v.* Oarmack; appeal from Miller Circuit Court; George R. Haynie, Judge; affirmed June 26, 1916, *per* McCulloch, C. J.

Schneider *v.* Bunn; appeal from Boone Chancery Court; T. H. Humphreys, Chancellor; affirmed June 26, 1916, *per* McCulloch, C. J.

Wally *v.* Heck; appeal from Benton Chancery Court; T. H. Humphreys, Chancellor; affirmed April 10, 1916, *per* Hart, J.

Equitable Surety Co. *v.* Wilson; appeal from Yell Circuit Court; Dardanelle District; M. L. Davis, Judge; affirmed June 12, 1916, *per* Wood, J.

Blakemore *v.* Edmondson; reversed, July 3, 1916, *per* Wood, J.

Cotton *v.* State; appeal from Mississippi Circuit Court, Osceola District; W. J. Driver, Judge; affirmed July 3, 1916, *per* McCulloch, C. J.

United States Cooperage and Handle Co. *v.* Williams; appeal from Jackson Circuit Court; Dene H. Coleman, Judge; reversed July 3, 1916, *per* Wood, J.

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Worley *v.* McMullen; appeal from Yell Circuit Court, Dardanelle District; Marcellus L. Davis, Judge; affirmed July 10, 1916, *per* Kirby, J.

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Walker *v.* State; appeal from Miller Circuit Court; George R. Haynie, Judge; affirmed, Oct. 2, 1916, *per* Kirby, J.

Scholem & Co. *v.* Jeffries & Sons; appeal from Monroe Chancery Court; John M. Elliott, Chancellor; reversed Oct. 2, 1916, *per* McCulloch, C. J.

Jordan *v.* State; appeal from Garland Circuit Court; Scott Wood, Judge; affirmed Oct. 2, 1916, *per* Kirby, J.

Ingram *v.* Pence, Admr.; appeal from Lonoke Circuit Court; G. W. Hendricks, Judge on Exchange; affirmed Oct. 9, 1916, *per* Hart, J.

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## CASES DISPOSED OF ON MOTION.

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Troy W. Lewis and Florida A. Lewis *v.* H. L. Lee; Pulaski Chancery Court; John E. Martineau, Chancellor; appeal dismissed on appellant's motion; September 18, 1916; *per curiam.*

Walter Greer *v.* The State of Arkansas; Crawford Circuit Court; James Cochran, Judge; appeal dismissed September 18, 1916, appellant having been pardoned; *per curiam.*

J. E. Hickey *v.* The State of Arkansas; Sebastian Circuit Court; Paul Little, Judge; appeal dismissed for non-compliance with rule ten, September 18, 1916; *per curiam.*

M. R. Carson and W. L. Mack *v.* J. A. Muse; Craighead Chancery Court, Western District; Charles D. Frierson, Chancellor; appeal dismissed October 2, 1916, not having been granted within the time allowed by statute; *per curiam.*

R. Y. Shook *v.* The Schmoller & Mueller Piano Company; Clay Circuit Court, Western District; J. F. Gautney, Judge; appellee's motion to affirm under rule seven overruled, October 2, 1916, for want of jurisdiction, the time limited by statute for appeal having expired; *per curiam.*

W. H. Harrell and Mike Dressler *v.* Merchants & Planters Bank & Trust Company and W. A. Smith; Cross Circuit Court; W. J. Driver, Judge; Petition for writ of certiorari overruled, October 9, 1916; *per curiam.*

F. B. Karr & Company *et al. v.* D. Ohlendorf *et al.*; Mississippi Circuit Court, Osceola District; W. J. Driver, Judge; appeal dismissed October 9, 1916, not having been perfected within the time limited by statute; *per curiam.*

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