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1913

JUDGES

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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*Term expired October 30, 1912.

†Term began October 30, 1912.

TABLE
OF CASES REPORTED

A

Adcock *v.* Coker..... 210
Alf Bennett Lbr. Co. *v.* Walnut Lake Cypress Co. 421
Andre (United States Bedding Co. *v.*)..... 111
Anglin (Florence Cotton Oil Co. *v.*)..... 672
Apple *v.* Apple..... 669
Arkansas Lumber Co. (Carmical *v.*) 663
Arkansas Nat. Bank (Little *v.*) 281
Arkansas Natural Gas Co. *v.* Miller 477
Asbury (Fred *v.*) 494
Attridge *v.* Smith 626

B

Bagnell Timber Co. (Goodrich *v.*) 90
Bailey *v.* State..... 228
Bank of Knobel (Clay County *v.*) 450
Barrentine *v.* Henry Wrape Co. 485
Beal-Doyle Dry Goods Co. *v.* Beller 370
Bedford *v.* Bedford..... 587
Bell *v.* Bell 194
Beller (Beal-Doyle Dry Goods Co. *v.*) 370
Biederman *v.* Parker..... 86
Birones *v.* State..... 82
Blagg *v.* Fry 356
Board of Directors, etc. (Milwee *v.*) 77
Board of Improvement, etc. *v.* Brun..... 65
Bobo *v.* State..... 462
Bond (Edwards *v.*)..... 314
Bouillion (National Packing Co. *v.*)..... 326
Bradley (Outcault Advertising Co. *v.*)..... 50
Brogan (St. Louis, I. M. & S. Ry. Co. *v.*)..... 533
Bruce (Speer Hardware Co. *v.*) 146
Brun (Board of Improvement, etc., *v.*) 65
Burnett *v.* Turner..... 290

C

Cammack (Norman *v.*) .. 121
Carmical *v.* Arkansas Lbr. Co. 663
Carson Dry Goods Co. (Ederheimer *v.*) 488
Castell (School District No. 22 *v.*)..... 106
Caston (Wales-Riggs Plantations *v.*) 641
Central Ry. Co. of Arkansas *v.* Lindley..... 294

Chamberlain (St. Louis, I. M. & S. Ry. Co. *v.*) 180
Chicago, R. I. & P. Ry. Co. (Mitchell *v.*) 364
Clark (H. D. Williams Cooperage Co. *v.*) 157
Clay County *v.* Bank of Knobel 450
Clouston *v.* Maingault.... 213
Coker (Adcock *v.*) 210
Coleman *v.* Floyd..... 300
Consolidated Casualty Co. of Ark. (McPherson *v.*) 324
Cooley *v.* Ksir 307
Cox (McCray *v.*) 47
Crandell *v.* Harrison..... 110
Crosby (Kenyon Printing & Mfg. Co. *v.*) 258
Culberhouse (Finn *v.*)... 197
Culp (Temple *v.*) 222
Cumbie *v.* St. Louis, I. M. & S. Ry. Co..... 406
——— *v.* St. Louis, I. M. & S. Ry. Co..... 415

D

Darby (Galloway *v.*) 558
Davis (Morton *v.*)..... 44
Deane *v.* Moore..... 309
Delight Lumber Co. *v.* Henderson 334
——— (Keopple *v.*)..... 233
Denton *v.* Mammoth Spring Electric Light & Power Co. 161
Dickerson *v.* State..... 72
Douglass *v.* State..... 218
Dreher (Grand Lodge A. O. U. W. *v.*)..... 676
Dye (Wales-Riggs Plantations *v.*) 446

E

Ederheimer *v.* Carson Dry Goods Co. 488
Edwards *v.* Bond..... 314
Ellis (Skeen *v.*) 513
Emerson *v.* Stevens Grocer Co. 575

F

Farmers' Bank *v.* Johnson 136
Ferrell *v.* Keel..... 380
Finn *v.* Culberhouse..... 197
Fleming (Stewart *v.*).... 37
Fletcher *v.* Freeman-Smith Lbr. Co..... 230
——— *v.* Josephs..... 646
Florence Cotton Oil Co. *v.* Anglin 672
Floyd (Coleman *v.*) 300
Forbes (Laser *v.*) 166
Fort Smith (Oglesby *v.*).. 506
Fort Smith & W. Rd. Co. (McDonald *v.*) 5
Fort Smith Biscuit Co. (Wortz *v.*) 526
Fred *v.* Asbury..... 494
Freeman-Smith Lumber Co. (Fletcher *v.*) 230
Freeo Valley Rd. Co. *v.* Hodges 314
Friedman *v.* Schleuter... 580
Fry (Blagg *v.*)..... 356
Fuqua (Johnston *v.*) 358
Fullerton *v.* Henry Wrape Co. 434

G

Galloway *v.* Darby 558
Gardner *v.* McAuley 439
George Knapp & Co. *v.* Wilks 243
Goodrich *v.* Bagnell Timber Co. 90
Goodwin (River, Rail & Harbor Const. Co. *v.*).. 247
Grady (Roberts Cotton Oil Co. *v.*) 53
Grand Lodge A. O. U. W. *v.* Dreher 676
Greenhaw (Jacks *v.*) 615
Groves *v.* Keene..... 40

H

Hare *v.* Sisters of Mercy, etc. 549
Harris (Kansas City So. Ry. Co. *v.*) 374
Harrison (Crandell *v.*) .. 110
Hayden *v.* Hayden 95
H. D. Williams Cooperage Co. *v.* Clark..... 157
Hearin *v.* Union Sawmill Co. 455
Henderson (Delight Lumber Co. *v.*) 334
Henry (Miller *v.*) 261
Henry Wrape Co. (Barrentine *v.*) 485
——— (Fullerton *v.*) 434
Hodges (Freeo Valley Rd. Co. *v.*) 314
Holdaway, *Ex parte*..... 1
Hooker *v.* Southwestern Imp. Assoc. 99

J

Jacks *v.* Greenhaw..... 615
——— (St. Louis, I. M. & S. Ry. Co. *v.*)..... 347
Jackson (Thomas *v.*) 353
Jenkins *v.* Quick 467
Johnson (Farmers' Bank *v.*) 136
——— (Metropolitan Life Ins. Co. *v.*) 101
——— (Skaggs *v.*) 254
Johnston *v.* Fuqua 358
——— *v.* Pennington 278
Josephs (Fletcher *v.*).... 646

K

Kansas City So. Ry. Co. *v.* Harris 374
Keel (Ferrell *v.*) 380
Keene (Groves *v.*) 40
Keith *v.* Wheeler..... 318
Kenyon Printing & Mfg. Co. *v.* Crosby 258
Keopple *v.* Delight Lumber Co. 233
Kightlinger *v.* State..... 172
Koen *v.* Miller..... 152
Ksir (Cooley *v.*) 307

L

Laser *v.* Forbes..... 166
Leslie (Reece *v.*) 127
Lindley (Central Ry. Co. of Ark. *v.*) 294
Little *v.* Arkansas Nat. Bank 281
Littleton (Oak Leaf Mill Co. *v.*) 392

Long (United States Express Co. *v.*) 130
Loyd (St. Louis, I. M. & S. Ry. Co. *v.*) 340

M

McAuley (Gardner *v.*) ... 439
McCarroll *v.* Red Diamond Clothing Co..... 443
McCord *v.* Welch 119
McCray *v.* Cox..... 47
McDonald *v.* Fort Smith & W. Rd. Co. 5
McMillan (St. Louis, I. M. & S. Ry. Co. *v.*)..... 25
McPherson *v.* Consolidated Casualty Co. of Ark. 324
Mack (Smith *v.*) 653
Maingault (Clouston *v.*) .. 213
Malone (St. Louis & S. F. Rd. Co. *v.*)..... 22
Mammoth Spring Electric Light & Power Co. (Denton *v.*) 161
Marshall Bank *v.* Turney 116
Mattison (Miller *v.*) 201
Medlock *v.* Owen 460
Metropolitan Life Ins. Co. *v.* Johnson 101
Miller (Arkansas Natural Gas Co. *v.*) 477
——— *v.* Henry..... 261
——— (Koen *v.*) 152
——— *v.* Mattison 201
——— *v.* Plummer..... 630
Milwee *v.* Board of Directors, etc..... 77
Mitchell *v.* Chicago, R. I. & P. Ry. Co. 364
Monk *v.* State..... 12
Moore (Deane *v.*) 309
——— *v.* Ollson 241
——— (Reeves *v.*) 598
Morrison (Supreme Royal Circle, etc. *v.*) 140
Morton *v.* Davis..... 44
Moscowitz (S. H. Kress Co. *v.*) 638
Motley *v.* State..... 608
Moulton *v.* State..... 502

N

National Packing Co. *v.* Boullion 326
Newman (St. Louis & S. F. Rd. Co. *v.*) 63
——— (St. Louis & S. F. Rd. Co. *v.*) 284
Norman *v.* Cammack 121

O

Oak Leaf Mill Co. *v.* Littleton 392
Oglesby *v.* Fort Smith... 506
Ollson (Moore *v.*) 241
Outcault Advertising Co. *v.* Bradley 50
Owen (Medlock *v.*) 460

P

Parker (Biederman *v.*).. 86
Pennewell *v.* State..... 32
Pennington (Johnston *v.*) 278
Plummer (Miller *v.*) 630

Q

Quick (Jenkins *v.*)..... 467

R

Red Diamond Clothing Co. (McCarroll *v.*) 443
Reece *v.* Leslie..... 127
Reeves *v.* Moore..... 598
River, Rail & Harbor Const. Co. *v.* Goodwin.. 247
Roberts Cotton Oil Co. *v.* Grady 53

S

St. John (Sims *v.*) 680
St. Louis & S. F. Rd. Co. *v.* Malone 22
——— *v.* Newman 63
——— *v.* Newman..... 284
St. Louis, I. M. & S. Ry. Co. *v.* Brogan..... 533
——— *v.* Chamberlain.... 180
——— (Cumbie *v.*) 406
——— (Cumbie *v.*) 415
——— *v.* Jacks 347
——— *v.* Loyd 340
——— *v.* McMillan..... 25
——— *v.* Steed..... 205
——— *v.* Swaim..... 224
——— *v.* Waters..... 619
——— *v.* Williams..... 331
——— *v.* Wright..... 269
Schleuter (Friedman *v.*).. 580
School District No. 22 *v.* Castell 106
S. H. Kress Co. *v.* Moscowitz 638
Simmons, *Ex parte*..... 19
Simms *v.* State..... 16
Sims *v.* St. John..... 680
Sisters of Mercy, etc. (Hare *v.*) 549
Skaggs *v.* Johnson..... 254
Skeen *v.* Ellis..... 513
Smith (Attridge *v.*) 626
——— *v.* Mack..... 653
——— *v.* State..... 58
Southwestern Imp. Assoc. (Hooker *v.*) 99
Speer Hardware Co. *v.* Bruce 146
State (Bailey *v.*) 228
——— (Birones *v.*) 82
——— (Bobo *v.*) 462
——— (Dickerson *v.*) ... 72
——— (Douglass *v.*) 218
——— (Kightlinger *v.*).. 172
——— (Monk *v.*) 12
——— (Motley *v.*) 608
——— (Moulton *v.*) 502
——— (Pennewell *v.*) ... 32
——— (Simms *v.*) 16
——— (Smith *v.*) 58
——— (Tally *v.*) 28
——— (Villines *v.*) 471
——— (West *v.*) 175
——— (Wilkerson *v.*) ... 367
——— (Zaccanti *v.*) 60
Steed (St. Louis, I. M. & S. Ry. Co. *v.*) 205
Stevens Grocer Co. (Emerson *v.*) 575
Stewart *v.* Fleming..... 37
Stubblefield *v.* Stubblefield 594
Supreme Royal Circle, etc. *v.* Morrison 140
Swaim (St. Louis, I. M. & S. Ry. Co. *v.*)..... 224

T

Tally *v.* State..... 28
Taylor *v.* Union Sawmill Co. 519
Temple *v.* Culp..... 222
Thomas *v.* Jackson..... 353
Turner (Burnett *v.*) 290
Turney (Marshall Bank *v.*) 116

U

Union Sawmill Co. (Hearin *v.*) 455
——— (Taylor *v.*) 519
United States Bedding Co. *v.* Andre 111
United States Express Co. *v.* Long 130

V

Villines *v.* State..... 471

W

Wales-Riggs Plantations *v.* Caston 641
——— *v.* Dye..... 446
Walnut Lake Cypress Co. (Alf Bennett Lbr. Co. *v.*) 421
Waters (St. Louis, I. M. & S. Ry. Co. *v.*) 619
Welch (McCord *v.*) 119
West *v.* State..... 175
Wheeler (Keith *v.*) 318
Wilkerson *v.* State..... 367
Williams (St. Louis, I. M. & S. Ry. Co. *v.*) 331
Winn, *Ex parte*..... 190
Wortz *v.* Fort Smith Biscuit Co. 526
Wright (St. Louis, I. M. & S. Ry. Co. *v.*) 269

Z

Zaccanti *v.* State..... 60

TABLE OF CASES
CITED BY THE COURT

A

A. & N. Rd. Co. *v.* Wagner, 19 Kan. 535 679
Aetna Life Ins. Co. *v.* Rehlaender, 68 Neb. 284 106
Albie *v.* Jones, 82 Ark. 414 89
A. L. Clark Lbr. Co. *v.* Johns, 98 Ark. 211 338
——— *v.* Northcutt, 95 Ark. 291 ..... 227, 437
Allen *v.* State, 70 Ark. 337 356
Aluminum Co. of N. A. *v.* Ramsey, 89 Ark. 522 545
American Sales Book Co. *v.* Whitaker, 100 Ark. 360 115
Ammon *v.* Martin, 59 Ark. 191 118
Anderson *v.* State, 77 Ark. 37 221
Anglin *v.* Cravens, 76 Ark. 122 223
Archer-Foster Const. Co. *v.* Vaughan, 79 Ark. 20 404
Arkadelphia Lumber Co. *v.* Thornton, 83 Ark. 403 684
Arkadelphia Milling Co. *v.* Smoker Mdse. Co., 100 Ark. 37 412
Arkansas Fire Ins. Co. *v.* Wilson, 67 Ark. 553 518
Arkansas Midland Ry. Co. *v.* Worden, 90 Ark. 407 252
Arkansas S. W. Rd. Co. *v.* Wingfield, 94 Ark. 75 276
Ark-Mo Zinc Co. *v.* Patterson, 79 Ark. 506 356
Asher *v.* Byrnes, 101 Ark. 197 437
Avera *v.* Rice, 64 Ark. 330 89
Ayers *v.* Anderson-Tully Co., 89 Ark. 163 ..... 123, 326

B

Bank of Jonesboro *v.* Hampton, 92 Ark. 492 453
Bank of Monette *v.* Hale, 104 Ark. 388 39
Bank of Tennessee *v.* Hill, 10 Humph. 176 293
Banks *v.* Directors of St. F. Lev. Dist., 66 Ark. 490 43
——— *v.* Flint, 54 Ark. 40 662
——— *v.* Levee Dist., 66 Ark. 490 267
——— *v.* Murphy, 83 Ark. 36 662
Barnett *v.* Mecham, 62 Ark. 313 653
Barringer *v.* St. Louis, I. M. & S. Ry. Co., 73 Ark. 548 25
Bartel *v.* Brown, 80 N. W. 801 157
Bartlett *v.* Gregory, 60 Ark. 453 266
Bascom *v.* Smith, 41 N. E. 130 247
Beatty *v.* Parker, 141 Mass. 523 150
Beckford *v.* Menier, 107 N. Y. 407 114
Bellows *v.* Cheek, 20 Ark. 424 171
Benham *v.* Ferris, 124 N. W. 538 686
Bennett *v.* State, 62 Ark. 516 84
Berman *v.* Shelby, 92 Ark. 472 171
Berry *v.* Barnes, 23 Ark. 411 115
Biggs *v.* St. Louis, I. M. & S. Ry. Co., 91 Ark. 122 27
Birones *v.* State, 105 Ark. 82 221
Bizzell *v.* Booker, 16 Ark. 308 190
Blake *v.* Scott, 92 Ark. 46 671
Block *v.* Valley Mut. Ins. Assoc., 52 Ark. 202 143
Board Dir. St. Francis Levee Dist. *v.* Fleming 268
Boaz *v.* Owens, 45 S. W. 876 200
Bobo *v.* State, 40 Ark. 229 476
Bodcaw Lbr. Co. *v.* Ford, 82 Ark. 555 209

Booe *v.* Vinson, 104 Ark. 439..... 572
Boone County *v.* Mitchell, 64 Ark. 125 .....59, 60
Borden *v.* State, 11 Ark. 519..... 9
Boston Store *v.* Schlenter, 88 Ark. 213 458
Boyd *v.* Arnold, 103 Ark. 105..... 93
——— *v.* Roane, 49 Ark. 397... 9
Boysen *v.* Van Dorn Iron Works, 87 N. Y. Supp. 995..... 585
Boward *v.* Bankers' Union, 94 Mo. App. 442..... 144
Bradley *v.* Hume, 18 Ark. 284.634, 635
Bradley Gin Co. *v.* J. L. Means Mach. Co.; 94 Ark. 130..... 458
Bradshaw *v.* Bank of Little Rock, 76 Ark. 501..... 443
Bray Clothing Co. *v.* McKinney, 90 Ark. 161.....57, 58
Bridges *v.* Stevens, 132 Mo. 524... 293
Bright *v.* Bostick, 27 Ark. 55.... 309
Brinkley Car Works & Mfg. Co. *v.* Cooper, 75 Ark. 325..... 543
Briscoe *v.* Ashby, 24 Grat. 454.... 205
Bromley *v.* Aday, 70 Ark. 354.... 683
Brooke *v.* State, 86 Ark. 364.... 625
Brown *v.* Higgs, 4 Ves. Jr. 709... 574
——— *v.* Le May, 101 Ark. 95.. 39
——— *v.* State, 55 Ark. 593... 36
Bryant Lbr. Co. *v.* Stastney, 87 Ark. 321 532
Buchanan *v.* State, 4 Okla. Cr. 645 466
Burke *v.* St. Louis, I. M. & S. Ry. Co., 72 Ark. 256..... 671
Burns *v.* Thompson, 64 Ark. 489.. 109
Burnside *v.* Peterson, 17 L. R. A. (N. S.) 76..... 403
Burrel *v.* Boken, 89 Ark. 168.... 653
Burris *v.* State, 73 Ark. 455..... 355
Butler *v.* Butler, 73 S. C. 402.... 441
——— *v.* State, 34 Ark. 480.... 76
Byars *v.* McDonald, 12 Ark. 285.. 205
Byles, *Ex parte*, 93 Ark. 612..... 2

C

Caldwell *v.* Nichol, 97 Ark. 422.. 252
Camden *v.* Harris, 15 W. Va. 554.. 205
Cameron *v.* State, 13 Ark. 712.... 14
Campbell *v.* Samples, 92 Ark. 79.. 80
——— *v.* Segars, 81 Ala. 259... 676
Carlisle *v.* Jumper, 81 Ky. 282... 205
Carnall *v.* Wilson, 21 Ark. 62... 653
Carpenter *v.* State, 62 Ark. 237.. 469
Carroll *v.* State, 45 Ark. 539..... 19
Chambers *v.* Michael, 71 Ark. 373 323
Chancellor *v.* Banks, 92 Ark. 497. 268
Chapline *v.* State, 77 Ark. 444... 75
Cheatham *v.* Phillips, 23 Ark. 80.. 512
Cherokee Const. Co. *v.* Prairie Creek Coal Mining Co., 102 Ark. 102 .....428, 458
Chicago Great Western Ry. Co. *v.* McDonough, 161 Fed. 657..... 401
Chicago Mill & Lumber Co. *v.* Ross, 99 Ark. 597..... 471
Chicago, M. & St. P. R. Co. *v.* Moore, 166 Fed. 663..... 401
Chicago, etc., Ry. *v.* Belli, 83 Fed. 437 40
Chicago, R. I. & P. Ry. Co. *v.* Jones, 77 Ark. 367..... 546
——— *v.* Neusch, 99 Ark. 568.. 412
——— *v.* Williams, 101 Ark. 436 .....414, 415
Choctaw & M. Rd. Co. *v.* Goset, 70 Ark. 427..... 355
Choctaw, O. & G. Rd. Co. *v.* Thompson, 92 Ark. 11..... 338
Church *v.* Gallic, 76 Ark. 423..... 493
City Electric Street Railway Co. *v.* First Nat. Bank, 62 Ark. 33.. 115
City Street Improvement Co. *v.* Taylor, 138 Cal. 364..... 70
Clarendon *v.* Walker, 72 Ark. 8... 80
Clay *v.* Bilby, 72 Ark. 101..... 9
——— *v.* Penzel, 79 Ark. 5..... 462
Clay County *v.* Brown Lbr. Co., 90 Ark. 147..... 453
Cogburn *v.* State, 76 Ark. 110.... 229
Coin *v.* John M. Talge Lounge Co., 222 Mo. 488..... 165
Coles *v.* Coles, 13 N. J. Eq. 365.. 441

