good faith, he has reasonable belief, from the facts as they may appear to him at the time, that he is in such imminent peril."

In view of the importance of the case, we have examined not only the instructions which counsel claim were erroneous, but all the instructions given by the court; and we are of the opinion that the instructions, when taken together, fairly and correctly state the law as applied to the evidence in this case.

Lastly it is claimed by plaintiff in error that the verdict is not sustained by sufficient evidence. We do not think so. After a careful and critical examination of the entire record, we think that the evidence is entirely sufficient to sustain and uphold the verdict of the jury. And it is the settled rule of this court that where the evidence reasonably supports the verdict of the jury, and the court has properly instructed the jury as to the law of the case, and a motion for new trial has been denied by the trial court, and the verdict of the jury approved, this court, on appeal, will not undertake to invade the province of the jury by weighing the testimony, and disturb the verdict of the jury. Douthitt v. Territory, 7 Okl. 55, 54 Pac. 312.

There being no error in the record prejudicial to the rights of the defendant, and believing that substantial justice has been done in this case, the judgment of the district court of Canadian county is therefore affirmed. All the justices concurring, except IRWIN, J., who presided in the court below, not sitting.

RAY v. WILEY et al.

(Supreme Court of Oklahoma. July 17, 1902.)

NUNCUPATIVE WILL—WHO CAN MAKE.

1. Under the laws of the territory of Oklahoma, no one can make a nuncupative will except those in actual military service in the field, or those doing duty on shipboard at sea; and even those can only make a nuncupative will when they are at the time in actual contemplation, fear, or peril of death, or at the time are in expectation of immediate death from an injury received the same day. One who at the time is engaged in the pursuit of farming cannot make a valid nuncupative will.

(Syllabus by the Court.)

Error from district court, Grant county; before Justice John L. McAtee.

In the matter of the application of D. W. Wiley and others for the probate of a nuncupative will. From an order admitting the same to probate, Marshall Ray brings error. Reversed.

A. M. Mackey and Sam P. Ridings, for plaintiff in error. P. C. Simons and S. C. Burnette, for defendants in error.

BURWELL, J. John M. Ray was a farmer living on a homestead claim in Grant county. On June 4, 1898, he was sitting outside of his house, in company with a young man by the name of Elmer M. Thompson. While sitting there, engaged in conversation, a rabbit ran along by the side of a corncrib which was located a short distance from the house. Thompson remarked that the rabbit would be a good shot, and then went into the house and got the gun, and when he returned he walked out a few steps from the house, and fired. The bullet struck a stone and glanced, accidentally striking Ray in the breast, and went clear through his body. A physician was called, and stated to Ray, after examining him that he (Ray) was in a critical condition, and if he had anything to say, or any request to make, he had better say it before the wound was dressed. Ray replied that he had a request to make, and asked the physician to call in two young men (one of whom was the young man who accidentally shot him), and he then told these gentlemen that he desired Mr. and Mrs. Hawks to have all of his property after his debts were paid, and that he also desired them to have his claim if they could prove up on it and hold it. This statement was made on the same day he was shot, and he died from the effects of this gunshot wound some four days later. On June 30, 1898, this request was reduced to writing, and was afterwards admitted to probate as the nuncupative will of the deceased, and the property all awarded by the probate court to Mr. and Mrs. Hawks. From this order Marshall Ray, the surviving brother of the deceased, appealed to the district court, and the judgment was there affirmed, and Ray then appealed to this court. The appellant makes the point against the judgment that the written will is not the same as the spoken words; that the spoken words willed everything to Mr. and Mrs. Hawks, while the written will gives everything to Mr. Hawks. The other side, however, contends that this is immaterial, because the probate court, and the district court, too, ordered the property distributed pursuant to the spoken words; and other questions are raised and discussed, but after examining our own statute we deem it unnecessary to pass upon any of them.

John M. Ray was engaged in one of the ordinary civil avocations of life, and was therefore not one of the persons who can make a nuncupative will, even though he may have been, at the time the words were spoken, in expectation of immediate death. By section 6170 of the Statutes of Oklahoma of 1893, it is provided who may make a nuncupative will, and under what circumstances one can be made.

"Sec. 6170. To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed: First. The estate bequeathed must not exceed in value the sum of one thousand dollars. Second. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will, or to that effect. Third. The decedent must at the time have been in ac-

tual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day."