Collins *v.* Paepcke-Leicht Lbr. Co., 74 Ark. 81 671
Colonial & U. S. Mfg. Co. *v.* Jeter, 71 Ark. 185 40
Compagionette *v.* McArmick, 91 Ark. 69 675
Compton *v.* State, 102 Ark. 213 31
Cone *v.* Hartford, 28 Conn. 363 .. 70
Consolidated Fire Works Co. *v.* Koehl, 190 Ill. 145 482
Cooper *v.* Railway Co., 11 Am. St. 482 352
Coughlan *v.* Cambridge, 166 Mass. 268 482
Cowling *v.* Hill, 69 Ark. 350 94
——— *v.* Nelson, 76 Ark. 146 .....264, 440, 441
Cox *v.* Price, 22 S. E. 512 593
——— *v.* Smith, 97 Ark. 218 ... 458
Cromwell *v.* Sac County, 94 U. S. 351 493
Crook *v.* State, 59 Ark. 326 14
Crow *v.* Reed, 38 Ark. 596 596

D

Dale *v.* State, 90 Ark. 579 464
Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 418 105
——— *v.* Street, 15 Ark. 307 671
Davidson *v.* Old People's Mut. Ben. Soc., 1 L. R. A. 482 144
Davies *v.* Holland, 43 Ark. 425 ... 80
——— *v.* Railway, 53 Ark. 117 .. 437
——— *v.* State, 40 Ga. 229 174
Dean *v.* Depot Co., 43 N. W. 54 ... 487
Delaney *v.* Jackson, 95 Ark. 131 .. 458
Dell *v.* Gardner, 25 Ark. 134 309
Deloy *v.* Blodgett, 185 Mass. 126 .. 482
Denver & R. G. Rd. Co. *v.* Morton, 3 Col. App. 155 379
Dierks Lbr. & Coal Co. *v.* Coffman, 96 Ark. 505 641
Disken *v.* Herter, 73 N. Y. App. Div. 453 586
Doebler's Appeal, 64 Pa. St. 9 566
Doniphan Lbr. Co. *v.* Case, 87 Ark. 169 160
Dortch *v.* Robinson, 31 Ark. 296 .....634, 635
Doss *v.* Long Prairie Lev. Dist., 96 Ark. 454 .....89, 90
Dotson *v.* State, 51 Ark. 122 31
Dowell *v.* Schisler, 76 Ark. 482 .. 160
Doyle *v.* Missouri, K. & T. Trust Co., 41 S. W. 255 403
Dozier *v.* Grayson-McLeod Lbr. Co., 100 Ark. 244 678
Drew *v.* Wakefield, 54 Me. 291 569
Driggs & Co.'s Bank *v.* Norwood, 50 Ark. 42 95

E

Eagan *v.* Clasbey, 5 Utah, 154 200
Eastern Ark. Hedge Fence Co. *v.* Tanner, 67 Ark. 156 171
Eastland *v.* Maney, 81 S. W. 514 .. 684
Eddy *v.* Loyd, 90 Ark. 340 98
El Dorado Ice & Planing Mill Co. *v.* Kinard, 96 Ark. 184 641
Emerson *v.* Stevens Grocer Co., 95 Ark. 426 584
Eoff *v.* Kennefick-Hammond Mfg. Co., 80 Ark. 138 374
Eufaula Water Co. *v.* Addyston Pipe Co., 8 So. 25 151
Evatt *v.* Hudson, 97 Ark. 268 39
Evins *v.* St. Louis & S. F. Rd. Co., 104 Ark. 79 379

F

Faulkner *v.* Davis, 18 Gratt. 651 .. 591
Felton *v.* Brown, 102 Ark. 658 653
Ferrell *v.* Keel, 103 Ark. 96 219
Fitzgerald *v.* Laporte, 64 Ark. 34 .. 356
Fletcher *v.* Baltimore & P. R. Ry. Co., 168 U. S. 135 487
——— *v.* Freeman-Smith Lbr. Co., 98 Ark. 202 231
Floyd *v.* State, 12 Ark. 43 626
Fonda *v.* Railroad Co., 71 Minn. 438 186
Ford Hardwood Lbr. Co. *v.* Clement, 97 Ark. 522 .....429, 433, 524

Fordyce *v.* Hardin, 54 Ark. 554.. 119
——— *v.* Vickers, 99 Ark. 500 .....667, 669
Fort Smith *v.* Dodson, 51 Ark. 447 280
Fort Smith L. & T. Co. *v.* Soard, 79 Ark. 388..... 209
Fort Smith Oil Co. *v.* Slover, 58 Ark. 168 251
Foster *v.* Beidler, 79 Ark. 425.... 325
——— *v.* State, 45 Ark. 261, 464, 466
——— *v.* Treadway, 98 Ark. 452 323
Fourche River Lbr. Co. *v.* Bryant Lbr. Co., 97 Ark. 632..... 355
Friedland *v.* Sullivan, 48 Ark. 213 63
Friedman *v.* Schleuter, 105 Ark. 580 516
Friend *v.* Smith Gin Co., 59 Ark. 91 445
Frizzell *v.* Duffer, 58 Ark. 612.... 129

G

Gallini *v.* Gallini, 5 Barnewall & Ad. 621..... 566
Gannon *v.* Moore, 83 Ark. 196.... 653
Gardner *v.* Ward, 99 Ark. 588.... 640
Garibaldi *v.* Jones, 48 Ark. 230.. 653
Gates *v.* Bennett, 33 Ark. 475.... 619
——— *v.* Solomon, 73 Ark. 8... 326
Gatlin *v.* Lafou, 95 Ark. 356..652, 653
Gavin *v.* Curtin, 171 Ill. 640..... 591
Gay *v.* Louisville, 93 Ky. 349.... 98
Gay Oil Co. *v.* Muskogee Ref. Co., 97 Ark. 502..... 433
German Bank *v.* DeShon, 41 Ark. 331..... 283
Gerstle *v.* Vandergriff, 72 Ark. 261 671
Gibbons *v.* Dillingham, 10 Ark. 9. 309
Gillingham *v.* Ohio River Rd. Co., 29 Am. St. 827..... 624
Goodright *v.* Downshire, 2 B. & P. 600 574
Goodrum *v.* Merchants & Planters Bank, 102 Ark. 326..... 671
Goodson *v.* Nat. Masonic Acc. Assoc., 91 Mo. App. 339..... 144
Goodwin *v.* United States, 10 Fed. Cas. 625..... 200
Gottlieb *v.* Rinaldo, 78 Ark. 123.. 57
Gray *v.* Immigration Co., 127 Ia. 560 171
Grayson-McLeod Lumber Co. *v.* Slack, 102 Ark. 79..... 432
Green *v.* Brooks, 25 Ark. 318..... 98
——— *v.* Cole, 103 Mo. 70..... 585
——— *v.* Southern Ry. Co., 5 A. & E. Ann. Cas. 165..... 165
Greer *v.* Vaughan, 96 Ark. 524... 306
——— *v.* White, 90 Ark. 119... 257
——— *v.* Stewart, 48 Ark. 21.. 219
Greusel *v.* Smith, 85 Mich. 574.... 440
Grider *v.* Clopton, 27 Ark. 244.... 40
Griffin *v.* Dunn, 79 Ark. 408..... 653
——— *v.* Dunn, 79 Ark. 412.... 652
Gulf Compress Co. *v.* Harrington, 90 Ark. 256..... 524

H

Haldiman *v.* Taft, 102 Ark. 45... 204
Hall *v.* Trucks, 38 Ark. 257...634, 635
Halleck, Estate of, 49 Cal. 111... 98
Hamilton *v.* Ford, 46 Ark. 245.... 40
Hampton *v.* Hickey, 88 Ark. 324.. 80
Hand *v.* Marcy, 28 N. J. Eq. 59... 567
Hardin *v.* Harrington, 11 Bush, 367 205
Hare *v.* Fort Smith & W. Rd. Co., 104 Ark. 187..... 11
Harper *v.* State, 91 Ark. 422..... 56
Harris *v.* Brady, 87 Ark. 428.... 653
——— *v.* Graham, 86 Ark. 570. 356
Harris *v.* Wheeler Lumber Co., 88 Ark. 491..... 171
Harris Lbr. Co. *v.* Grandstaff, 78 Ark. 187 372
Harvick *v.* State, 49 Ark. 514...13, 85
Hatcher *v.* Buford, 60 Ark. 169.. 118
Haven *v.* Haven, 64 N. E. 410.... 479
Hawkes *v.* Kehoe, 9 Am. & Eng. Ann. Cas. 1053..... 516
Hazleton Tripod Boiler Co. *v.* Citizens St. Ry. Co., 72 Fed. 317.... 200
Helena Hardware Co. *v.* Maynard, 99 Ark. 377..... 209
Hencke *v.* Standiford, 66 Ark. 535 283

Herget *v.* McLeod, 102 Ark. 60 .....268, 668, 669
Hershy *v.* Baer, 45 Ark. 240..... 475
Herst *v.* De Comeau, 31 N. Y. Superior Ct. 590..... 200
Hicks *v.* Hogan, 36 Ark. 303..... 671
Higgins *v.* Western Union Tel. Co., 156 N. Y. 75..... 482
Hill *v.* Gregory, 64 Ark. 317..... 313
——— *v.* Hilliard, 103 N. C. 34 293
——— *v.* Jebb, 55 Ark. 574.... 363
Hinkle *v.* Hinkle, 55 Ark. 583.... 500
Hoffmaster *v.* Black, 78 Ohio St. 1 156
Hogle *v.* H. H. Franklin Mfg. Co., 199 N. Y. 388..... 487
Holbrook *v.* McClary, 79 Ind. 167 569
Hollinshead *v.* John Stuart & Co., 77 N. W. 89.....156, 157
Holloway *v.* Frick, 149 Pa. St. 178 200
Holman *v.* Patterson, 29 Ark. 357 204
Holmes *v.* Bluff City Lumber Co., 97 Ark. 180..... 400
Hot Springs St. Rd. Co. *v.* Hildreth, 72 Ark. 572..... 190
Houston *v.* State, 13 Ark. 66..... 174
Hubbard *v.* American Investment Co., 70 Fed. 808..... 493
Huntington *v.* Finch, 3 Ohio St. 444 326
Hurt *v.* Jones, 79 S. W. 486..... 684
Hutts *v.* Martin, 134 Ind. 587.... 441

I

Ince *v.* State, 77 Ark. 418..... 356
Ingram *v.* Sherwood, 75 Ark. 176 9
Inhabitants of S. Berwick *v.* Huntress, 53 Me. 89..... 246
International Harvester Co. *v.* Campbell, 96 S. W. 93..... 586
International Order of 12 *v.* Jackson, 101 Ark. 555..... 678
Isaackson *v.* Duluth R. Co., 77 N. W. 433..... 186

J

Jacks *v.* Kelley Trust Co., 90 Ark. 548 264
Jackson, *Ex parte*, 45 Ark. 158... 2
——— *v.* Alsop, 67 Conn. 249 .....567, 569
——— *v.* Knowlton, 173 Mass. 94 626
——— *v.* State, 101 Ark. 473... 391
——— *v.* Williams, 92 Ark. 489 257
Jarrett *v.* Langston, 99 Ark. 438.. 39
J. B. Watkins Land Mtge. Co. *v.* Thetford, 96 S. W. 72..... 685
John A. Gauger & Co. *v.* Sawyer & Austin Co., 88 Ark. 422..... 171
Johnson *v.* Hall, 55 Ark. 210..... 143
——— *v.* Graves, 27 Ark. 557.. 204
——— *v.* Hayward, 74 Neb. 157 205
——— *v.* Knights of Honor, 53 Ark. 255 565
——— *v.* Mammoth Cotton Oil Co., 88 Ark. 243..... 545
——— *v.* West, 41 Ark. 535.634, 635
Joiner *v.* State, 94 Ark. 198..... 4
Jones, *In re*, 100 Ark. 226...4, 5, 476
Jordan *v.* Farrow, 130 Ala. 428.. 441
——— *v.* Jordan, 85 Tenn. 651. 293
Joy *v.* Vance, 62 N. W. 140..... 156

K

Kampman *v.* Kampman, 98 Ark. 328 671
Kansas & A. V. Ry. Co. *v.* Ayers, 63 Ark. 332.....411, 413, 414
Kansas City So. Ry. Co. *v.* Tonn, 102 Ark. 20..... 168
Keith *v.* Freeman, 43 Ark. 296.... 100
Keller *v.* Henry, 24 Ark. 575..636, 637
Kelley *v.* McGuire, 15 Ark. 555... 47
Keniston *v.* Adams, 80 Me. 290... 567
Kent *v.* Church of St. Michael, 136 N. Y. 10..... 591
Killeam *v.* Carter, 65 Ark. 68.... 653
Killian *v.* Badgett, 27 Ark. 166... 47
Kimball *v.* Chappel, 27 Abb. N. C. 437 567
——— *v.* Story, 108 Mass. 382.. 567
King *v.* Ill. Cent. Rd. Co., 69 Miss. 245 624
——— *v.* Payan, 18 Ark. 583... 671

Kirkland *v.* Board of Public Works, 41 N. E. 374..... 70
Klindt *v.* Higgins, 64 N. W. 414.. 156
Kraft *v.* Smothers, 103 Ark. 269.. 68
Krutsen *v.* Krock, 127 N. W. 11.. 499

L

Lake Shore & Mich. S. W. Ry. Co. *v.* Teeters, 77 N. E. 599..... 345
Lamb *v.* Lamb, 131 N. Y. 237..... 573
Lampman *v.* Milks, 21 N. Y. 505.. 150
Lane *v.* Warren, 115 S. W. 903.... 586
Lang *v.* Constance, 20 Ky. L. Rep. 502 440
Lawyer *v.* Carpenter, 80 Ark. 411 80
Lee *v.* Vaughan's Seed Store, 101 Ark. 69..... 115
Leftwich *v.* Lecann, 4 Wall. 187.. 679
Legg *v.* Legg, 34 Wash. 132..... 441
Leggett *v.* Grimmett, 36 Ark. 496 56
Leonhard *v.* Flood, 68 Ark. 162.. 662
Lewis *v.* Atlas Mut. L. Ins. Co., 61 Mo. 534..... 429
Liddell *v.* Stone, 101 Ark. 328.... 100
Lindsey *v.* St. Louis, I. M. & S. Ry. Co., 95 Ark. 534.....329, 331
Littell *v.* Grady, 38 Ark. 587.... 634
Little Rock & F. S. Ry. Co. *v.* Blewitt, 65 Ark. 235..... 297
——— *v.* Miles, 40 Ark. 298.344, 346
——— *v.* Young, 74 Ark. 144... 146
Little Rock Ry. & El. Co. *v.* Dobbins, 78 Ark. 553..... 625
Little Rock Traction & Electric Co. *v.* Nelson, 66 Ark. 494..... 252
L'Hommedieu, In the Matter of, 32 Hun 10.....572, 574
Long *v.* Chas. T. Abeles & Co., 77 Ark. 150..... 587
Love *v.* Bryson, 57 Ark. 589..... 671
——— *v.* Kauffman, 72 Ark. 265 9
Lovering *v.* Lovering, 129 Mass. 97 571
Lowrey *v.* Danforth, 69 S. W. 39.. 585
Lucas *v.* Owens, 16 N. E. 196..... 247

M

McAlees *v.* Good, 65 Atl. 934..... 626
McAndrews *v.* Hollingsworth, 72 Ark. 446..... 653
McCarroll *v.* Stafford, 24 Ark. 224 355
McConnell *v.* Day, 61 Ark. 464.... 9
——— *v.* Hopkins, 86 Ark. 225 95
McCoy *v.* Erie & Western Trans. Co., 42 Md. 498..... 522
——— *v.* Hastings, 92 Iowa, 585 200
McCracken *v.* San Francisco, 16 Cal. 591..... 513
McDonnell *v.* Improvement Dist., 97 Ark. 334..... 68
McFalls *v.* State, 66 Ark. 16..... 19
McGuire *v.* Cook, 13 Ark. 448.... 634
McIlroy Banking Co. *v.* Dickson, 66 Ark. 327..... 98
McRae *v.* Holcombe, 46 Ark. 310.. 63
——— *v.* Warmack, 98 Ark. 52 283
McWilliams *v.* Mason, 31 N. Y. 294 247
Mallett *v.* Hampton, 94 Ark. 119.. 326
Malone *v.* Mobbs, 102 Ark. 542.605, 607
Marling *v.* Milwaukee Realty Co., 5 L. R. A. (N. S.), 412..... 156
Martin *v.* Hickman, 64 Ark. 217.. 512
——— *v.* Tucker, 35 Ark. 279.. 283
——— *v.* Ogden, 41 Ark. 191... 242
Mason *v.* Delancy, 44 Ark. 444... 634
Marx *v.* Mathews, 50 Ark. 338.... 9
Mauldin *v.* Seaboard Air Line Ry. Co., 73 S. C. 9..... 419
Maxwell *v.* Featherston, 83 Ind. 339 567
Meadow *v.* Wise, 41 Ark. 285.... 90
Melton *v.* State, 43 Ark. 367..... 19
Meyer *v.* Stone, 46 Ark. 210..... 115
Midland Valley Rd. Co. *v.* Hamilton, 84 Ark. 81..... 624
——— *v.* Hoffman Coal Co., 91 Ark. 180..... 419
Milner *v.* Freeman, 40 Ark. 67... 323
Mississippi River Logging Co. *v.* Robson, 69 Fed. 773..... 429
Missouri Pac. Ry. Co. *v.* Yarnell, 65 Ark. 320..... 171
Mitchell *v.* Caplinger, 97 Ark. 281 356
——— *v.* State, 73 Ark. 291.... 36

Mitchell Mfg. Co. *v.* Kempner, 84 Ark. 349 40
Molineux *v.* Reynolds, 55 N. J. Eq. 187 569
Monk *v.* State, 105 Ark. 12 85
Moody *v.* Walker, 3 Ark. 147 565
Mooney *v.* Brinkley, 17 Ark. 340 .. 671
Moss *v.* Adams, 32 Ark. 562 671
——— *v.* Helsley, 60 Tex. 426 .. 567
Mulrooney *v.* O'Bear, 71 S. W. 1019 150
Murphy *v.* Peoria, 119 Ill. 509 70
Murray *v.* Galbraith, 86 Ark. 55 .. 257
Mutual Benefit Life Ins. Co. *v.* Robertson, 59 Ill. 123 105
Myar *v.* Snow, 49 Ark. 129 565

N

Natl. Foundry & Pipe Works *v.* O'Connor Water Co., 52 Fed. 43 151
National Surety Co. *v.* Long, 60 C. C. A. 623 239
——— *v.* Long, 60 C. C. A. 623 .. 239
Necklace *v.* West, 33 Ark. 682 634
Neely *v.* State, 60 Ark. 66 309
Nelson *v.* Herschberg, 70 Ark. 39. 630
Newcomb *v.* N. Y. Cent. & H. R. Rd. Co., 81 S. W. 1069 494
Newhouse Mill & Lbr. Co. *v.* Avery, 101 Ark. 34 160
New Orleans & N. E. R. Co. *v.* Thomas, 60 Fed. 379 345
Newton *v.* State, 37 Ark. 333 469
Niko Wiita *v.* Interstate Iron Co., 103 Minn. 303 400
North American Trust Co. *v.* Chappell, 70 Ark. 508 683
Norton *v.* State, 4 Mo. 461 31

O

Oakleaf Mill Co. *v.* Smith, 98 Ark. 34 .....403, 532
O'Neal *v.* Taylor, 53 S. E. 471 151
Organ *v.* Memphis & L. R. Rd. Co., 51 Ark. 235 671
Osborn *v.* LeMaire, 82 Ark. 490 .. 326
Osceola Land Co. *v.* Henderson, 81 Ark. 432 667
Ouachita Baptist College *v.* Scott, 64 Ark. 349 305
Ousler *v.* Robinson, 72 Ark. 339 .. 264
Overman *v.* State, 49 Ark. 364 56
223 400
Ozan Lumber Co. *v.* Biddle, 87 Ark. 587 545
——— *v.* Bryan, 90 Ark. 223 ... 400
Oxford *v.* Hobson, 73 Ark. 170 ... 47

P

Padgett *v.* Norman, 44 Ark. 490 .. 653
Paine *v.* Chandler, 134 N. Y. 385 150
Parker *v.* State, 98 Ark. 575 75
Parks *v.* Satterthwaite, 132 Ind. 111 293
Patton *v.* Texas & P. Ry. Co., 179 U. S. 658 160
Patty *v.* Goolsby, 51 Ark. 61 570
Paul *v.* State, 99 Ark. 558 221
Peay *v.* Pulaski County, 103 Ark. 601 223
Penrose *v.* Doherty, 70 Ark. 256 .. 268
Percifull *v.* Platt, 36 Ark. 456 121
Perkins *v.* Swank, 43 Miss. 349 .. 205
Peter *v.* Chicago, etc., R. Co., 121 Mich. 324 379
Peters *v.* Townsend, 93 Ark. 103 .. 11
Philbrick *v.* Ewing, 97 Mass. 133 149
Phillips *v.* Benson, 82 Ala. 500 ... 265
——— *v.* Phillips, DeGex, F. & J. 208 205
Pillow *v.* Sentelle, 49 Ark. 430 ... 205
Pitsnogle *v.* Commonwealth, 91 Va. 808 84
Planters' Mut. Ins. Assoc. *v.* Nelson, 80 Ark. 103 98
Porter *v.* Dooley, 66 Ark. 81 9
——— *v.* Hanson, 36 Ark. 591 .. 265
Potter *v.* Phoenix Ins. Co., 63 Fed. 382 522
Powers *v.* Clarke, 28 N. E. 402 ... 247
Prescott & N. W. R. Co. *v.* Smith, 70 Ark. 179 209
Prioleau *v.* Williams, 104 Ark. 322 .....635, 636

Providence Life Assurance Society *v.* Reutlinger, 58 Ark. 528..... 105
Pulaski County *v.* Downer, 10 Ark. 588 80
——— *v.* Hill, 97 Ark. 450..... 47
Pulaski Gas Light Co. *v.* McClintock, 97 Ark. 576..... 403
Purcell, *Ex parte*, 61 Ark. 17..... 477

Q

Quertermous *v.* State, 95 Ark. 48. 469

R

Rachels *v.* Stecher Cooperage Works, 95 Ark. 7..... 100
Railroad Co. *v.* Clark, 136 Ala. 450 186
Railway Co. *v.* Bundy, 97 Ill. App. 202 420
——— *v.* Lyman, 57 Ark. 512.. 469
——— *v.* Robbins, 57 Ark. 377 350
——— *v.* State, 56 Ark. 166.... 306
——— *v.* Sweet, 60 Ark. 550.351, 542
——— *v.* Taylor, 57 Ark. 136.. 297
Ray *v.* Light, 34 Ark. 421..... 355
Rector *v.* Taylor, 12 Ark. 128.... 84
Reed *v.* State, 16 Tex. App. 586.. 32
Reeves *v.* Reeves, 5 Lea, 644..... 569
Reppond *v.* Nat. L. Ins. Co., 11 L. R. A. (N. S.), 981..... 106
Requa *v.* Rea, 2 Paige, 339..... 265
Rhea *v.* McWilliams, 73 Ark. 557 100
——— *v.* State, 104 Ark. 162... 615
Rice & Bullen Matting Co. *v.* Paulsen, 51 Ill. App. 123..... 403
Richards *v.* Walker, 68 N. W. 1053 156
Ridley *v.* Halliday, 106 Tenn. 607 591
Riker *v.* Cornwell, 113 N. Y. 115.. 575
Ringo *v.* Woodruff, 43 Ark. 469.. 205
Roberts *v.* Cook, 16 Ves. Jr. 451.. 574
Robertson *v.* McClintock, 86 Ark. 255 .....43, 267
Rosster *v.* Miller, 3 App. Cas. 1151 585
Rourke *v.* White Moss Colliery Co., 20 Moak Rep. 469..... 482
Ryan *v.* Lemon, 7 Ark. 78..... 97

S

St. Louis & N. A. Rd. Co. *v.* Bratton, 93 Ark. 234..... 474
St. Louis & S. F. Rd. Co. *v.* Bowman, 76 Ark. 34..... 80
——— *v.* Carr, 94 Ark. 246.... 188
——— *v.* Fayetteville, 75 Ark. 534 355
——— *v.* Keller, 90 Ark. 308.412, 413
——— *v.* Kitchen, 98 Ark. 507.. 346
St. Louis, I. M. & S. Ry. Co. *v.* Aiken, 100 Ark. 437.....471, 505
——— *v.* Bennett, 53 Ark. 208 450
——— *v.* Birch, 89 Ark. 424... 338
——— *v.* Bragg, 69 Ark. 402... 403
——— *v.* Brogan, 105 Ark. 533. 351
——— *v.* Buckner, 89 Ark. 58.. 403
——— *v.* Corman, 92 Ark. 102 .....338, 545
——— *v.* Courtney, 77 Ark. 43.. 209
——— *v.* Cumbie, 101 Ark. 172 .....407, 414
——— *v.* Deshong, 63 Ark. 443 355
——— *v.* Furlow, 89 Ark. 404.. 413
——— *v.* Gaines, 46 Ark. 567.. 209
——— *v.* Garner, 90 Ark. 19... 184
——— *v.* Gillihan, 77 Ark. 551. 481
——— *v.* Glossup, 88 Ark. 225.. 542
——— *v.* Hall, 71 Ark. 302.... 641
——— *v.* Harper, 44 Ark. 524.. 160
——— *v.* Hartung, 95 Ark. 220 .....273, 274
——— *v.* Hitt, 76 Ark. 227.... 184
——— *v.* Holman, 90 Ark. 555 .....545, 565
——— *v.* Hudson, 95 Ark. 506.. 623
——— *v.* Ledford, 90 Ark. 543 545
——— *v.* Neely, 63 Ark. 636... 345
——— *v.* Owens, 103 Ark. 61... 437
——— *v.* Pape, 100 Ark. 269... 252
——— *v.* Prince, 101 Ark. 315. 188
——— *v.* Purifoy, 99 Ark. 366.. 276
——— *v.* Rhoden, 93 Ark. 29.. 300
——— *v.* Rice, 57 Ark. 479.... 209
——— *v.* Townes, 93 Ark. 430.. 412
——— *v.* Walker, 89 Ark. 556.. 209

St. Louis, I. M. & S. Ry. Co. *v.* Wells, 93 Ark. 153 226
——— *v.* Wilkerson, 46 Ark. 513 289
——— *v.* Wyatt, 79 Ark. 241 ... 184
St. Louis S. W. Ry. Co. *v.* Burdg, 93 Ark. 88 545
——— *v.* Clay County Gin Co., 77 Ark. 357 419
——— *v.* Mulkey, 100 Ark. 71 .. 27
——— *v.* Plumlee, 78 Ark. 147. 209
Sanders *v.* Plunkett, 40 Ark. 507 .. 21
——— *v.* Plunkett, 40 Ark. 507 326
——— *v.* Russell, 64 Ark. 236 .. 309
Sarles *v.* Sharlow, 37 N. W. 748 .. 584
Sawyer *v.* Chicago, 183 Ill. 57 70
Shall *v.* Biscoe, 18 Ark. 142 204
Schiele *v.* Dillard, 94 Ark. 277 ... 306
School District *v.* Adams, 69 Ark. 159 109
——— *v.* Allen, 83 Ark. 491 109
——— *v.* Bennett, 52 Ark. 511 .. 109
——— *v.* Garrison, 90 Ark. 335. 109
——— *v.* Goodwin, 81 Ark. 843 109
Schultz *v.* C., M. & St. P. R. Co., 116 Wis. 31 165
Scott *v.* Orbison, 21 Ark. 202 204
Searle *v.* Roman Catholic Bishop of Springfield, 203 Mass. 493 ... 640
Sessions *v.* Peay, 23 Ark. 39 265
Sexton *v.* Pike, 13 Ark. 193 671
Shanks *v.* Griffen, 14 B. Mon. 153 587
Sheppard *v.* State, 42 Ala. 531 ... 174
Shirey *v.* Clark, 72 Ark. 539 565
Shultz *v.* Redondo Imp. Co., 156 Cal. 439 171
Singer *v.* Naron, 99 Ark. 451 324
Singer Mfg. Co. *v.* W. D. Reeves Lbr. Co., 95 Ark. 363 .....433, 630
Skaggs *v.* State, 88 Ark. 62 615
Sloan *v.* Sloan, 11 Ark. 29 293
Smith *v.* First Nat. Bank, 29 L. R. A. (N. S.), 576 156
——— *v.* Jarvis, 105 S. W. 1168 685
——— *v.* Kidd, 68 N. Y. 130 157
——— *v.* Scott, 92 Ark. 143 653
Southern Cotton Oil Co. *v.* Spotts, 77 Ark. 458 546
Spence *v.* Central Accident Ins. Co., 236 Ill. 444 105
Spencer Med. Co. *v.* Hall, 78 Ark. 336 .....433, 630
Spokane *v.* Brown, 8 Wash. 317 .. 70
Spradling *v.* Spradling, 101 Ark. 451 323
Springfield Furniture Co. *v.* School Dist., 67 Ark. 236 109
Stanley *v.* Bonham, 52 Ark. 354 .. 219
State *v.* Little, 94 Ark. 217 453
——— *v.* Neal, 48 Ark. 412 2
——— *v.* Rottaken, 34 Ark. 144 306
——— *v.* Rowe, 69 Ark. 642 10
——— *v.* Scoggins, 85 Ark. 43 .. 29
State Bank *v.* Walker, 14 Ark. 234 98
State Fair Assoc. *v.* Townsend, 69 Ark. 215 223
State Nat. Bank *v.* Neel, 53 Ark. 110 .....264, 265
State *use* Columbia County *v.* Nabors, 103 Ark. 16 219
Stecher Cooperage Works *v.* Steadman, 78 Ark. 381 252
Steger *v.* Arctic Refrig. Co., 89 Tenn. 453 151
Steiner *v.* Ray, 84 Ala. 93 ....675, 676
Stewart *v.* Fleming, 105 Ark. 37 .. 459
——— *v.* Morrell, 65 Ark. 471 .. 129
——— *v.* Sharp County Bank, 71 Ark. 588 445
Stormes *v.* State, 81 Ark. 30 30
Stricklin *v.* Moore, 98 Ark. 30 121
Striplin *v.* State, 100 Ark. 132 505
Stubbs *v.* Pitts, 84 Ark. 160 653
Supreme Lodge K. & L. of H. *v.* Johnson, 81 Ark. 512 143
Swartzel *v.* Rogers, 3 Kan. 380 ... 440
Swinarton *v.* Le Boutelier, 148 N. Y. 752 487

T

Talbot *v.* Wilkins, 31 Ark. 422 ... 671
Tatum *v.* Ark. Lbr. Co., 103 Ark. 251 669

Taylor *v.* Leonard, 94 Ark. 122... 311
——— *v.* Moore, 99 Ark. 412... 2
——— *v.* Purcell, 60 Ark. 606.. 283
——— *v.* State, 72 Ark. 613.... 84
——— *v.* Taylor, 45 Atl. 440... 93
Terry *v.* Logue, 97 Ark. 314..... 264
Thayer *v.* Wellington, 91 Mass. 283 .....569, 574
Thomas *v.* Hinkle, 35 Ark. 450... 90
Thomas-Huycke-Martin Co. *v.* Gray, 94 Ark. 9..... 432
Thompson *v.* Buelher, 95 N. W. 854 156
——— *v.* Ingram, 51 Ark. 547.. 662
——— *v.* Sherrill, 51 Ark. 453 43
Thurman *v.* State, 54 Ark. 120... 474
Tillar *v.* Henry, 75 Ark. 451..... 323
Tindall's Executor *v.* Tindall, 24 N. J. Eq. 512..... 575
Tobin *v.* Jenkins, 29 Ark. 151..... 47
Towell *v.* Etter, 69 Ark. 34 .....634, 635, 636, 637
Towson *v.* Denson, 74 Ark. 302.63, 312
Treadwell *v.* Pitts, 64 Ark. 447... 89
Trull *v.* Hammond, 73 N. W. 642 156
Turner *v.* State, 100 Ark. 199..... 505

U

Union, etc., R. Co. *v.* Williams, 3 Col. App. 526..... 379
United States *v.* Bobbitt, 1 Black, 94 63
——— *v.* Claflin, 97 Ark. 546... 80
Upham, Estate of, 127 Cal. 9.... 569
Upton *v.* Tribilcock, 91 U. S. 50... 40

V

Vahlberg *v.* Keaton, 51 Ark. 535.. 662
Vinsant *v.* Knox, 27 Ark. 266..389, 391

W

Wailes *v.* Cooper, 24 Miss. 208.... 205
Walker *v.* Noll, 92 Ark. 148..... 56
——— *v.* State, 50 Ark. 532.... 174
——— *v.* State, 102 Ark. 336... 179
Wallis *v.* State, 54 Ark. 611.....31, 32
Walls *v.* Bailey, 49 N. Y. 464..... 524
Ware *v.* State, 33 Ark. 567..... 174
Warren *v.* Healey, 31 Ia. 31..... 70
——— *v.* State, 103 Ark. 165... 85
Waters-Pierce Oil Co. *v.* Bridwell, 103 Ark. 345.....330, 331
Watkins *v.* Griffith, 59 Ark. 345... 68
Watson *v.* State, 70 Ala. 13..... 31
——— *v.* Henderson, 98 Ark. 63 590
——— *v.* Wolff-Goldman Realty Co., 95 Ark. 18.....568, 592
Weaver *v.* Rush, 62 Ark. 57..... 653
Weigel *v.* Boone, 64 Ark. 228..... 171
Wells, In Matter of, 113 N. Y. 396 567
——— *v.* Christian, 76 N. E. 518 151
——— *v.* Parker, 76 Ark. 42.... 160
West *v.* West, 89 Ind. 529..... 569
Western Coal & Mining Co. *v.* Jones, 75 Ark. 76..... 469
Western N. Y. Life Ins. Co. *v.* Clinton, 66 N. Y. 326..... 247
Western Roofing Tile Co. *v.* Jones, 26 Okla. 209..... 585
Western Union Telegraph Co. *v.* Moxley, 80 Ark. 554..... 415
——— *v.* State, 82 Ark. 305..... 80
White *v.* Smith, 63 Ark. 513..... 9
——— *v.* Stokes, 67 Ark. 184.. 652
White River Lumber Co. *v.* Southwestern Imp. Assoc., 55 Ark. 625 100
White-Wilson-Drew Co. *v.* Egelhoff, 96 Ark. 105..... 246
Whitmore *v.* State, 72 Ark. 14.... 463
Wilcox *v.* Hebert, 90 Ark. 145.... 400
Wilkerson *v.* Eads, 97 Ark. 296... 98
Williams *v.* St. Louis & S. F. Rd. Co., 103 Ark. 401..... 140
——— *v.* State, 100 Ark. 218.471, 505
Williamson *v.* Berry, 8 How. (U. S.) 495..... 593
Wilson *v.* Massie, 70 Ark. 27..... 80
Winn *v.* State, 55 Ark. 360..... 636
Winer *v.* Bank of Blytheville, 89 Ark. 435..... 155
Winter *v.* Bandel, 30 Ark. 362.... 469
Womack *v.* Connor, 74 Ark. 354.. 326
Wood *v.* Seaver, 158 Mass. 411... 567

Woodmen of the World *v.* Hall, 104 Ark. 538 143
——— *v.* Jackson, 80 Ark. 419 .. 143
Woolfort *v.* Dixie Cotton Oil Co., 77 Ark. 203 674
Wortham *v.* State, 80 Miss. 212 ... 466
Wright *v.* Maxwell, 9 Ind. 192 587
Wyllie *v.* Palmer, 137 N. Y. 248 .. 482
Wyman *v.* Johnson, 68 Ark. 369 .. 565

Y

Yeates *v.* Pryor, 11 Ark. 58 ....40, 171
Young *v.* Stevenson, 73 Ark. 480 .. 160
Youngs *v.* Youngs, 45 N. Y. 254 ... 569

CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

Ex parte HOLDAWAY.

Opinion delivered September 30, 1912.

1. HABEAS CORPUS—REVIEW.—The proper method of bringing up for review the actions of inferior courts or judges in proceedings for habeas corpus is by certiorari, and not by appeal; yet, where the Attorney General, representing the State, concedes that the record is correct, and has agreed that a cause on appeal may be heard as if a petition for certiorari had been duly presented and the record brought up for review in obedience to the writ issued thereon, the cause will be so considered. (Page 2.)
2. CRIMINAL LAW—SENTENCE—VALIDITY.—Although the law requires that, where the punishment of an offense is by fine, the judgment shall direct that the defendant be imprisoned until the fine and costs be paid, the omission to make such direction will not render the judgment void. (Page 3.)
3. SAME—SENTENCE—VALIDITY.—A judgment in a criminal case which recites that the defendant entered a plea of guilty without condition, and adjudges a recovery of the fine and costs assessed against him unconditionally, is not void because it recites further that the payment of the fine and costs was postponed to a future day, as such recital did not make the judgment conditional, and, if erroneous, was not prejudicial to the accused. (Page 4.)

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

J. M. Brice, for appellant.

1. The judgment failed to direct imprisonment. Kirby's Digest, § 2443; 11 A. & E. Ann. Cases, 812; 36 Ark. 74; Acts 1909, p. 63; Castle's Digest 89.

2. The plea of guilty was only entered conditionally and the judgment was thereupon conditionally suspended 12 Cyc. 779; 51 Kan. 700; 33 Pac. 620; 2 Mich. N. P. 239.

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

1. The proper practice is by certiorari (45 Ark. 158; 48 *Id.* 283) and not by appeal.

2. The failure to direct imprisonment is an irregularity merely, and does not render the judgment void. 140 S. W. 22; 49 Ark. 143; 51 *Id.* 215; 60 *Id.* 93; 70 *Id.* 336.

3. There is no authority for a conditional plea of guilty. 94 Ark. 199.

FRAUENTHAL, J. This is an appeal from a judgment of the Arkansas Circuit Court refusing to discharge appellant from custody upon a proceeding for habeas corpus instituted by him. The petition for the issuance of the writ of habeas corpus was presented by appellant to the judge of the Pulaski Chancery Court, who issued same, making it returnable before the Arkansas Circuit Court. Upon the hearing of the application for habeas corpus, the Arkansas Circuit Court denied the same, and from that judgment the petitioner has appealed to this court.

In his brief in this case, the Attorney General has suggested that the proper practice to review the actions of inferior courts or judges in proceedings for habeas corpus is by certiorari and not by appeal; and we are of the opinion that this suggestion is correct. *Ex parte Jackson,* 45 Ark. 158; *State* v. *Neal,* 48 Ark. 253; *Ex parte Byles,* 93 Ark. 612; *Taylor* v. *Moore,* 99 Ark. 412. The Attorney General, however, concedes that the record returned upon this appeal is correct, and he has agreed that the matter may be heard as if the petition for certiorari had been duly presented to this court and the record brought up for review in obedience to the writ issued thereon. We will therefore consider the matter as thus properly before us for review by certiorari.

It appears that at the April, 1910, term of the Arkansas Circuit Court two indictments were duly and regularly pending against the appellant, in each of which he was charged with the separate offense of selling liquor without license. He appeared in person at that term of court and entered a plea of guilty to each indictment, and thereupon the court rendered two separate judgments of conviction against him upon said indictments. One of the judgments was duly satisfied, but

the other has not been paid nor in any manner satisfied. The latter judgment is as follows: "On this day comes the State of Arkansas by her prosecuting attorney, Geo. W. Clark, and comes the defendant, H. W. Holdaway, in his own proper person, and by leave of court enters herein a plea of guilty to the charge contained in an indictment charging him with the selling of liquor without license. Whereupon the court doth assess his fine at $50. It is therefore considered, ordered and adjudged by the court that the State of Arkansas for the use of Arkansas County do have and recover of and from the defendant, Henry Holdaway, the sum of $50 for fine, and all costs herein expended, and execution issue therefor, and that defendant stand on his present bond until the November term of this court, at which time he is to arrange for the payment of said fine and costs."

It appears that the county court of Arkansas County had duly entered into a contract with one Hugh Watson for the maintenance, safe-keeping and working of prisoners committed to the jail of said county, in pursuance of section 1080 *et seq.* of Kirby's Digest and the acts amendatory thereof. On April 22, 1912, a commitment was issued upon the above judgment, under which the sheriff of said county delivered appellant to said Watson to be kept and worked under said contract; and it was under this authority that he was held in custody by said Watson, the legality of which is assailed by appellant by this proceeding.

In his petition for habeas corpus the appellant alleged that said Watson was holding and working him for the purpose of paying the fine of $50 and costs adjudged against him, and he urges that his detention thereunder is illegal principally upon two grounds: First, because the judgment failed to direct that in default of the payment of the fine and costs he should be committed to the county jail and by the jailer delivered to the county contractor; and, second, because the plea of guilty was only entered by him conditionally, and that the judgment was thereupon conditionally suspended.