This section states that, to make a nuncupative will valid, the decedent must at the time have been in actual military service in the field, or doing duty on shipboard at sea. Even the soldier who is not in the field, nor the person doing duty on shipboard not at sea, cannot make a nuncupative will. The right to make a nuncupative will is confined to the two classes, viz., those in actual military service in the field, and those doing duty on shipboard at sea; and all other persons of every character and occupation are excluded from this right. Then the latter part of subdivision 3 of section 6170 states the circumstances under which these two classes may make a nuncupative will. In addition to being in military service in the field, or doing duty on shipboard at sea, the decedent must at the time have been in actual contemplation, fear, or peril of death, or such soldier or sailor, in addition to being in actual military service in the field, or doing duty on shipboard at sea, must have been at the time in expectation of immediate death from an injury received the same day. This statute is plain and unambiguous, and, no matter what rule obtains in other jurisdictions, in this territory one engaged in the ordinary vocations of life cannot under any circumstances make a nuncupative will. Hence, the will in question could not pass the title to the property of the deceased to Mr. and Mrs. Hawks, but the property should be distributed by the probate court under the law of succession, the same as though the deceased had not attempted to make a nuncupative will.

For the reasons herein stated, the judgment of the district court is hereby reversed at the cost of the defendants in error, and the case remanded with directions that the lower court proceed in conformity with this opinion. All of the justices concurring, except IRWIN, J., absent.

YINGLING v. REDWINE.

(Supreme Court of Oklahoma. July 18, 1902.)

MORTGAGE—WHAT CONSTITUTES—RECORDING — FORECLOSURE — PAROL EVIDENCE — POSSESSION — CROSS-EXAMINATION — DEMURRER TO EVIDENCE.

1. Every instrument purporting to be an absolute conveyance of real estate or any interest therein, but intended as security for the payment of money, shall be deemed a mortgage, and must be recorded and foreclosed as such.

2. Parol evidence is admissible to show that an instrument purporting to be a warranty deed was in fact executed as security for the payment of money.

3. When a deed, absolute on its face, is shown to be a mortgage in fact, the rights of the parties to such instrument will be measured and determined by the law governing the rights of parties under a mortgage.

4. In the absence of a specific agreement to the contrary, a mortgagee is not entitled to possession as against the mortgagor, although the mortgage purports on its face to be a deed absolute.

5. The latitude allowed on cross-examination of witnesses is largely within the discretion of the trial court, and, unless such discretion has been abused to the manifest injury of the complaining party, a cause will not be reversed for such errors.

6. The trial court should sustain a demurrer to the evidence whenever all the evidence, and the reasonable and rational inferences and deductions therefrom in favor of the plaintiff, taken as true, will not warrant a verdict for the plaintiff.

(Syllabus by the Court.)

Error to district court, Pawnee county; before Justice Bayard T. Hainer.

Action by F. D. Yingling against W. H. Redwine. Judgment for defendant, and plaintiff brings error. Affirmed.

C. J. Wrightsman and E. M. Clark, for plaintiff in error. A. J. Biddison, for defendant in error.

BURFORD, C. J. The plaintiff in error. F. D. Yingling, brought his action in the probate court against the defendant in error, W. H. Redwine, for forcible detainer, and to recover possession of lots 1 to 8, inclusive, in block 35, in the town of Pawnee, Okl. Yingling recovered judgment in the probate court, and Redwine appealed to the district court. Trial was there had to a jury, and, after the plaintiff had introduced his evidence and rested, the defendant demurred to the evidence. The court sustained the demurrer, discharged the jury, and gave judgment against the plaintiff for costs. From this judgment, the plaintiff, Yingling, appeals to this court, and complains of the ruling of the trial court in sustaining the demurrer to the evidence and discharging the jury.

In October, 1898, the defendant, Redwine, was the owner of the real estate in question, and on October 25, 1898, conveyed the same by warranty deed to F. D. Yingling. On October 31, 1898, by a written instrument duly executed, Yingling leased to Redwine the real estate in question, at an annual rental of $52.50 per year, and agreed to reconvey to Redwine the real estate at any time within the five years on payment to him of the sum of $700. Redwine remained in possession of the property, and on December 19th entered upon the margin of the records where said lease was recorded, in the office of the register of deeds, a written release of all rights, options, and privileges under said lease. On the trial of the cause, the plaintiff relied upon his deed and the release above referred to, together with proof of service of a notice to quit. The court, on cross-examination of plaintiff's witnesses, permitted the defendant to show that, at the time the deed and lease were respectively executed, Redwine was indebted to Yingling in a considerable sum; that the deed was executed as