It is provided by section 2443 of Kirby's Digest that "if the punishment of an offense shall be a fine, the judgment shall direct that the defendant be imprisoned until the fine and costs are paid." And by other provisions of our statute it is prescribed that all persons convicted and committed to the

county jail shall be delivered to the contractor, who shall keep and work such prisoners for the time they shall have been adjudged to have been imprisoned. Kirby's Digest, § § 1085, 1091. The proper judgment, therefore, which should be rendered, when the punishment for an offense is by fine, is to also direct that the defendant be imprisoned until the fine and costs are paid. But a failure to incorporate such direction in the judgment does not render it void.

This question was decided in the case of *In re Jones*, 100 Ark. 226. In that case a similar contention was made, and relative thereto we said: "The law requires that where the punishment of an offense is by fine, the judgment shall direct that the defendant be imprisoned until the fine and costs are paid, and such directions should have been included in such judgments against Jones in default of the payment of the fines levied. Its omission, however, did not render the judgment void."

In his petition the appellant alleged that he entered into an agreement with the prosecuting attorney under which he was to plead guilty to the two charges made against him in the two indictments; that he should satisfy the judgment entered in one case, and, on condition that he would give full and truthful testimony in a case pending against another party, and not be guilty of any illegal sale of liquor in the future, he would not be required to pay the judgment in the other case; that he duly complied with these conditions, and for that reason the above judgment is unenforceable.

In the case of *Joiner* v. *State*, 94 Ark. 198, it was held that there is no authority for a plea of guilty to be entered and received on any kind of condition, or for any judgment to be suspended on condition. In that case the contention was made that the pleas of guilty were entered only on condition, and for that reason the court erred in rendering judgment on such pleas. In that case the court said: "The record made by the clerk at the time showed that the pleas of guilty were entered unconditionally," and thereupon held that the judgments of conviction therein rendered were regular and valid. So in the present case the record shows that the plea of guilty was entered unconditionally. The judgment entered thereon, therefore, was correct. Nor does it appear that the judgment

was suspended on any condition. The record recites that the appellant entered a plea of guilty without condition, and adjudges the recovery of the fine and costs assessed against him, without any condition. It is true that the judgment recites that the payment of such fine and costs was postponed to a future day. This, however, did not make the payment of the judgment conditional. The judgment was still made absolute, and the time of payment thereof was only postponed. This at most was only an error; but, if an error, it was in favor of the appellant, and one therefore of which he can not complain. This did not render the judgment void. It is not contended that the judgment has been paid or satisfied. It follows that the judgment is still effective, and, as was said in the case of In re *Jones, supra,* "when it appeared that the petitioner was held in custody by the final judgment of the circuit court, a court of competent criminal jurisdiction, and under a contract legally made for the hire of such prisoners, the court should have remanded him to the custody of the contractor."

It follows that the court did not err in refusing to discharge the appellant, and its judgment is affirmed.

McDONALD v. FORT SMITH & WESTERN RAILROAD COMPANY.

Opinion delivered September 30, 1912.

1. JUDGMENT—COLLATERAL ATTACK.—A judgment that is not a nullity, but which only contains some defect that may become fatal and render it invalid is voidable merely, and until annulled can not be collaterally attacked. (Page 8.)
2. SAME—EFFECT OF WANT OF JURISDICTION.—A judgment rendered by a court lacking jurisdiction either of the person or of the subject-matter is void. (Page 8.)
3. JUDGMENT—COLLATERAL ATTACK.—In the case of a domestic judgment collaterally attacked, the question of notice or no notice must be tried by the court upon an inspection of the record only; and where a judgment recites that the defendants were duly served with summons as required by law, it must be taken as true unless there is something in the record to contradict it. (Page 9.)
4. EMINENT DOMAIN—PRESUMPTION IN FAVOR OF JUDGMENT.—The same presumption of regularity will be given to a judgment rendered in a

condemnation proceeding as in other actions which fall within the general jurisdiction of circuit courts. (Page 10.)

5. INSANE PERSONS—VALIDITY OF JUDGMENT AGAINST.—Where a judgment is rendered by a court having jurisdiction of the parties and subject-matter, it will not be void because the defendant was insane and no defense was made for her by a guardian, as required by Kirby's Digest, § § 6026, 6029. (Page 10.)

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

Winchester & Martin, for appellant.

1. The judgment, which shows affirmatively that no defense was made for an insane person, that no guardian was appointed to defend for her, that default was made, etc., was no bar to this suit. The judgment was void. Kirby's Dig., § 6050; 11 Ark. 519; 47 *Id.* 431; 49 *Id.* 397, 411.

2. The condemnation proceeding was a special proceeding, and the law was not followed. The judgment is open to collateral attack. Kirby's Dig., § § 2947, 2949; 1 Lewis on Em. Domain, (2 ed.) § 269; 47 Ark. 440-1; 21 Vt. 108; 9 How. (U. S.) 336; 20 Ark. 561-6-7; 19 *Id.* 499; 40 *Id.* 124; 55 *Id.* 30; 40 *Id.* 124; 11 *Id.* 120; 97 U. S. 444; 71 Ark. 318.

C. E. & H. P. Warner, for appellee.

1. The judgment in the condemnation suit is conclusive until reversed or vacated by direct proceeding. 49 Ark. 397; 72 *Id.* 299; 50 *Id.* 188; 1 Black on Judgments, § 205; 23 Cyc. 1072.

2. Evidence *dehors* the record was not admissible to show that the judgment was void. 39 Ark. 242; 32 N. E. 920; 112 Ind. 221; 47 S. W. 394.

3. The judgment was not void, but voidable only on a showing of a meritorious defense. 148 S. W. 1038; 51 Ark. 224; 57 *Id.* 628; 114 Cal. 218; 63 Tex. 88; 1 Black on Judgments, § 193.

4. If the records were silent as to notice, still the presumption is that the statute requiring notice has been complied with. 55 Ark. 30; 49 Ark. 397; 71 *Id.* 318.

FRAUENTHAL, J. This is an action instituted in 1909 by the guardian of Ella Hare, a person alleged to be of unsound mind, against the Fort Smith & Western Railroad Company

to recover damages for the appropriation by it for railroad purposes of certain land alleged to be owned by her. The defendant denied that Ella Hare owned said land, and pleaded in bar of any right she might have a judgment rendered in a suit instituted by it against said Ella Hare and others in which said land was duly condemned for its railroad purposes. The case was tried by the court sitting as a jury upon an agreed statement of facts. From this it appears that in 1901 the Fort Smith & Western Railroad Company instituted an action in the Sebastian Circuit Court for the condemnation of the land involved in the present suit. A number of persons were made parties to that action, amongst whom were said Ella Hare and Matt Grey, administrator of the estate of Mary A. Hare, the mother of said Ella Hare. After the filing of the complaint in that action, an order was made by said court directing the railroad company to make a deposit of a stated sum, in pursuance of the statute in such cases provided. In that order it is recited that, "it appearing to the court that due and sufficient notice has been given defendants herein, and that said motion is now properly presented, * * * and the court, being fully advised, doth sustain said motion and doth order that the plaintiff deposit, * * * subject to the order of the court, the sum of $2,000 for the purpose of making compensation to the defendants when the amount due them for the property herein sought to be appropriated shall have been assessed according to law." In that suit Matt Grey as such administrator alone filed an answer. Thereupon the cause came on for trial before a jury to assess the damages sustained by the defendants by reason of the appropriation of said land by the railroad company, who returned a verdict in the sum of $3,000 damages. A judgment was thereupon rendered condemning said land to the use of said railroad company and adjudging a recovery against it in favor of the defendants for said damages. In that judgment it is recited "that the defendants (naming them and the said Ella Hare specifically) have each and all been regularly and legally served with summons herein the due and proper length of time before the beginning of this term." None of the papers in said case could be found except the answer of said Matt Grey as administrator, and it does

not appear in any order of the court in that action that said Ella Hare was laboring under any legal disability, or that any guardian was appointed or appeared for her or filed an answer for her in that proceeding.

Upon the trial of the present case the plaintiff offered to prove (and in said agreed statement of facts it is conceded) that Ella Hare was at the time of the institution of said condemnation suit, and has been continuously ever since that time, a person of unsound mind. The court refused to permit the introduction of any evidence other than the record entries made in said condemnation suit. It held that parol testimony was inadmissible to impeach the judgment rendered in said condemnation suit, and that by said judgment the plaintiff herein was precluded from any recovery in the present action.

It is urged by counsel for plaintiff that the court erred in the ruling made by it, because by the offered testimony it would be shown that Ella Hare was at the time of the institution of said condemnation suit and the rendition of said judgment laboring under the disability of insanity, and the record in said case does not disclose that service of process therein was had both upon her and her guardian, nor that an answer was filed in that suit by any guardian for her; and for this reason the judgment is not valid. It will thus be seen that the object of the introduction of said testimony was to impeach said condemnation judgment in a collateral proceeding. The question, therefore, to be determined is whether said judgment is void or only voidable, in event the said Ella Hare was and has been continuously ever since the institution of said suit a person of unsound mind; for it is only when a judgment is absolutely void that it can be impeached collaterally.

When a judgment is not a mere nullity, but only contains some defect which may become fatal and render it invalid, then it is only voidable, and, until it is actually annulled, it has all the force and effect of a perfectly valid judgment. Until by a proper proceeding such judgment is reversed or vacated, it will be effective as an estoppel or as a source of title. A judgment rendered by a court without jurisdiction is void; and to have such jurisdiction the court must have

jurisdiction both over the subject-matter of the suit and the parties thereto.

It is conceded that the court rendering said condemnation judgment had jurisdiction over the subject-matter of said suit, and it is only contended that it did not have jurisdiction over the person of Ella Hare for the reason that proper notice had not been given to her thereof. A judgment pronounced against one without notice is void; and section 4424 of Kirby's Digest is a statutory declaration of that principle. But in all cases seeking to impeach a judgment for want of notice the question involved is, what is the character of the evidence which is necessary to show such notice or the want thereof? This question was fully and well considered by this court in the case of *Boyd* v. *Roane*, 49 Ark. 397. It was there held that, in the case of a domestic judgment collaterally attacked, "the question of notice or no notice must be tried by the the court upon an inspection of the record only." This ruling has been adhered to so often that the doctrine thus laid down can be considered settled in this State. The judgment of a domestic court having general and superior jurisdiction is presumed regular and valid, and founded upon jurisdiction properly acquired. Our statute provides that when it appears from the recital in the record of the court that notice has been given it shall be evidence of such fact (Kirby's Digest, § 4425); and in the case of *Love* v. *Kauffman*, 72 Ark. 265, it was held that when a judgment recited that the defendants "were duly served with summons herein as required by law," it must be taken as true unless there is something in the record to contradict it. *Borden* v. *State*, 11 Ark. 519; *Marx* v. *Mathews*, 50 Ark. 338; *McConnell* v. *Day*, 61 Ark. 464; *White* v. *Smith*, 63 Ark. 513; *Porter* v. *Dooley*, 66 Ark. 81; *Clay* v. *Bilby*, 72 Ark. 101; *Ingram* v. *Sherwood*, 75 Ark. 176.

It follows that, in a case seeking to impeach collaterally a domestic judgment, the question as to whether or not process has been served in the manner prescribed by law upon the parties defendant therein is tried alone by an inspection of the record, and the verity of such record can not be assailed by parol evidence. The judgment in the condemnation suit which plaintiff seeks in this case to impeach recites that process was duly and regularly served on said Ella Hare, who

was made a party defendant in that suit. This recital is conclusive evidence upon collateral attack of this judgment that Ella Hare, whether *sui juris* or laboring under disability, was served with process in the manner prescribed by law.

It is urged that the circuit court in the condemnation suit was proceeding in the exercise of a special power wholly conferred upon it by statute, and that its jurisdiction in such special proceeding will not be presumed upon collateral attack. But the powers conferred by our statute upon the circuit court to condemn property for public use are not of a summary nature, but are exercised judicially. The action taken in such matter by the circuit court is not ministerial, but belongs to it as a court of general jurisdiction, and is exercised in the same manner as in any civil action in which powers are exercised by it judicially and according to the course of the common law.

In the case of *State* v. *Rowe,* 69 Ark. 642, this court held that a proceeding by a railroad company to condemn land for its right-of-way was a civil action, and was a proceeding brought in a court of justice for the enforcement of a private right, like any other cause of action confided to the general jurisdiction of the circuit court. The rules which govern the exercise of jurisdiction conferred upon the circuit court in such condemnation action as to persons, process and procedure are the same as those applicable to the exercise of its powers over matters generally confided to its jurisdiction. It follows that the same presumption of regularity and verity will be given to a judgment rendered in a condemnation suit as in those actions which fall within the general jurisdiction of circuit courts.

It is urged that said judgment could be collaterally attacked because the record therein does not show that an answer was filed or a defense made by a guardian for the insane person, Ella Hare, but on the contrary that it affirmatively shows that an answer was only filed therein by the defendant Matt Grey, administrator. It is provided by our statutes that an action by an insane person must be brought by his guardian or next friend, and the defense of such person must be by his regular guardian or a guardian appointed by the court, and no judg-

ment can be rendered against him until after a defense by a guardian. Kirby's Digest, § § 6026, 6029.

In the case of *Peters* v. *Townsend*, 93 Ark. 103, it was held that these statutory provisions apply whether such persons was judicially declared to be of unsound mind or not. A judgment, however, which is rendered without the appointment of or a defense by a guardian for such insane person is not void. It would be erroneous to render a judgment against an insane person without the appointment of, or a defense made by, his guardian, and a judgment so rendered would be liable to reversal upon appeal or to vacation upon a proper action being instituted to that end. But such judgment would be voidable only. The principle is thus stated in 1 Black on Judgments, section 193: "If a judgment is rendered by a court having jurisdiction of the parties and subject, it is held by a great preponderance of authorities that it will not be void because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to a reversal upon a proper proceeding for that purpose. The theory is that the appointment of a guardian is not a prerequisite to the jurisdiction of the court. Omission to appoint a guardian does not impair the authority of the court to proceed in the case, but at most is an irregularity in the exercise of its lawful jurisdiction which on settled principles of law may impregnate its judgment with error, but can not render it absolutely null."

The effect of the omission to appoint a guardian *ad litem* for one laboring under legal disability, therefore, will not be to vitiate the judgment on collateral attack, but to make it voidable only by appeal, or other direct proceeding.

It follows that the condemnation judgment could not be impeached collaterally for the reasons assigned by counsel for plaintiff, and that the parol testimony offered was inadmissible for that purpose.

The character of said judgment has really been determined by this court in the case of *Hare* v. *Fort Smith & Western Rd. Co.*, 104 Ark. 187. In that case the present plaintiff sought to vacate this judgment in pursuance of subdivision 5 of section 4431 of Kirby's Digest. In that case we said: "It is an error to proceed with the trial of a condemnation

suit when a person of unsound mind is a party thereto and is not represented by statutory guardian or a guardian *ad litem*, but such proceeding and the judgment therein rendered is not absolutely void; it is only voidable, and may be vacated, at the instance of such party laboring under disability," by a proceeding in pursuance of said statute.

The court therefore committed no error in the ruling which it made or in the judgment which it rendered. Said judgment is accordingly affirmed.

MONK v. STATE.

Opinion Delivered September 30, 1912.

1. BURGLARY—INTENT TO COMMIT GRAND LARCENY—EVIDENCE.—Under an indictment for burglary alleging a burglarious entry with intent to commit grand larceny, a conviction will be sustained by proof tending to establish that the house was entered with intent to commit grand larceny, though the property taken turned out to be worth less than $10 in value. (Page 13.)
2. LARCENY—ALLEGATION OF OWNERSHIP.—An indictment for larceny of the property of one M. is sustained by proof that the property belong to M.'s wife, but was in his exclusive possession. (Page 13.)
3. CRIMINAL LAW—JOINDER OF OFFENSES.—While the charge of petit larceny can not be joined with a separate count for burglary, under Kirby's Digest, § 2231, providing that burglary and grand larceny may be joined in the same indictment, where the two latter charges are joined, there is nothing to prevent the jury from finding the defendant guilty of petit larceny. (Page 13.)
4. EVIDENCE—INCRIMINATING LETTER—IDENTIFICATION.—It was not error to admit in evidence an incriminating letter which purported to have been written by defendant and was sealed up in an envelope addressed by him. (Page 15.)
5. INSTRUCTION—REPUTATION OF ACCUSED.—An instruction that the reputation of the defendant should not be considered for any purpose except as to his credibility as a witness was properly refused where the State introduced no proof attacking his character, although the defendant voluntarily testified that he had served a term in the penitentiary. (Page 15.)

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

Appellant, pro se.

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

McCULLOCH, C. J. The grand jury of Pulaski County returned an indictment against the defendant, Clifton Monk, and one Davis, containing two counts, charging, respectively, the crimes of burglary and grand larceny. The charge is that they burglariously entered the dwelling house in the city of Little Rock of one E. G. Marlin with the intent to steal the latter's property, and that they did steal a watch and a fob of the value of $25, the property of E. G. Marlin. The defendant was tried separately, and the jury convicted him of burglary under the first count and of petty larceny under the second count.

The proof tended to show that Davis entered the house of Marlin in the night time, and that while in the house he stole a watch and fob; that Davis and the defendant were acting together in the commission of the burglary, and that defendant stood watch at the gate while Davis entered the house. The proof also tended to show that Davis gave the watch and fob to defendant.

The evidence is sufficient, we think, to sustain the finding of the jury. The proof adduced by the State tended to establish the value of the watch and fob in excess of the sum of $10, but the jury gave defendant the benefit of all doubts on that point and convicted him of petit larceny. The circumstances, however, warranted the inference that the house was entered by Davis with intent to commit grand larceny, and therefore warranted the conviction of burglary, even though it turned out that the property he took was of less than $10 in value. *Harvick* v. *State,* 49 Ark. 514.

It is insisted, however, that, according to the undisputed evidence, the watch and fob were the property of Marlin's wife, and that there was a variance between the allegations and the proof on that point. Mrs. Marlin testified that her husband purchased the watch and fob and gave them to her; that she gave them to him for safe-keeping, and that he had not returned them to her, but that when the articles were stolen they were under the pillow of the bed occupied by them both. Marlin testified that the watch and fob belonged to

his wife, but that she had turned them over to him for safe-keeping, and that he had not returned them to her at the time the larceny was committed. We are of the opinion that the proof justified the finding that the property was in the exclusive possession of Marlin, and this was sufficient for the ownership to be laid in him.

There is another question not raised by counsel which has, however, given us some concern, and that is whether the defendant could be, under this indictment, convicted of petit larceny. The statute provides that burglary and grand larceny may be charged in one indictment. Kirby's Digest, § 2231. It does not provide that petit larceny may be joined in an indictment for burglary, and it is worthy of notice that in other subdivisions of the same section, providing for the joining of larceny with other offenses, it is not restricted to grand larceny but to the crime of larceny generally. Prior to the year 1901 there was no authority for joining burglary and larceny in the same indictment, and this court held that they could not be joined. *Crook* v. *State*, 59 Ark. 326. But the General Assembly of that year amended the statute so as to allow burglary and grand larceny to be charged in the same indictment. From an early day it has been held that, "upon an indictment for a felony, the accused may be convicted of a misdemeanor, where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all the substantive allegations necessary to let in proof of the misdemeanor." *Cameron* v. *State*, 13 Ark. 712. It seems clear that, under the language of the statute, the charge of petit larceny can not be embraced in a separate count of an indictment for burglary, as the statute plainly provides only that the crime of grand larceny may be embraced therein. But there is no reason to believe that the Legislature meant to change the rule announced in the Cameron case, *supra*, so long adhered to, so as to prevent a conviction for petit larceny under a count for grand larceny contained in an indictment charging burglary also. The lawmakers evidently meant to provide for the joining of the two offenses in one indictment, so that, according to the rule

already established, there might be a conviction of any lower offense embraced in the charge named.

The defendant denied that he was with Davis that night or that he participated in the burglary, and undertook to establish an alibi. He stated that he slept with one Burt that night in a room in a certain office building. The State was permitted to introduce in evidence, over defendant's objection, a letter purporting to have been written by him to Burt in which he requested the latter to testify that he (the defendant) slept with Burt throughout the night. The letter has a clear tendency to establish an attempt to induce Burt to swear falsely, and constituted a strong circumstance tending to show such conduct on the part of the defendant as indicates guilt of the crime charged against him. His name was signed to the letter, but he denied that he wrote it, or that it was in his handwriting, and the State made no effort to identify the handwriting as his. The letter was taken by the officers from a discharged prisoner who had been occupying the jail with the defendant, and it was in a sealed envelope addressed in defendant's handwriting. He admitted that he addressed the envelope, but testified that when it left his hands it contained another letter which he gave to his fellow-prisoner to mail for him. The court allowed the letter to be read to the jury with instructions to the effect that they should not consider it unless they found that it was written, or authorized to be written, by the defendant. It is true that the authenticity of the letter was not traced directly to the defendant himself, but it was sealed up in an envelope which was addressed by him, and the circumstances, we think, warranted the submission of the question to the jury whether or not he had written the letter or authorized it to be written.

It is argued that the case should be reversed because the court refused to give the following instruction at defendant's request:

"The court instructs the jury that the reputation of the defendant shall not be considered by you for any purpose except as to his credibility as a witness. You can not convict the defendant of the crime of grand larceny on proof that he is or has been guilty of some other offense."

The State did not introduce any testimony directly

attacking the reputation of the defendant; therefore, the instruction was not called for, It is true that it was incidentally developed in the testimony that defendant and his brother and Marlin, the prosecuting witness, had all served together in the penitentiary; but this testimony came out unsought and merely as an incident to the answer of one of the witnesses. In fact, the defendant himself testified that he had been in the penitentiary with Marlin in order to establish the fact that he and Marlin had engaged in some kind of a difficulty while in prison together, and to show that Marlin was prejudiced against him and was testifying falsely in the case. We do not think that the circumstances under which the fact of defendant having been in the penitentiary was drawn out made it necessary to admonish the jury not to consider it in determining defendant's guilt or innocence, and he was not prejudiced by the court's refusal to give the instruction on that subject. In fact, the instruction which he asked was not directed to that particular fact, but dealt with the matter of the defendant's reputation, and there was no evidence adduced on that point at all.

Judgment affirmed.

SIMMS v. STATE.

Opinion delivered September 30, 1912.

1. ACCOMPLICE—WITHHOLDING INFORMATION OF CRIME.—One who withholds information of the commission of a crime out of fear for her own safety, and not merely from a desire to shield the guilty parties, is not an accomplice. (Page 18.)
2. SAME—INSTRUCTION AS TO CORROBORATION.—Where it was a question whether a certain witness was an accomplice or not, it was not error to refuse an instruction which assumed that she was an accomplice. (Page 19.)

Appeal from Prairie Circuit Court, Southern District; *Eugene Lankford*, Judge; affirmed.

W. A. Leach, for appellant.

One who in any manner participates in the criminality of an act, whether as principal in the first or second degree or merely as an accessory before or after the fact, is an accomplice. 96 Ark. 13; 90 Ark. 461; 51 Ark. 115; 50 Ark. 534; 43 Ark.

371; 45 Ark. 539; 36 Ark. 117. See Kirby's Digest, § 1562. Whether or not the witness Alice Walls was an accessory after the fact or accomplice was a mixed question of law and fact to be submitted to the jury under proper instructions, unless the testimony shows conclusively that she was an accomplice. 51 Ark. 115. Appellant's requested instruction should have been given.

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

The requested instruction assumes that Alice Walls was an accomplice. Moreover, taken in connection with the testimony, it violates the fundamental principle governing trials by jury that "judges shall not charge juries in regard to matters of fact, but shall declare the law." Art. 7, § 28, Const.; 85 Ark. 188; 83 Ark. 195. Even if there had been testimony to show that she was an accomplice, still it would have been error to assume that fact in the instruction. 36 Ark. 117; 70 Ark. 337; 73 Ark. 568; 66 Ark. 506.

Had there been any evidence tending to show that she was an accomplice, appellant had the right to have that issue submitted to the jury, under proper instructions defining an accomplice. 51 Ark. 115. But, not having requested such an instruction, he can not now complain that the court omitted to do so. 30 Ark. 335; 45 Ark. 539; 75 Ark. 76; *Id.* 373; 77 Ark. 445; 67 Ark. 416.

McCULLOCH, C. J. The defendant, Chester Simms, is accused of the crime of murder in the first degree in killing one Kirk Morford, alleged to have been committed on December 30, 1911, at the town of DeValls Bluff, in Prairie County. He was convicted of the crime charged against him in the indictment, and sentenced to be hanged.

The dismembered body of Morford was found on the railroad track near DeValls Bluff on Sunday morning, December 31, 1911, about fifty or seventy-five yards distant from the house of a woman named Rosalind Mann. Though the body was greatly mutilated, very little blood had, according to the testimony adduced by the State, been discharged, and the evidence tends to establish the fact that death occurred before the body was placed on the railroad track. There were indications of

a fatal knife wound in the body. A search of the house of Rosalind Mann developed the fact that a large area of the floor in one of the rooms had been recently scrubbed, but still disclosed human blood spots, as demonstrated by chemical analysis. A woman named Alice Walls testified that she witnessed the killing of Morford by the defendant and one Harvey Woods. She testified that she came to DeValls Bluff about a week before the killing, and was living in illicit relation with the defendant at the house of Rosalind Mann, but that she accepted the attentions of Morford and allowed him to spend the night with her on Friday night before the killing. She testified that the next day (Saturday) she had a fight with defendant, which he provoked on account of her refusal to give him the money she had received from Morford. She stated that she met Morford again Saturday night, and allowed him to accompany her to her room at the house of Rosalind Mann, both of them being to some extent intoxicated, Morford being intoxicated to the extent that he was unable to undress himself without her help; that after they had been in bed some time, and she had been asleep, she was awakened by a cry, and when she roused up found Morford lying on the floor and defendant and Woods on top of his body; that she heard the dying groans of Morford, and saw a large open knife in the hands of Woods. Woods secreted a knife at the house of Rosalind Mann, and there is testimony that he purchased the knife that morning, the defendant being with him at the time.

The evidence was sufficient to warrant the jury in finding that Morford was murdered, and that the crime was committed by the defendant and Woods.

The only ground for reversal urged by defendant's counsel is that the court erred in refusing to give an instruction telling the jury that the defendant could not be convicted on the uncorroborated testimony of the witness Alice Walls. The effect of this instruction was to declare as an undisputed fact that Alice Walls was an accomplice; and if there is any dispute in the testimony on that point, it necessarily follows that the instruction was not correct, and that the court properly refused it. The witness admitted that she had made conflicting statements, and had endeavored to shield the defendant, but stated

that she did so because she had been threatened with violence and was afraid of the defendant and Woods. If she withheld information out of fear for her own safety, and not merely from a desire to shield the guilty parties, she was not an accomplice. *Melton* v. *State*, 43 Ark. 367; *Carroll* v. *State*, 45 Ark. 539; *McFalls* v. *State*, 66 Ark. 16.

The defendant was entitled to an instruction submitting the question to the jury whether or not the witness was an accomplice; and if such an instruction had been asked for, it would have been the duty of the court to give it. But the instruction asked for was clearly erroneous, because it assumed as an undisputed fact that the witness was an accomplice.

We are unable to find any prejudicial error in the record, and as the judgment is amply sustained by the testimony it must be affirmed. It is so ordered.

Ex parte SIMMONS.

Opinion delivered September 30, 1912.

1. INJUNCTION—EFFECT OF TEMPORARY ORDER BY CIRCUIT JUDGE.—Where a circuit judge, in the absence of the chancellor from the county, grants a temporary injunction in a case pending in the chancery court, such order has the same effect as if it had been made by the chancellor, and is subject to be controlled, modified or dissolved by the chancellor in all respects as if issued by him in the first instance. (Page 21.)
2. SAME—VALIDITY OF ORDER DISSOLVING TEMPORARY INJUNCTION.—Where a circuit judge, in the chancellor's absence from the county, granted a temporary injunction at plaintiff's instance, and the chancellor subsequently dissolved the injunction without requiring the defendant to file an answer or to give the ten days' notice, as required by section 3994, Kirby's Digest, such order was not an excess of jurisdiction, but only an erroneous decision. (Page 21.)
3. SAME—DISSOLUTION—EFFECT OF DISOBEDIENCE OF INJUNCTION.—Where a circuit judge, in the chancellor's absence, granted a temporary injunction at the plaintiff's instance, which the chancellor subsequently dissolved, the circuit judge had no power to treat the defendant as in contempt for disobeying the injunction after its dissolution. (Page 22.)

Certiorari to Phillips Chancery Court; *Edward D. Robertson*, Chancellor; judgment quashed.

STATEMENT BY THE COURT.

G. W. Simmons presents his petition for a writ of certiorari to this court, asking it to quash a judgment committing him for contempt for violation of an injunction order. The facts are as follows:

On May 29, 1912, Frank Carter *et al.* filed in the Phillips Chancery Court a complaint against G. W. Simmons, in which they ask that the defendant be enjoined from acting as pastor of the Beautiful Zion Church of Helena, in Phillips County, Arkansas. On the same day, without notice to the defendant, the complaint was presented to the Hon. H. N. Hutton, Judge of the First Judicial Circuit, and a temporary injunction was issued by said judge. On the 11th day of June, 1912, the defendant Simmons gave notice to the plaintiffs that he would apply to the Hon. E. D. Robertson, Chancellor of the Phillips Chancery Court, for an order to set aside and dissolve said temporary injunction. At the time and place mentioned in the notice the defendant appeared before the chancellor and presented his motion to dissolve the injunction.

On June 15, 1912, the chancellor made an order dissolving the temporary injunction. Thereafter the defendant Simmons was summoned to appear before the Hon. H. N. Hutton, Judge of the First Judicial Circuit, at chambers on June 25, 1912, to show cause why he should not be punished for contempt for violation of the temporary injunction for preaching in the Beautiful Zion Church on the 16th day of June, 1912.

The defendant Simmons appeared before the circuit judge in obedience to the summons, and filed his written response in which he stated, among other things, that the temporary injunction had been dissolved by an order of the chancellor of the Phillips Chancery Court before he preached in the church on the 16th day of June, 1912. The circuit judge adjudged the defendant guilty of contempt and issued a warrant of commitment directing the sheriff of Phillips County to keep the defendant in custody in the jail of Phillips County for ten days and until he shall pay a fine of twenty-five dollars.

The object of the defendant's petition in this case is to review the judgment of the circuit judge.

Moore, Vineyard & Satterfield, for petitioner.

The judgment should be quashed. The chancellor has

power to dissolve the injunction, which he did, and thereafter petitioner was not in contempt. Kirby's Dig., § 3993; 40 Ark. 507; 23 Cyc. 549; 22 *Id.* 983.

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

1. The power vested in a court or judge to grant an injunction necessarily implies the power of the same court or judge to dissolve or modify it. Acts 1903, § 12, p. 314; 5 Sawy. (U. S.) 464; 40 Ark. 507; 3 Okla. 508; 41 Barb. (N.Y.) 547; 66 Cal. 161; 75 Ga. 325; 25 Kan. 359.

2. A chancellor, at chambers, has no authority to dissolve or modify an order made by a co-ordinate judge. 91 Va. 209; 57 Ga. 325; 44 Neb. 361.

HART, J., (after stating the facts). In the case of *Sanders* v. *Plunkett*, 40 Ark. 507, the court held that a circuit judge has the power to dissolve in vacation an injunction ordered by himself in vacation. At the time the decision was rendered jurisdiction of matters of equity was vested in the circuit courts of the State. (Constitution of 1874, art. 7, § 15). Subsequently the State was divided into chancery districts, and jurisdiction in matters of equity was transferred from the circuit courts to the chancery courts.

Upon the authority of *Sanders* v. *Plunkett, supra*, it follows that a chancellor has power to dissolve in vacation an injunction ordered by himself in vacation. Section 12 of Acts of 1903, c. 166, creating chancery courts and dividing the State into chancery districts, reads as follows: "In case of the absence of the chancellor from the county any circuit judge or the judge of the county court of the county may issue writs of injunction or restraining orders, after the action has been commenced, but not before."

The original action against the defendant Simmons was filed in the Phillips Chancery Court, and was there pending when the order granting the injunction was made by the circuit judge. The circuit judge in granting the injunction was acting pursuant to the power given him by section 12, Acts of 1903, c. 166, creating chancery courts, and was exercising a power auxiliary to the jurisdiction of the chancery court in which the action was pending. The effect of the order was the same as if it had been made by the chancellor.

The injunction, therefore, was subject to be controlled, modified or dissolved by the chancellor in all respects as if issued by his order in the first instance.

Section 3993, Kirby's Digest, provides that the party enjoined may at any time, upon reasonable notice to the plaintiff, move the court upon the plaintiff's complaint and affidavits alone to dissolve or modify an injunction of the application for which no notice was given.

Section 3994, Kirby's Digest, provides that, after answer filed by the party enjoined, he may give notice to the plaintiff of the motion, in not less than ten days thereafter, upon the whole case, to dissolve or modify the injunction, and that, upon such motion, either party may read depositions and other competent evidence in writing.

The record in the case shows that no answer was filed by the defendant at the time he made the motion to dissolve the injunction, nor did he give the plaintiffs the ten days' notice required by section 3994, Kirby's Digest. Additional affidavits were also read at the hearing by the defendant. It may be that the chancellor should have refused to have dissolved the injunction until the defendant had complied with section 3994, Kirby's Digest, but his order dissolving the injunction was not an act in excess of jurisdiction; his power to decide erroneously is as clear and undoubted as to decide correctly. In such case there is no want of jurisdiction, but only an erroneous decision.

It follows that the circuit judge had no power to treat the defendant as in contempt, and it is ordered that his judgment committing the defendant for contempt be reversed and quashed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. MALONE.

Opinion delivered September 30, 1912.

1. APPEAL AND ERROR—ABSTRACT—PRINTING ENTIRE RECORD.—For the appellant to transcribe in full the record of the entire proceedings of the court below is not a compliance with rule 9 of this court requiring "an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which

he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to the court for decision." (Page 24.)

2. SAME—SUFFICIENCY OF COMPLIANCE WITH RULE 9.—Where the appellant in his abstract set out the entire record of the court below, the cause will not be affirmed if in the brief there is contained a sufficient abstract or abridgment of the transcript to comply with rule 9. (Page 24.)

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

STATEMENT BY THE COURT.

The appellee sued the appellant for personal injuries, alleging in substance that she was a passenger on appellant's train from Memphis, Tenn., to Jericho, Ark.; that while the train was stopped at Jericho she proceeded with due diligence to the platform of the coach in which she was riding for the purpose of alighting from the train, and when she had reached the platform, but before she had reasonable time to alight, defendant's servants negligently caused the train to violently lurch forward without notice or warning to plaintiff, thereby hurling her from the platform of said train to the ground below, where she fell and was severely injured.

The appellant denied the allegations of the complaint as to negligence, and set up that the plaintiff herself was negligent in delaying to leave the train, alleging that, after the train had been held at the station a reasonable length of time for all passengers to alight, plaintiff delayed leaving the train; that the train then started in the usual and ordinary way, and after it had started the husband of plaintiff notified the employees on the train that plaintiff was on the train and desired to alight, whereupon the employees commenced to stop the train in order to give plaintiff an opportunity to alight, but before the train was fully stopped plaintiff attempted to alight while the train was in motion, and thereby was caused whatever injuries plaintiff received, the same being produced by her own negligence in attempting to step from the train while the same was in motion.

The court gave, among others, the following instructions:

"1. The court instructs the jury that if you find from the preponderance of the evidence that plaintiff was a passenger on defendant's train, and that she was injured, and that

such injuries were caused by a moving train of the defendant, then you are instructed that this is *prima facie* proof of negligence on the part of said defendant."

"2. If you find from the preponderance of the evidence that plaintiff was a passenger on defendant's train, and her destination was Jericho, a station on defendant's road, and that defendant's servants, on arriving at the said station of Jericho, failed to stop said train a sufficient length of time for plaintiff, she using such diligence and dispatch as an ordinarily prudent person would have used under all the circumstances to safely debark and alight from said train, but started said train without notice to plaintiff, and thereby injured plaintiff, without negligence on her part contributing to the injury, your verdict will be for the plaintiff."

The appellant duly excepted to these instructions. The verdict was in favor of the appellee in the sum of $500. Judgment was entered for that sum, to reverse which this appeal has been duly prosecuted.

W. F. Evans, and *W. J. Orr*, for appellant.

The appellee, pro se.

WOOD, J., (after stating the facts). The appellant's abstract is a transcript of the record of the entire proceedings of the court below. This does not comply with rule 9 of this court, which requires "an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to the court for decision."

This rule was intended to conserve the time of the court and to relieve it of the necessity of reading the entire record of the proceedings below in order to understand the questions upon which appellant relies for reversal of the judgment appealed from. Appellee does not complain of this, and we will not affirm the case for want of a proper abstract, because upon an examination of appellant's brief we find there is a sufficient abstract of the proceedings, with the exception of mention of the motion for a new trial, to comply with the requirements of rule 9.

After reading the entire record, we are of the opinon that the issues of appellant's and appellee's negligence, as raised by the pleadings, were questions of fact for the jury, and it could serve no useful purpose as a precedent to set out and discuss in detail the evidence upon which the verdict was rendered. Suffice it to say that there was evidence on the part of the appellee tending to prove the allegations of negligence set up in her complaint, and, on the other hand, there was evidence on the part of the appellant tending to prove that appellee was negligent on her part, as set forth in appellant's answer. These were questions of fact for the jury, and their verdict is amply sustained.

Appellant contends that instructions 1 and 2 are abstract and not applicable to the facts as presented by the testimony embodied in this record, but we are of the opinion that the instructions were bottomed upon the evidence and fairly submitted the issues to the jury.

The contention of appellant that appellee had to give it notice of the conditions existing here under the evidence, when the passengers were getting on and off the train, can not be sustained. It was the duty of the employees of appellant to be present and to take notice of these conditions. Appellant is presumed therefore to have had knowledge of them. No duty to notify it devolved on appellee.

These and three other instructions which the court gave, and which the appellant has not noticed in its brief, contain familiar principles of law which have already been announced and approved by this court, and it is unnecessary to discuss them. *Barringer* v. *St. Louis, I. M. & S. Ry. Co.*, 73 Ark. 548.

Finding no error, the judgment is affirmed.

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

Opinion delivered September 30, 1912.

TRIAL—EFFECT OF BOTH PARTIES ASKING A DIRECTED VERDICT—Where each party to an action requests that a verdict be directed in his favor, without requesting other instructions, both parties will be held to have waived the right to a decision by a jury, and the court's direction would have the same effect as the verdict of a jury.

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

E. B. Kinsworthy, R. E. Wiley and *W. V. Tompkins*, for appellant.

1. Penal statutes are strictly construed. A laborer must request, *at the time of his discharge*, that his check be sent to a *certain* place.

2. Morrison was the foreman or keeper of appellee's time when he was discharged. 91 Ark. 122-127; 88 *Id.* 281; 87 *Id.* 132; 82 *Id.* 377.

3. There is no proof that a regular agent was kept at Malvern.

J. C. Ross, for appellee.

HART, J. This is an action brought by a laborer against a railway corporation to recover balance due him for wages and the penalty imposed by statute upon a corporation for failing to pay the wages of a discharged employee within seven days from his discharge. The plaintiff recovered judgment in the sum of ninety-four dollars and thirty-five cents, and the defendant has appealed. The plaintiff testified substantially as follows:

"I was employed by the defendant as a carpenter at two dollars and fifty-five cents per day during the month of October and the first three days of November, 1911. During this time I worked four days at Benton, Arkansas, and the balance of the time at Klondyke, Arkansas. On the third day of November Mr. Morrison laid me off. I asked him where our checks would come to, and he said they would come to Malvern, and I agreed to that. I called at Malvern several times, the first time about eight or nine days after I was laid off, and then again after the 15th or 16th of November, and six or seven times after that.

Cross examination: "We were working at Benton when I was laid off, and had been there three days working on the depot. Mr. Gephart was the foreman there. I never told him where to send my check. Mr. Morrison was the foreman at Klondyke, and was in charge of the work at Benton when I was laid off, Mr. Gephart at the time being in Little Rock.

G. H. Morrison testified substantially as follows: "Last

October and November I was carpenter foreman for the defendant. I built a small depot at Klondyke. I was the foreman there, and kept the time for building that depot. Mr. Gephart was foreman of the depot building department at Benton, and he kept the time, I suppose; I did not. It was his business to keep the time. I did not think it was my duty to report the time the men worked at Benton. Gephart was foreman at Benton. He was away some on account of going in and out of Little Rock. He was there so as to keep the time, and I did not keep the time of the men."

Cross examination: "I was in charge when he was not there, and directed Frank McMillan in the work when Gephart was absent. When Gephart and I were both at Benton, he was the boss."

The defendant requested the court to instruct a verdict in its favor. This the court refused to do, but at the instance of the plaintiff instructed a verdict in his favor. In the case of *St. Louis Southwestern Ry. Co.* v. *Mulkey*, 100 Ark. 71, we held: "Each party, by requesting a directed verdict for himself, without requesting other instructions, waived the right to a decision by the jury, so that the court's direction would have the same effect as the jury's verdict."

In the application of this rule to the facts in the present case, we think the judgment should be affirmed.

The evidence of the plaintiff tends to show that Gephart was not present when he was discharged, but that Morrison was there acting as foreman in his stead, that Morrison told the plaintiff that the money due him would be sent to Malvern, and that the plaintiff agreed to that place for receiving payment. The plaintiff was finally paid at Malvern, and it is fairly inferable from this fact and from the connection of the conversation between plaintiff and Morrison at the time of plaintiff's discharge that Malvern was a station on defendant's line of railroad. (*Biggs* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 91 Ark. 122.)

Therefore, the judgment will be affirmed.

TALLY v. STATE.

Opinion delivered September 30, 1912.

1. EMBEZZLEMENT—INDICTMENT—ALLEGATION OF BAILMENT.—An indictment for embezzlement of chattels belonging to a certain firm, which alleges that he was bailee of such firm, but does not allege that the property came into his possession as bailee nor that the property, being in his possession as bailee, was converted by him to his own use, is insufficient. (Page 29.)
2. INDICTMENT—AMENDMENT BY PROOF.—The omission from an indictment of essential allegations can not be supplied by the proof. (Page 30.)
3. EMBEZZLEMENT—EMBEZZLEMENT BY BAILEE.—Under Kirby's Digest, § 1839, providing that if any carrier or other bailee shall embezzle or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, * * * any * * * property which shall have come into his possession, * * * such bailee * * * shall be deemed guilty of larceny," etc., *held* that one who hires a horse and buggy from another under an express contract to return them at the end of the period of the hire is a bailee. (Page 30.)

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

STATEMENT BY THE COURT.

The appellant was convicted of embezzlement on an indictment which charges as follows: "The said W. W. Tally, in the county and State aforesaid, on the 10th day of May, A. D. 1912, one horse of the value of one hundred and fifty dollars and one buggy of the value of one hundred dollars the property of Reinman's Stables, a copartnership composed of Louis Reinman and L. Wolfort, and being then and there the bailee of said Louis Reinman and L. Wolfort, did unlawfully and feloniously convert and embezzle to his own use said horse of the value of one hundred and fifty and said buggy of the value of one hundred dollars, the property of said Louis Reinman and L. Wolfort against the peace and dignity of the State of Arkansas."

The appellant moved an arrest of judgment, setting up, in substance, that the facts stated in the indictment did not constitute a public offense within the jurisdiction of the court. The court overruled the motion and entered judgment sentenc-

ing appellant to two years' imprisonment in the penitentiary. Appellant duly excepted, and prosecutes this appeal.

The Appellant, pro se.

1. The indictment charges no offense. Kirby's Digest § 1839; 81 Ark. 25; 51 *Id.* 121; 85 *Id.* 47; 79 N. E. 353; 70 Ala. 13; 45 Am. Rep. 70; 16 Tex. App. 586; 118 La. 547; Bishop, Stat. Cr. § § 419, 420.

2. A subsequent felonious intent will not render a previous intention felonious. 13 Ark. 168.

3. The argument of the prosecuting attorney was improper. 74 Ark. 210; 58 *Id.* 473; 71 *Id.* 427; 69 *Id.* 648.

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

The indictment is sufficient under our statute. 3 W. & F. 2731-6; Kirby's Dig., § § 1635-1643, 2089-2102; 60 Ark. 454; 54 *Id.* 611; 51 *Id.* 122; 92 *Id.* 202; Wharton, Cr. Law, § 1885, (8 ed.).

WOOD, J., (after stating the facts). 1. The indictment does not state facts constituting a public offense. It does not state facts sufficient to constitute the offense of embezzlement. To constitute embezzlement of the horse and buggy, it was necessary to charge that same came into the possession of appellant as bailee. The indictment does allege that the appellant was bailee of Reinman & Wolfort, and this was sufficient to show his fiduciary capacity. But nowhere is it alleged that the horse and buggy came into his possession as such bailee, nor is it alleged that the horse and buggy being in his possession as bailee were converted to his own use. In other words, no facts are stated in the indictment to show that appellant had possession of the horse and buggy of Louis Reinman and L. Wolfort as their bailee. This was essential to the validity of the indictment. *State* v. *Scoggins,* 85 Ark. 43.

Had the indictment set up that appellant was in possession of the horse and buggy of Reinman & Wolfort as bailee in general terms, it would have been sufficient to have advised appellant that he came into the possession of the horse and buggy for some special purpose, upon the accomplishment of which the property was to be returned or delivered over to

its owners; or if, instead of this, the indictment had set up specifically the facts showing that appellant had possession of the property as bailee, it would have been sufficient. *Stormes* v. *State*, 81 Ark. 30. But nothing of the kind is alleged. For aught that appears to the contrary in the indictment, appellant might have been the bailee of Reinman & Wolfort, and yet might not have obtained possession of the horse and buggy as such bailee at all. He might have been a bailee of Reinman & Wolfort, and yet have bought the horse and buggy from some one who had stolen the same from the owners; or, he might have been their bailee and have stolen the horse and buggy himself. The indictment nowhere shows how appellant came into possession of the property he is alleged to have embezzled.

2. The evidence adduced at the trial showed that appellant hired the horse and buggy from Reinman & Wolfort for a day, but this proof could not supply essential allegations in the indictment. Moreover, it is contended by appellant that the hiring of the horse and buggy did not constitute appellant a bailee; and, inasmuch as the case must be remanded to the circuit court with directions to arrest the judgment and quash the indictment, a new indictment may be returned alleging facts to show that appellant came into possession of the horse and buggy by hiring the same.

Appellant contends that, even though such were the fact, it would not constitute him a bailee under section 1839 of Kirby's Digest, and that therefore he would not be guilty of embezzlement. Inasmuch as the question would necessarily arise and would have to be adjudicated if presented on another appeal, we will dispose of it now.

Section 1839 of Kirby's Digest provides: "If any carrier or other bailee shall embezzle or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any money, goods, rights in action, property, effects or valuable security, which shall have come to his possession, or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny."

In *Wallis* v. *State,* 54 Ark. 611, this court held that the term "bailee" as used in the statute was not confined to bailees of the generic class of carriers, but embraced all bailees. In thus construing it our court adopted the construction of the Supreme Court of Missouri upon a statute of which ours is a substantial copy. The Supreme Court of Missouri, in *Norton* v. *State,* 4 Mo. 461, construing the statute said: "In our opinion, the Legislature intended to make it larceny in all bailees to embezzle and convert goods," etc.

Our court, speaking through Justice HEMINGWAY, after quoting the above from the Missouri Supreme Court, said: "Upon consideration we are constrained to adopt the construction first put upon the act in Missouri. That does not extend the natural import of the terms employed, or enlarge the scope of the act by construction; but accords to these terms their ordinary signification, and declines to restrict their operation."

In *Dotson* v. *State,* 51 Ark. 122, Judge BATTLE, in construing the term "bailee" as used in this statute, said: "The term 'bailee,' when used in statutes declaring what acts of embezzlement shall constitute a public offense, is not to be understood, says Mr. Wharton, 'in its large, but in its limited sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bona fide,* and then fraudulently convert.' When it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted, though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust and then appropriated."

This language was again quoted approvingly in *Compton* v. *State,* 102 Ark. 213, where, under the peculiar facts of that case, it was held that the accused was a bailee in its limited and restricted sense.

In the case at bar, if the appellant, as the proof tends to show, hired the horse and buggy of Reinman & Wolfort, then he was under an express contract to return the horse and buggy at the end of the period of hire to their owners. This would constitute him a bailee under the statute.

Appellant relies upon the cases of *Watson* v. *State,* 70

Ala. 13, and *Reed* v. *State*, 16 Tex. App. 586. These courts, under the construction given their particular statutes, hold that, while the hirer of chattels is a bailee, he is not a bailee of the particular class or kind referred to in the statutes. An examination of these cases will discover that the courts, in construing the word "bailee," as used in the statute, applied the rule of *ejusdem generis*, and held that the term "bailee" was restricted and limited by other terms used in the statute with which it was associated, and confined it to the classes of bailees therein enumerated. But our own court, in construing our statute, has not applied the rule of *ejusdem generis*, but has given the statute a broader meaning than that rule would admit of. *Wallis* v. *State*, *supra*.

For the error in refusing to grant appellant's motion, the judgment is reversed, and the cause is remanded with directions to quash the indictment, and for such further proceedings as the circuit court may deem necessary.

HART and KIRBY, JJ., dissenting.

PENNEWELL v. STATE.

Opinion delivered September 30, 1912.

1. OFFICERS—NONFEASANCE—FAILURE TO ARREST MOB.—In a prosecution of peace officers for failing to arrest persons who had riotously assembled for the purpose of lynching a prisoner confined in jail, it was not error to give in charge to the jury sections 2524, 2526, 2528, Kirby's Digest, relating to the duty of officers in such case. (Page 36.)
2. SAME—NONFEASANCE.—Police officers were not guilty of nonfeasance in office in failing to arrest members of a mob who were about to lynch a prisoner if they were not able to make the arrests, or if they did not know that the mob intended to lynch the prisoner. (Page 36.)
3. SAME—NONFEASANCE—FAILURE TO ARREST MOB—INSTRUCTIONS.—In a prosecution of peace officers for failure to arrest members of a mob assembled for the purpose of lynching a prisoner, an instruction that if the defendants "neglected, failed or refused" to arrest such persons the jury should find them guilty was not open to a general objection because it made the defendants liable whether they were able to make such arrests or not. (Page 36.)

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

STATEMENT BY THE COURT.

The defendants, Pennewell, Lacey and Jarnigan, were indicted for nonfeasance in office alleged to have been committed by failing and refusing to arrest or cause to be arrested certain persons who had riotously assembled in the city of Fort Smith for the purpose of lynching a prisoner confined in jail. At the trial evidence was adduced by the State substantially as follows:

The defendants, Pennewell, Lacey and Jarnigan, were policemen in the city of Fort Smith and were on duty on the night of the 23d of March, 1912; about 10 o'clock P.M. a negro, Sanford Lewis, was arrested by officer Pitcock for quarreling with two negro women on the streets of Fort Smith. The defendant Jarnigan arrested one of the negro women and the other escaped; Sanford Lewis jerked away from Pitcock, but was pursued and was recaptured by John Williams. During the time of his escape some one shot Andrew Carr, a deputy constable. It was thought at the time that Sanford Lewis had shot him, and it was so reported on the streets of the city. After his recapture, Sanford Lewis was placed in charge of the defendant Lacey and officers Danna and Phillips, who carried him to the jail. In the meantime the defendant Pennewell went to the assistance of the defendant Jarnigan and helped him to convey the negro woman to the jail. After the defendants arrived at the jail with their prisoners a mob variously estimated from one hundred to several hundred persons assembled around the jail and threatened to lynch the negro prisoner, Sanford Lewis. The threats of lynching were made in the presence and hearing of the defendants. The defendants, without taking any action in the matter, went on about their duties to other parts of the city; later on they returned to the jail with other prisoners, and in the meantime a mob had broken into the jail and had secured Sanford Lewis and had taken him out and lynched him. The defendants made no efforts to disperse the mob that had assembled for the purpose of lynching Sanford Lewis, and made no efforts to arrest any of them.

The evidence adduced by the defendants is substantially as follows:

When they put Sanford Lewis and the negro woman in jail, they did not see any great number of persons assembled around the jail, and did not hear any threats to lynch the prisoner Lewis. They were informed of some disturbances in the precincts which they were required to patrol, and immediately went back to perform their duties there. Later on they returned to the jail with other prisoners, and then learned that Sanford Lewis had been lynched during their absence. The evidence introduced by them shows that they did not know at any time that a mob had assembled for the purpose of lynching Sanford Lewis, or any other prisoner, and that they were not advised that Sanford Lewis had been lynched until after their return to the jail with other prisoners. At the request of the State the court gave the following instructions:

"1. Section 2524, Kirby's Digest. All militia officers and others who shall be so summoned shall give prompt obedience to such officer.

"Section 2526, Kirby's Digest. If the persons assembled do not immediately disperse, the magistrates and officers must arrest them or cause them to be arrested, that they may be punished according to law, and may command to their aid all persons present or in the county.

"Section 2528, Kirby's Digest. If such magistrate or other officer, having notice of an unlawful or riotous assembly, neglect to proceed to the place of assembly, or as near as he can with safety, and exercise the authority invested in him to suppress the same and arrest the offenders, he is guilty of a misdemeanor.

"No. 2. If the jury find from the evidence, beyond a reasonable doubt, that defendants were policemen and peace officers of the city of Fort Smith, in said county and district, and that there was at the time set out in the indictment (or at any time within twelve months before the return of the indictment) unlawfully and riotously assembled at the city jail in the city of Fort Smith an unlawful mob or riotous people, more than twenty in number, for the purpose of doing an unlawful act, and if you further find that said defendants were

present at any time while such mob was assembled, and witnessed or knew that said unlawful and riotous assembly of persons had gathered at the city jail for an unlawful and felonious purpose, and neglected, failed or refused to arrest; or cause to be arrested, the persons so assembled or any of them, who had so unlawfully and riotously assembled at said city jail, you will find the defendants guilty.

"No. 3. If the defendants were unable to arrest the persons riotously and unlawfully assembled on account of the large number there assembled, it was their duty to command all persons present to aid them, and, if they were unable to make arrests, and neglected, failed or refused to command to their aid persons present, you will find the defendants guilty.

"No. 4. By a reasonable doubt, mentioned in the instructions given you, is meant a doubt that is reasonable, not a captious, imaginary or possible doubt, but such a doubt which, after the entire comparison and consideration of all the evidence in the case, leaves your minds in such a condition that you do not feel that you have an abiding conviction, to a moral certainty, of the truth of the charge against the defendants."

At the request of the defendants the court gave the following instruction:

"4. You are instructed that the defendants are presumed to be innocent, and this presumption attends them through the trial, and shields them from conviction, until their guilt is established from the evidence on the part of the State beyond a reasonable doubt."

The jury rendered a verdict of guilty and fixed the punishment of each of said defendants at a fine of one hundred dollars, and the defendants have appealed.

Styles T. Rowe and *Cravens & Cravens,* for appellant.

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

Our statute is a re-enactment of the common law. The reading of the three sections of our statute to the jury was proper. Kirby's Dig., § § 1520-3, 2524-6-8; 1 Bish. Cr. Pr. § § 166, 171, 183; 1 Bish. Cr. Law, § § 168-a and 849; 5 C. & P. 282, 24 E. C. S. 566.

HART, J., (after stating the facts). The defendants insist that the court erred in giving instruction No. 1 to the jury, but we can not agree with their contention in this behalf. The instruction was not intended as a concrete application of the law to a particular state of facts, but the instruction embodies several sections of the statute relating to and defining the offense charged against the defendants. The several sections of the Digest contained in the instruction are parts of the same statute, and are so closely related to one another that each to some extent explains or controls the meaning of the others. Therefore, it was proper to give them all in charge to the jury. *Brown* v. *State*, 55 Ark. 593; *Mitchell* v. *State*, 73 Ark. 291.

It is next urged by the defendants that the court erred in giving instructions numbered 2 and 3 to the jury. Of course, it can not be said that the defendants would be guilty of the offense charged against them if they failed in any event to arrest or cause to be arrested the persons composing the mob who had assembled for the purpose of lynching the prisoner Sanford Lewis. The defendants might not have been able to have made the arrests, and, according to the testimony adduced by them, they did not know that the mob had assembled for the purpose of lynching the prisoner. If either of these things were true, they would not have been guilty, and this phase of the case was covered by the instructions given by the court. The court in the instruction complained of evidently used the word "failed" in the sense of nonperformance of duty—that is, an equivalent of neglect. It is manifest, when the instructions are read together, that the court used the words, "fail, refuse and neglect," in substantially the same sense. As used by the court, they all contemplate the failure to come up to the requirements of the statute on the part of the defendants. If the defendants thought otherwise, they should have made specific objection to the instructions, and doubtless the court would have changed the verbiage to meet their objections. The defendants asked the court to give to the jury several instructions which were refused. We do not deem it necessary to set out these instructions or to make any extended comment upon them. It is sufficient to say that the court did not commit any error in refusing to give them. The case was submitted to the jury

on instructions that fully and fairly covered every phase of the offense of which the defendants were charged, and the evidence on the part of the State was sufficient to warrant the jury in convicting the defendants.

The judgment will be affirmed.

STEWART v. FLEMING.

Opinion delivered September 30, 1912.

CONTRACT—EXECUTION UNDER MISTAKE.—One who signed a written contract prepared by another, after having an opportunity to examine it, will not be heard to say that when he signed it he did not know what it contained if he was not misled by any misrepresentation or conduct of the other party.

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

Powell & Taylor, for appellant.

The court erred in refusing to allow defendant to prove the false representations of plaintiff's attorney and agent and in instructing a verdict for plaintiff. It is not necessary that the fraudulent representations be made by word of mouth. It may be by language written, by conduct or external acts, when through this means it is intended to convey the impression or to produce the conviction that some fact exists and such result is the natural consequence of the acts. Pom. Eq. Jur. § 877; 10 Mich. 310; 88 Mo. App. 215.

Henry Moore and *Henry Moore, Jr.*, for appellee.

1. There is no evidence that defendant was misled by any representations of plaintiff's agent. The law is elementary. 31 Ark. 170; 11 Ark. 58; 19 *Id.* 522; 26 *Id.* 28; 83 Fed. 437; 84 Ark. 349.

2. Oral testimony is not allowable to vary the terms of a written contract. 4 Ark. 179; 5 *Id.* 651; 88 *Id.* 213; 94 *Id.* 130; 95 *Id.* 131; 96 *Id.* 405.

KIRBY, J. This is the second appeal of this case, which is sufficiently stated in the opinion on the former appeal, reported in 96 Ark., at page 371.

The judgment was reversed for the error of the lower court in striking out of the answer the allegations that defendant was induced to sign the contract sued upon by false representations of the plaintiff's attorney to the effect that the written contract contained the same terms as the former lease, except as to the amount of the rent, which it was held and alleged was a good defense.

Upon the trial anew, after hearing the testimony, the court directed a verdict for appellee, and from the judgment this appeal comes.

It is contended that the court erred in refusing to allow the introduction of certain testimony relative to conversations between appellant and appellee's attorney and in directing the verdict.

It is undisputed that the lease sued upon was executed by appellant, and he stated in his testimony that he had talked with the attorney for appellee relative to the execution of a new lease and the terms thereof once or twice, but that finally he went to the World's Fair, at St. Louis, and from there down to Columbia, Missouri, to see Mrs. Fleming, the appellee. That, on the first evening when he called and stated his business, she requested him to call the next day, being engaged in the entertainment of some of her friends, but said that she had been advised that she ought to have at least twelve hundred dollars rent.

After seeing her, he returned home, without stopping at Texarkana to see Mr. Moore, her agent, and in a few days thereafter received through the mail copies of the lease to be signed with a letter from Mr. Moore, stating that the contract of lease between Mrs. Fleming and himself was enclosed. That he relied on the conversations he had had with Mr. Moore, the agent, some time previous to seeing Mrs. Fleming, relative to the contents of the lease, and did not compare the new with the old one, "just read the outline, the amounts, dates, etc., did not read it in full and relied wholly on Mr. Moore drawing that one just as the other one."

The court did not permit him to state the conversation had with the agent some six weeks before the execution of the lease in which he claimed it was agreed that the new lease should be drawn as the old, except as to the amount of rent,

and that he relied upon the statements of said agent as to the contents of the lease and signed the new one without any notice or knowledge of the fact of its provisions requiring him to pay the taxes as in the other lease and in addition "other legal assessments against the lands," which action is relied upon for reversal.

The lease executed is materially different from the old lease in some other respects and fixes the amount of rent at one thousand dollars, and, according to appellant's statement, Mrs. Fleming, the lessor, when he first mentioned the matter to her stated she had been advised she should receive twelve hundred dollars. The attorney who drew the lease was not afterwards seen by appellant, according to his own statement, and evidently received his information as to what it should contain from Mrs. Fleming, after the terms had been agreed upon between her and appellant. Certainly, appellant could not rely upon any statement made by an agent during the negotiations for the lease, the terms of which were afterwards agreed upon between himself and the principal, and claim that he was induced by fraudulent representations to execute a lease that he did not agree to make, when no statement of the contents of the lease accompanied the draft of it sent for his signature, but only a statement that the contract was inclosed for execution; and the court did not err in excluding such testimony.

"Representations, to be fraudulent in law, must be material to the contract or transaction which is to be avoided 'and must be made by one who either knows them to be false, or else, not knowing, asserts them to be true, and made with the intent to have the other party act upon them to his injury, and such must be their effect.'" *Bank of Monette* v. *Hale,* 104 Ark. 388; *Evatt* v. *Hudson,* 97 Ark. 268; *Jarrett* v. *Langston,* 99 Ark. 438; *Brown* v. *LeMay,* 101 Ark. 95.

The undisputed testimony shows that no representations whatever as to the contents of the lease accompanied it when it was sent for appellant's signature, and that he agreed upon its terms with appellee long after he claims to have discussed the matter with her attorney, who afterwards drew it, evidently upon information furnished by appellee, and forwarded it by mail for appellant's examination and signature, with only the

statement that the contract of lease was inclosed. There was no misrepresentation as to any matter of inducement to the making of the lease, which, from the relative position of the parties and their means of information, the one could be presumed to contract upon the faith and trust which he reposed in the representation of the agent of the other on account of his superior information and knowledge with respect to the subject of the contract, nor were any fraudulent representations made holding out inducements calculated to mislead the lessee and induce him to execute the lease on the faith and confidence of such representations made and, having signed it after opportunity to examine it, he will not be heard to say when he signed it that he did not know what it contained. *Colonial & U. S. Mortgage Co.* v. *Jeter*, 71 Ark. 185; *Mitchell Mfg. Co.* v. *Kempner*, 84 Ark. 349; *Yates* v. *Pryor*, 11 Ark. 58; *Grider* v. *Clopton*, 27 Ark. 244; *Hamilton* v. *Ford*, 46 Ark. 245; *Upton* v. *Tribilcock*, 91 U. S. 50; *Chicago, etc. Ry.* v. *Belli*, 83 Fed. 437, 28 C. C. A. 358.

There was no conflict in the testimony, and no question for the jury to decide, and the court did not err in directing the verdict.

The judgment is affirmed.

GROVES v. KEENE.

Opinion delivered October 7, 1912.

1. LEVEES—SALE FOR TAXES—RIGHT OF REDEMPTION.—The owner of land sold for levee taxes, where there was no fraud or mistake in conducting the sale, can not redeem therefrom by showing that he intended to pay the levee taxes, and made an effort to do so, but failed through the mistake of his agent. (Page 42.)
2. JUDICIAL SALE—RIGHT OF REDEMPTION.—Where a judicial sale of land has been conducted fairly and in substantial compliance with the law and orders of the court directing same to be made, it is error to permit the original owner to redeem. (Page 43.)
3. SAME—SUFFICIENCY OF DESCRIPTION.—Where lands in a section are laid off and platted into lots and numbered, a description as therein designated is not indefinite and would not render a sale void for uncertainty. (Page 43.)
4. SAME—RIGHT OF REDEMPTION.—The right to redeem from a levee tax sale depends upon the statute in force at the date of sale. (Page 43.)

5. APPEAL AND ERROR.—QUESTION RAISED IN REPLY BRIEF.—Appellant can not raise in his reply brief a question not raised below nor in his original brief. (Page 44.)

Appeal from Woodruff Chancery Court, Southern District; *Edward D. Robertson,* Chancellor; affirmed.

Suit by the Board of Directors of White and Cache River Levee District No. 1, of Woodruff County, for the sale of land for delinquent taxes. There was a decree of sale, and a sale was made to W. A. Keene, Jr., and from the decree confirming the sale and directing the execution of a deed the owner, E. W. Groves; appeals.

C. F. Greenlee, for appellant.

It is clear that appellant made diligent inquiry to ascertain the amount of levee taxes due by him with the intention of paying the same. There can be no question but that the failure to pay the levee taxes at the time they were due was purely by reason of mistake or accident. The facts and circumstances, as well as appellant's offer to do equity, entitle him to equitable relief. 2 Story's Jur. § 1319; 70 Ark. 500; 46 Ark. 96; 53 Ark. 204; 55 Ark. 192.

J. F. Summers, for appellee.

1. Equity follows the law. The law in this case makes no provision for redemption. The vested rights of the bidder at a judicial sale, to whom the commissioner has struck off the property, will be respected by the courts. 66 Ark. 490; 86 Ark. 255.

2. Act. 97, Special Acts 1911, was passed long after the commissioner's sale and report thereof, and can not affect the status of the parties here.

WOOD, J. The only question on this appeal is whether or not the owner of land that has been sold for levee taxes, where there is no fraud or mistake made in conducting the sale, the same being in all respects according to law, can redeem from such sale by showing that he intended to pay the levee taxes on the land, and made an effort to do so, but failed through mistake of his agent.

1. It was shown on behalf of appellant that he owned a large acreage of land in and out of the levee district, and that he was desirous of paying all of the taxes assessed against his lands; that his agents made an effort to ascertain the total

amount of taxes due by him, and that the secretary of the levee board promised to send him a map showing the lands embraced within the levee district, and failed to do so; that he had written to the secretary for a list of his lands within the district and for the amount of levee taxes due thereon, and when the secretary sent him the list the appellant immediately sent a check therefor. The lands in controversy, however, that were afterwards sold for the taxes, were not included in the list, for the reason doubtless that these lands at that time did not appear on the records of the county in which they were situated in the name of appellant. It was also shown in appellant's behalf that his agent had a talk with appellee, who was engineer of the levee board, and endeavored to obtain from him a description of the lands within the levee district.

The question is, should the chancery court, for these reasons, have refused to confirm the report of the commissioner showing a sale of the lands under the chancery court decree to the appellee?

The reason appellant did not pay the taxes was because his agent failed to ascertain that he owned the particular lands in controversy, and that the secretary of the board, in sending him the list of his lands with the amount of the levee taxes due thereon, failed to include the lands in controversy in the list.

It is unfortunate that appellant, through oversight or lack of information on the part of his agents, was unable to pay the taxes on his land which he fully intended to pay, but such mistake is in no manner attributable to appellee. It is not pretended that appellee in any manner misled or perpetrated a fraud upon appellant that caused him to fail to pay the taxes for which the land in controversy was sold.

The fact that appellee was preparing a plat of the lands in the levee district and promised to send one to the agent of the appellant, which he failed to do, if it be a fact, did not tend to show any fraud upon the part of appellee in having appellant's lands condemned and sold for taxes. The proof showed that the lands in controversy did not appear upon the records of the county where they were situated in the name of appellant at the time they were assessed, condemned and sold for taxes. There was nothing in the facts of this record that would have justified the chancery court in refusing to approve

and confirm the report of the commissioner who made the sale of the lands under the decree of the court. Appellee therefore acquired by his purchase at that sale vested rights. *Robertson* v. *McClintock,* 86 Ark. 255, and cases therein cited. These rights are created by statute, and a court of chancery can not annul them.

It is not pretended that there was any fraud or mistake on the part of the officers or of the appellee in connection with this sale. Therefore, the appellee was entitled to have the report of the sale to him confirmed.

In *Banks* v. *Directors of St. Francis Levee District,* 66 Ark. 490, we held that "where a judicial sale of land has been conducted fairly and in substantial compliance with the law and the orders of the court directing the same to be made, it is error to permit the original owner to redeem before confirmation."

Appellant contends that the sale was void for uncertainty of description because the lands were described as lots 5 and 14, section 6, township 4, range 3, and were sold to appellee under that description. Where lands in a section are laid off and platted into lots and numbered, a description as therein designated is not indefinite and would not render a sale void for uncertainty.

2. Appellant contends that he was entitled to redeem under act 97 of the Special Acts of 1911, which was an act to establish the White River Levee District, in which the lands in controversy are located, one object of which was to add other territory. In section 7 of the act it is provided, among other things, "that any land owner shall have the right to redeem any and all lands sold at such sale within one year thereafter."

There was no provision for redemption in the general law under which the levee district was created, and the special act, *supra,* which appellant contends gives him the right to redeem, was enacted March 15, 1911, and took effect and was in force from and after that date. The report of the sale of the commissioner was filed in the court below February 14, 1911, showing that the sale was had and the report thereon made to the court ordering it long before the passage of the act upon which appellant relies.

In *Thompson* v. *Sherrill,* 51 Ark. 453, we held that "the

right to redeem lands from a tax sale depends upon the statute in force at the date of the sale."

Judge Cooley says: "The statute in force at the time of the sale governs the right of redemption." 2 Cooley on Taxation (3 ed.) p. 1030.

In 37 Cyc. p. 1389, it is stated; "Where the statute provides that the owner shall have a certain length of time after the sale in which to redeem, this period begins to run from the day of the sale, and not from the time the purchaser takes a deed." See also cases cited in note.

3. Appellant contends for the first time in his reply brief that there was uncertainty of description, and that the separate tracts and lots were sold *en masse*, and that the sale was void for these reasons. But no such contention was made in the court below, nor was such question raised in the appellant's original brief. There were no exceptions of this kind to the report of the sale. Therefore we can not consider these questions here for the first time.

It follows that the court did not err in approving and confirming the sale to appellee and in refusing to allow appellant to redeem.

The judgment is therefore affirmed.

MORTON v. DAVIS.

Opinion delivered October 7, 1912.

DEEDS—CANCELLATION—OVERREACHING.—Whenever a person through age, decrepitude, affliction or disease becomes imbecile and incapable of managing his affairs, an unreasonable and improvident conveyance of his property will be set aside in equity.

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

A. J. Newman, for appellant.

The preponderance of the evidence shows that appellee was of sound mind and discretion when the deed was executed and delivered, and the chancellor's findings and decree should be reversed, 92 Ark. 359; 41 Ark. 292; 42 Ark. 521; 43 Ark. 307; 55 Ark. 112; 75 Ark. 72; 77 Ark. 216.

Marshall & Coffman, for appellee.

A clear preponderance of the evidence shows that appellee was of unsound mind, and not capable of making a valid deed,

at the time the deed to appellants is alleged to have been executed. The decree should be affirmed. 92 Ark. 30; 70 Ark. 173; 97 Ark. 450; 15 Ark. 555.

FRAUENTHAL, J. This is an action originally instituted by L. C. Maloney against J. T. and A. M. Morton seeking to cancel a deed executed by one Sylvia Davis to them, conveying certain land situated in Pulaski County, and to remove said deed as a cloud from his title to the land. The plaintiff claimed title to the land under a prior deed executed to him by said Sylvia Davis. Subsequently, said Sylvia Davis was made a party to the suit, and she appeared by her guardian, who filed an answer, which was also made a cross complaint against said parties, plaintiff and defendant. This pleading also asked that one James Turner be made a party to the suit, which was done, and prayed for a cancellation of a deed which she had also executed to him. In the cross complaint filed for her, it is alleged that Sylvia Davis was a person of unsound mind, and that a guardian was duly appointed for her by the probate court. It is further alleged that she was the owner of the land in suit, containing 105 acres, and that her interest consisted of a fee in one-half thereof and a life estate in the remainder; that she had made separate conveyances for the land to Maloney, the Mortons and Turner, and at the time she was incapable by reason of being of unsound mind to enter into said contracts, resulting in the execution of the deeds, which it was alleged were obtained without proper consideration and by imposition and fraud. The cross complaint sought the avoidance and cancellation of each of these deeds. Separate answers were filed by all said parties, except Turner, in which each of them alleged the validity of the deed executed to him, and sought the cancellation of the deeds executed by her to the other cross defendants.

A great mass of testimony was taken relative to the transactions had by each of these parties with Sylvia Davis, the condition and value of the land, the alleged consideration paid by each of them, and her mental condition. The chancellor entered a decree cancelling all of said deeds which had been executed by said Sylvia Davis, and restoring to each of the said grantees the moneys and property which each had paid for taxes and parted with for the deeds which they obtained.

The defendants J. T. and A. M. Morton alone have appealed from this decree.

It appears from the testimony that Sylvia Davis was a negro woman, variously estimated by the witnesses to be from eighty to one hundred years old. The land in controversy consisted of 105 acres, sixty of which were in a state of cultivation. It was estimated by the witnesses to be worth from one thousand to three or four thousand dollars, and its rental value was probably five dollars per acre for the land which could be cultivated. It appears that taxes had become due upon the land amounting to about $30, and that the land had been sold for the payment thereof. The plaintiff Maloney, who was a practicing attorney, agreed to perfect a redemption of the land from the tax sale, and also to collect the rents of the land. In 1908 he obtained from Sylvia Davis a deed for the land upon the consideration, as he claimed, of $5 then paid and the agreement upon his part to pay towards her support $10 per month during her life, not exceeding, however, the sum of $1,000. It appears from his testimony that he rented this land for the year 1910 for the sum of $390, but it does not appear that he ever paid to her any sum except the $5 above mentioned.

In February, 1910, either the above taxes or other taxes were due upon this land, and Sylvia Davis agreed with the defendants J. T. and A. M. Morton that she would give them one-third of the land to settle these taxes. Afterwards, they claimed that they entered into a contract with her by which they bought the land, and thereafter she executed to them a deed therefor. They paid to her $80 and to her nephew $25, and executed to her and her nephew a deed for a lot variously estimated to be worth from $100 to $400.

In March, 1910, she again executed a deed for this land, this time to said Turner. Turner executed to her notes for $2,500 and a mortgage upon the land. Turner filed no answer to the cross complaint, and it would be inferred from his actions that the notes were not executed with any expectation of making any payment thereof, but at the suggestion of an attorney who at one time claimed to represent Sylvia Davis in this litigation and later withdrew from the case, with probably the intention of further involving the title to this land. It would serve no useful purpose to detail the facts showing the mental condition of Sylvia Davis during all this time, nor the

circumstances attending the various transactions which she had with these various parties, culminating in the execution of these various deeds for this land. It is sufficient to say that it appears from the testimony that she was very old and infirm, feeble both in mind and body, and incapable of managing her affairs. The testimony was sufficient to warrant the finding that she was not of sound mind, and that her mental incapacity was such that she was unable to understand and appreciate the business involved in selling or conveying her land. She was not only of weak understanding, but she did not have capacity to take care of or to manage her property or to properly understand the effect of executing a deed for it. On account of her mental infirmities, it would appear that an undue advantage was taken of her by these parties in making these transactions and obtaining these deeds. The contracts made by her with each of them was unreasonable and improvident. These were the findings of the chancellor, and we can not say that his findings are against the weight of the evidence. On the contrary, after as careful an examination thereof as we are able to give, we think that the findings of fact made by him are well supported by the testimony. Under these findings of fact, equity and good conscience require the cancellation of these deeds.

The principle upon which this cancellation should be made is thus well stated in the case of *Kelley* v. *McGuire*, 15 Ark. 555: "While the solemn contracts between men should never be disturbed on slight grounds, yet it may perhaps be assumed as a safe general rule that whenever a person, through age, decrepitude, affliction or disease, becomes imbecile and incapable of managing his affairs, an unreasonable and improvident disposition of his property will be set aside in a court of chancery." See also *Killian* v. *Badgett*, 27 Ark. 166; *Tobin* v. *Jenkins*, 29 Ark. 151; *Oxford* v. *Hobson*, 73 Ark. 170; *Pulaski County* v. *Hill*, 97 Ark. 450.

The decree is affirmed.

McCRAY v. COX.

Opinion delivered October 7, 1912.

SCHOOLS—ANNEXATION OF CONTIGUOUS TERRITORY—NOTICE.—The county court is authorized to annex contiguous territory to a single school

district when a majority of the legal voters of said territory and the board of directors of said single school district ask it by petition, without requiring the notice provided by section 7540, Kirby's Digest, to be given.

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

STATEMENT BY THE COURT.

Appellant petitioned the county court to annex contiguous territory to a single school district. Appellees, who are directors of the common school district from which the contiguous territory was to be taken, intervened to resist the application on the ground that the petitioners had not complied with section 7540, Kirby's Digest, in regard to the giving of notice of the proposed change.

The county court granted the prayer of the petitioners, and, upon appeal, the circuit court found that it had no jurisdiction because the notice required by section 7540, Kirby's Digest, had not been given, and dismissed the appeal. The petitioners have appealed to this court.

J. S. Abercrombie, for appellant.

Appellant school district was organized under a "special act" (Acts February 4, 1869), and the provisions of section 7540, Kirby's Digest, as to notice do not apply to special school districts. 60 Ark. 124; Kirby's Dig., § 7695.

Mehaffy, Reid & Mehaffy, for appellee.

The law applicable to this case in Kirby's Digest, § 7695. Section 7540, *Ib.*, applies to common school districts generally, and must be followed by single or special districts. The special act specifically states that the provisions of the general act shall apply, and 68 Ark. 130 does not apply. 60 Ark. 124; Kirby's Dig., § 7544; 54 Ark. 134.

Hart, J., (after stating the facts). The law applicable to annexing contiguous territory to a single school district is contained in section 7695, Kirby's Digest, which reads as follows:

"The provisions of the general school laws of the State, which are now or may hereafter be in force, when not inapplicable, and so far as the same are not inconsistent with and repugnant to the provisions of this act, shall apply to districts organized under this act; and such provisions of such laws as

are inconsistent with, and repugnant to, the provisions of this act, and inapplicable to districts organized thereunder, shall have no operation, force or effect in such district. The county court shall annex contiguous territory to single school districts, under the provisions of this act, when a majority of the legal voters of said territory and the board of directors of said single district shall ask, by petition, that the same shall be done."

The sole question raised by the appeal is as follows: Can the county court annex contiguous territory to a single school district when a majority of the legal voters of said territory and the board of directors of said single school district ask it by petition, without requiring the notice provided in section 7540, Kirby's Digest, to be given?

Section 7540, Kirby's Digest, reads as follows: "When a change is proposed in any school district, notice shall be given by the parties proposing the change, by putting up handbills in four or more conspicuous places in each district to be affected, one of said notices to be placed on the public school building in each affected district. All of said notices to be posted thirty days before the convening of the court to which they propose to present their petition; said notices shall give a geographical description of the proposed change."

This section, we think, is applicable to common school districts, and was not intended to be made applicable to single school districts.

Appellant school district was organized under a special act for the regulation of schools in cities and towns, and section 7695, Kirby's Digest, which is a part of that act, expressly provides that "the county court shall annex contiguous territory to single school districts under the provisions of this act when a majority of the legal voters of said territory and the board of directors of said single districts shall ask by petition that the same shall be done."

Thus it will be seen that the Legislature expressly provided by a separate provision of said act the manner by which a single school district might annex contiguous territory to it. The annexation of the contiguous territory is to be made when a majority of the legal voters of said territory and the board of directors of said single school district shall ask it. The statute does not contemplate that the voters of the common school

district from which the contiguous territory is to be taken shall have any voice in the matter. Therefore, it would be a vain and useless thing to give them notice of the proceedings. We hold that the provision of section 7540, Kirby's Digest, in regard to giving notices of the proposed change is not applicable to special or single school districts.

It follows that the judgment of the circuit court must be reversed and the cause remanded for a new trial.

OUTCAULT ADVERTISING COMPANY v. BRADLEY.

Opinion delivered October 7, 1912.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING.—Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.

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

STATEMENT BY THE COURT.

Appellant sued appellee for $108.16, for one year's service for advertising cuts and type, upon the following written contract:

"To the Outcault Advertising Company, Order No. 544.

"334 Dearborn Street, Chicago, Ill. Date, 3-11-10.

"Ship us at our expense your 'Little House Maid furniture ad.' service to cover a period of one year, beginning April, 1910. The service to consist of: Fifty-two Little House Maid cuts. One font Little House Maid type (ten pounds in font).

"We (or I) agree to pay you net cash monthly at the rate of $2.08 per week, for one year, we (or I) to have exclusive right to use the above Little House Maid 'ad.' service in our city only, and to hold type and cuts subject to your order when this contract expires.

"This contract can not be cancelled. Ship us all at once, if possible.

"William F. Bradley,
"Carlisle, Ark.
"C. H. Elliott, Salesman.

"Salesmen are not authorized to alter this contract by verbal agreement."

It was alleged that appellant had performed its part of the contract, and that defendant had accepted and retained the advertising matter and refused to perform their contract, to its damage in the full amount thereof, for which judgment was prayed.

The appellee admitted signing the contract, denied any indebtedness thereunder, "and charged that a fraud was perpetrated in this: that said plaintiff claimed that for said amount mentioned in said contract that the said *Carlisle Independent* would publish and print in its paper said cuts, and that the sum mentioned in said contract would include, in addition to said cuts, pay for the printing, which statement was false, plaintiff having made no agreement at all with said printer," and denied the breach of the contract on his part, and that plaintiff was damaged.

The testimony shows that the contract was executed, and in pursuance to its terms appellant shipped the "Little House Maid furniture ad." service to appellee, consisting of fifty-two cuts and one font of type, in accordance with the contract, and that appellee refused to pay anything whatever under the terms thereof.

Appellee testified that he signed the contract, and that the goods were shipped "and when delivered to me I immediately took them back to the depot. I had notified the company not to ship the goods to me because they had misrepresented the contract to me. I did not keep the goods five minutes." Other statements were made by the witness of the terms of the contract, different from the written contract, which the court afterwards excluded from the jury.

The court instructed a verdict for plaintiff for one dollar, over its objections, and from the judgment it appealed.

Trimble, Robinson & Trimble, for appellant.

Evidence of representations by the agent in contradiction of the terms of the contract was wholly inadmissible. 105 Ga. 34. The contract and performance thereof by appellant having been proved, the court should have instructed a verdict for the full amount of appellant's claim.

George M. Chapline, for appellee.

The fraudulent representations by the agent, whereby appellee was induced to sign the contract, avoid the contract and are available as a defense. 96 Ark. 371.

The principal is bound by fraudulent acts of his agent within the apparent scope of his authority, notwithstanding the agent may have acted without the knowledge of the principal. 1 Am. & Eng. Enc. of L. (2 ed.), 1159-1161; 23 Ark. 289.

KIRBY, J., (after stating the facts). It is contended by appellant that it is entitled to the full amount specified in its contract for the service, and that the court erred in instructing a verdict for one dollar.

The statement of appellee, attempted to be introduced in evidence, related to a matter that he claimed was discussed before the execution of the contract, and as an inducement thereto, but it was entirely at variance with its terms, as expressed in writing, and no error was committed in excluding it from the jury.

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," and there is no ambiguity or uncertainty in the written instrument which would permit the introduction of parol testimony in explanation of it.

The advertising service having been furnished to appellee in accordance with the terms of the contract therefor, he will not be excused from the payment for same, as agreed, because he did not use it, but is bound therefor as though he had done so, it being placed at his disposal, as it was contracted to be. The amount of his liability is in no wise decreased by the fact that he declined to perform the contract, and the judgment should have been for the full amount thereof; $108.16, and the court erred in instructing a verdict for a smaller amount.

The judgment is reversed, and judgment will be entered here for said sum. It is so ordered.

ROBERTS COTTON OIL COMPANY *v.* GRADY.

Opinion delivered October 7, 1912.

1. APPEAL AND ERROR—BRINGING UP ALL THE EVIDENCE.—The requirement that a bill of exceptions contain all of the testimony in a case is sufficiently complied with if it appears inferentially that all of the evidence is brought up, as where the bill of exceptions shows that plaintiff called certain witnesses, whose testimony is set out, and rested, that defendant called a certain witness whose testimony is set out and rested, and that plaintiff recalled a certain witness and closed his testimony. (Page 56.)
2. CARRIER—LOSS OF GOODS—RIGHT OF ACTION.—The delivery of goods to a common carrier, when made in pursuance of an order to ship, is in effect a delivery to the consignee, and in such case the consignor has no title to or right of possession of the goods, and can not sue for their conversion. (Page 57.)

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver*, Judge; reversed.

STATEMENT BY THE COURT.

The plaintiff, Dr. N. H. Grady, brought this suit in the circuit court against the Roberts Cotton Oil Company, a corporation organized under the laws of the State or Arkansas. The complaint alleges:

1. That in the fall of 1910 the plaintiff sold and shipped to Robert B. Brown Oil Company of St. Louis, Missouri, twenty-five tons of cotton seed at the value of twenty-five dollars per ton. That the seed was shipped in car number 73,900; that the defendant took possession of said car of seed and converted it to its own use, to the plaintiff's damage in the sum of six hundred and twenty-five dollars.

2. That the defendant took possession of nineteen hundred pounds of cotton seed upon which the plaintiff had a mortgage, and converted same to its own use, to the plaintiff's damage in the sum of one hundred and three dollars and fifty-nine cents.

3. That in November, 1910, plaintiff delivered to defendant twenty-eight tons of cotton seed, worth twenty-four dollars per ton, upon which defendant paid two hundred and ninety-eight dollars and ten cents, leaving a balance due of three hundred and seventy-three dollars and ninety-nine cents.

The defendant answered and denied all of the material

allegations in the three paragraphs of plaintiff's complaint.

The testimony adduced at the trial, in so far as it is material to the issues raised by the appeal, is as follows:

The plaintiff, N. H. Grady, testified that he was in the general mercantile business at Monette, Arkansas. That in the fall of 1910 he had been shipping cotton seed to Osborn Bros. Grocery Company, of Jonesboro, Arkansas, but on account of some confusion in regard to the matter he decided to stop shipping to them. That in November, 1910, he sold some cottonseed to a Mr. Fields, as representative of the Robert B. Brown Oil Company of St. Louis, Missouri, at twenty-five dollars per ton. That, pursuant to the contract made with him, on the 21st day of November, 1910, he shipped a car of seed, numbered 73,900, from Monette, Arkansas, to the Brown Oil Company at St. Louis, Missouri. That a representative of the defendant company admitted to him that said car of seed had by mistake been taken charge of by the defendant at Jonesboro, Arkansas, and had been converted to its own use.

W. B. Chittenden, a witness for the plaintiff, testified: "I am now, and was in November, 1910, secretary of the Robert B. Brown Oil Company of St. Louis, Missouri. We hold bill of lading issued by the Jonesboro, Lake City & Eastern Railroad Company, dated November 21, 1910, for car of cotton seed E. R. R. No. 73,900, showing same was shipped to us on that date by N. H. Grady, Monette, Arkansas. Our company did not buy this car direct from Doctor Grady, but the car was bought from Doctor Grady by the Osborn Grocery Company, Jonesboro, Arkansas, and we paid their draft against same. We received advice from the Osborn Bros. Grocery Company, Jonesboro, Arkansas, that this car of seed, with two other cars they shipped to us, through error on the part of the Jonesboro, Lake City & Eastern Railroad Company, had been diverted to Roberts Cotton Oil Company, Jonesboro, Arkansas. The Roberts Cotton Oil Company admitted receiving and unloading this car of seed in their letter to us dated December 18, 1910. The Roberts Cotton Oil Company received and unloaded Erie car No. 73,900, together with two others shipped to us by the Osborn Bros. Grocery Company, and the Roberts Cotton Oil Company in turn shipped

to us three cars of seed to replace the three cars erroneously delivered to them. The three cars shipped by the Roberts Cotton Oil Company did not fully reimburse us for the three cars they unloaded, and there is a balance due us on account of this diversion of two hundred and seventy-seven dollars and ninety cents, for which amount we have made claim against the Jonesboro, Lake City & Eastern Railroad Company."

The plaintiff, being recalled, testified: "I did not authorize the Osborn Bros. Grocery Company or anybody else to draw draft on the Brown Oil Company for car 73,900, and did not know it had been done until Chittenden's deposition was taken. I know I had sold Osborn Brothers six cars of seed, and this seventh car (the car in question) was sold by me direct to the Robert B. Brown Oil Company."

J. W. Sikes, a witness for the defendant, testified: "I am manager of Roberts Cotton Oil Company at Jonesboro, and was manager through season of 1910-11. Through error of the railroad company, car 73,900 was delivered to Roberts Cotton Oil Company, and we unloaded it. They delivered three cars of seed to us erroneously (car 73,900 was one of them) and the railroad company took three cars of our seed and shipped them to Robert B. Brown Oil Company, replacing the seed it had delivered to us through error, and we made settlement with the railroad company for all the seed, accepting Nettleton weights as the proper basis for settlement; the railroad weights.

"Q. Then Roberts Cotton Oil Company have paid for this seed?

"A. Yes, sir."

During the trial the plaintiff abandoned any right of recovery on the third paragraph of the complaint.

The jury returned a verdict for the plaintiff for seven hundred and ninety-eight dollars and seventy-six cents on the first two paragraphs of the complaint.

The defendant has appealed.

E. L. Westbrooke, for appellant

1. Grady can not maintain this action. He had neither the title to nor the right of possession of the seed, and, under

the law, he must have both. 44 Ark. 108; 10 *Id.* 211; 8 *Id.* 204; 54 S. E. Rep. 751; 72 N. W. 1074; 28 A. &. E. Enc. Law, 657; 21 Enc. Pl. & Pr. 1037–8.

2. Delivery of goods to a carrier, when made in pursuance of an order to ship, is, in effect, a delivery to the consignee. 53 Ark. 196; 78 *Id.* 123. The court erred in its charge to the jury, therefore, and a new trial should be granted. Kirby's Dig., § 6215.

3. A bill of exceptions is sufficient if it appears, as here, inferentially that all the evidence is brought up. 92 Ark. 150; 49 *Id.* 364; 36 *Id.* 496; 35 *Id.* 450.

Lamb & Caraway, for appellee.

1. The bill of exceptions does not contain all the evidence. 75 Ark. 76; 81 *Id.* 327; 74 *Id.* 553; 142 S. W. 1151.

2. The evidence fully sustains appellee's right to recover. The evidence of shipment and that he had not been paid was positive. In the absence of anything in the record other than the mere fact of shipment by appellee to the Brown Company, showing the rights or liability of the consignor or consignee, either party may sue. 8 Gray 281; 112 Mass. 524; 27 Wis. 81; 13 Ill. App. 490; 80 Mo. 213; 85 Mo. 90; 22 S. E. 815.

HART, J., (after stating the facts). 1. It is insisted by counsel for plaintiff that the judgment should be affirmed because it is not expressly stated in the bill of exceptions that it contains all of the evidence introduced at the trial. The record shows that the plaintiff, to maintain the issues on his part, introduced certain named witnesses, whose testimony follows. It then recites that the plaintiff rested. The defendant called certain witnesses, whose testimony is set out. The defendant then rested. The record then recites that the plaintiff recalled a witness, and then closed its testimony. The record then shows that the plaintiff abandoned his claim for the car of seed sued for in the third paragraph of the complaint, and that all consideration thereof was by the court withdrawn from the jury. The record then shows the court proceeded to instruct the jury.

It will be noticed that, while it is not expressly stated in the bill of exceptions that it contains all of the evidence introduced at the trial, such fact is to be inferred from its general

tenor. We have frequently held that the requirement that the bill of exceptions contain all of the testimony in a case is sufficiently complied with if it appears inferentially that all of the evidence is brought up. *Walker* v. *Noll*, 92 Ark. 148; *Overman* v. *State*, 49 Ark. 364; *Leggett* v. *Grimmett*, 36 Ark. 496.

The cases cited by plaintiff on this question are not in point under the state of facts as disclosed by the record. In each of the cases cited by him there was an affirmative showing that the bill of exceptions did not contain all of the evidence.

2. It is contended by counsel for defendant that the court erred in refusing to give the following instructions, asked by it:

"The acceptance of a bill of lading from a common carrier by plaintiff for a car of seed shipped to Brown Oil Company at St. Louis constitutes a delivery to Brown Oil Company by the plaintiff; and, if the seed so billed and delivered was not by the carrier delivered, the plaintiff's cause of action is against the carrier and the Brown Oil Company, if he has not yet received compensation therefor from some other source."

We think he is correct in this contention. The plaintiff's own evidence shows that he sold the car of seed in question to the Robert B. Brown Oil Company of St. Louis, Missouri, and shipped the same to it on November 21, 1910. The secretary of the Brown Oil Company, a witness for the plaintiff, testified that his company held the bill of lading issued by the Jonesboro, Lake City & Eastern Railroad Company, dated November 21, 1910, for the car of seed in question.

It is a settled law in this State that the delivery of goods to a common carrier, when made in pursuance to an order to ship, is in effect a delivery to the consignee. *Harper* v. *State*, 91 Ark. 422; *Bray Clothing Company* v. *McKinney*, 90 Ark. 161; *Gottlieb* v. *Rinaldo*, 78 Ark. 123, and cases cited.

Consequently, under the facts in this case as disclosed by the record, the plaintiff had neither the title nor the right to the possession of the car of seed in question, and had no right to maintain this action.

It is urged by counsel for plaintiff that the instruction was refused because Grady testified that under his contract with the Brown Oil Company the loading and consignment of the car to that company was not a delivery to it, and that

it did not become liable to him for anything until the car was received, inspected and unloaded at St. Louis.

In answer to this, we have not been able to find any testimony to that effect in the record.

The facts as disclosed by the record are substantially as we have stated them, that is to say, the record shows that the plaintiff sold the car of seed in question to the Brown Oil Company of St. Louis and consigned the same to it, taking a bill of lading therefor from the Jonesboro, Lake City & Eastern Railroad Company. Under this state of the record (and we can only review assignments of error upon the record as presented to us), the instruction under consideration should have been given; for, as we have already seen, according to the uniform current of decisions in this State, where goods are delivered to a common carrier pursuant to a contract authorizing shipment, a delivery to the carrier is held to be a delivery to the consignee, so as to cast upon the latter a liability for any loss resulting in transit. *Bray Clothing Company* v. *McKinney, supra,* and cases cited.

For the error in refusing to give instruction numbered 2 at the request of the defendant, the judgment will be reversed, and the cause remanded for a new trial.

SMITH v. STATE.

Opinion delivered October 7, 1912.

COSTS—INDICTMENT FOR FELONY AND CONVICTION OF MISDEMEANOR.—Where a defendant was indicted for a felony and convicted of a misdemeanor of the same generic class, and had no property out of which a judgment for costs could be made, the county is liable for the costs that accrued on the trial of the felony charge, and it was error to order that defendant be imprisoned or hired out to pay such costs.

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

STATEMENT BY THE COURT.

Appellant was indicted and tried for a felony. He was convicted of a misdemeanor of the same generic class, and, in

default of the payment of the fine and costs, it was adjudged that he be committed to jail. The costs in the case amounted to $239.25. Appellant moved to retax the costs, setting up that he was acquitted of the felony charge, and that he was only liable for costs consisting of prosecuting attorney's fee, $10, jury tax $3, and clerk's costs $1.40, aggregating $14.40. He prayed that the costs be retaxed, so that he might be relieved of the payment of all except this amount. The uncontradicted evidence showed that the defendant did not have the property to pay the costs. The court overruled the motion, and defendant appealed.

J. F. Gautney, J. M. Raines and *S. R. Simpson,* for appellant.

Where a defendant is indicted for a felony and acquitted of felony but convicted of misdemeanor, the county is liable for the costs. The motion to retax should have been granted. 64 Ark. 125; 100 Tenn. 307; 47 S. W. 221.

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

In all misdemeanors the defendant is liable for the costs. Kirby's Dig., § 2470. 64 Ark. 125 can be distinguished from this case. In that case it was *agreed* that defendant had no property out of which the costs could, be made and section 2470, Kirby's Digest, is not applicable.

WOOD, J., (after stating the facts). In *Boone County* v. *Mitchell,* 64 Ark. 125, Mitchell and others sued Boone County for fees of officers and witnesses incurred in a felony case wherein the accused was acquitted of the felony, but convicted of a misdemeanor of the same generic class. In that case we held that the county was liable for the costs, the defendant having no property out of which a judgment for costs could be made. The same rule applies here.

Section 2469 of Kirby's Digest provides: "Fees allowed in criminal cases shall be paid by the defendant, but if sufficient property belonging to the defendant can not be found for that purpose, they shall be paid by the county where the conviction is had, except in such cases of misdemeanor where the county is not to be liable."

Section 2470 provides: "In all criminal or penal cases

pending under indictment in the circuit court, if the defendant shall be acquitted or *nolle prosequi* entered by the attorney for the State, except in cases where the prosecutor shall be adjudged to pay the costs, or, in case of felony, if the defendant shall be convicted and shall not have the property to pay the costs, the same shall be paid by the county."

Under these statutes, where defendants are indicted for felonies and acquitted of the felonies and convicted of misdemeanors included in the indictment, if they "shall not have the property to pay the costs, the same shall be paid by the county." Since the county in such cases is liable for and must pay the costs, as held in *Boone County* v. *Mitchell, supra,* it necessarily follows that the appellant could not be imprisoned or hired out to pay such costs. There is no provision in the statute authorizing imprisonment or hiring out of parties convicted of misdemeanors on indictments and trials for felonies, for the purpose of paying the costs that accrued on the trial of such felony charge.

The words "cases of misdemeanor," as used in section 2469 of Kirby's Digest, mean cases where parties are charged solely with the commission of a misdemeanor and tried and convicted on such charge, and not cases where the indictment and trial is for a felony, although finally resulting in conviction for a misdemeanor included in the indictment.

The words "cases of felony," as used in section 2470, *supra,* refer to cases where the indictment and trial is for a felony, including a misdemeanor of the same generic class as the felony. Where parties are indicted and tried for felonies, such cases are regarded as felony cases under section 2470, *supra,* although the accused may only be convicted of a misdemeanor included in the felony charge.

The court therefore erred in overruling the motion to retax the costs for which error the judgment is reversed, and the cause remanded with directions to grant the prayer of the motion.

ZACCANTI *v.* STATE.

Opinion delivered October 7, 1912.

1. STATUTES—CONSTRUCTION.—A proviso in a statute must be construed with reference to the immediately preceding parts of the clause to which it is attached. **(Page 62.)**

2. LIQUORS—SEVERAL SALES ON SAME DAY.—Under Kirby's Digest, § 5098, providing for punishment of one guilty of selling liquor without license, and that "each day of such unauthorized selling shall constitute a separate offense," one who has been convicted of unlawfully selling liquor to one person on a certain day can not be convicted of making another sale to another person on the same day. (Page 63.)

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

STATEMENT BY THE COURT.

Appellant was charged with selling liquor without license, upon the following indictment, the formal parts omitted.

"That the said Andy Zaccanti, in the county, district and State aforesaid, on the 17th day of November, 1911, unlawfully did sell and give away and unlawfully was interested in the selling and giving away of ardent, vinous, malt, spirituous and intoxicating liquors without first having procured a license from the county court of said county, authorizing the sale of the same, against the peace and dignity of the State of Arkansas."

He filed a motion to quash the indictment, alleging that there was another indictment pending against him for unlawfully selling liquor on the 17th day of November, 1911, upon which he had already been tried. This motion was overruled. He then pleaded a former conviction and not guilty.

This indictment and one in another case, which had already been submitted to the jury, upon the calling of this case for trial, each charged the sale of liquor on the same day, and the proof showed that appellant sold beer to two different parties on the same day and at the same time. Defendant was put upon trial on the first indictment, and the sale to one of the parties was proved, and the case submitted to the jury, and upon its retiring he was put upon trial in the indictment herein, and while the trial was in progress the jury in the other case returned a verdict of guilty against him.

Upon permission of the court, he pleaded the former conviction, which was proved, and also the fact that the sale relied upon by the State for conviction in each case occurred on the same day, as already stated. He then requested a peremptory instruction of not guilty, and upon the denial thereof

asked the court to instruct the jury to acquit him in this case if they should find from the evidence that the sale of beer proved was made on the same day upon which the sale was made, which was proved or in evidence before the jury in the case wherein he had already been convicted. The court refused to give this instruction over his exceptions, and instructed the jury that if they should find beyond a reasonable doubt that the defendant within the district, county and State, within one year next before the finding of the indictment, sold beer, as testified to by the witnesses for the State, without first having obtained the license, they would find him guilty. The jury returned a verdict of guilty and assessed a fine of $75, from which this appeal comes.

George W. Dodd, for appellant.

The plea of former conviction should have been sustained. The statute is clearly directed against each day's unlawful business, and not against separate sales on the same day. Kirby's Dig., § 5112; 56 Ark. 350.

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

Appellee confesses error. The statute specifically provides that "*each day* of such unauthorized selling shall constitute a separate offense." The Legislature by the use of this language impliedly excluded the operation of the statute as to *each separate sale.*

KIRBY, J., (after stating the facts). This indictment charges the sale of liquor without first procuring a license, as required by section 5093 of Kirby's Digest, the punishment for which offense is prescribed by section 5112 of the Digest, which makes provision for different and greater penalties upon the second and third conviction of a similar offense, with a proviso as follows:

"Where more than one indictment is found against the same party or parties at the same term of court, if it be the first charge or charges of this nature against the party or parties, the same punishment shall be inflicted under each indictment as if it were the first offense, and each day of such unauthorized selling shall constitute a separate offense."

It is insisted that, since both of the sales of liquor charged

against the defendant occurred on the same day at the same time, they constitute but one offense under said proviso, and the Attorney General confesses error, and we are of the opinion that the confession of error should be sustained.

The proviso is to be construed with reference to the immediately preceding parts of the clause, to which it is attached. Lewis' Sutherland, Statutory Construction, §§ 352, 420; *Friedland* v. *Sullivan*, 48 Ark. 213; *United States* v. *Bobbitt*, 1 Black, 94; *McRae* v. *Holcombe*, 46 Ark. 310; *Towson* v. *Denson*, 76 Ark. 306.

It is stated therein that "each day of such unauthorized selling shall constitute a separate offense," and the meaning is so clear and plain as to admit of no other construction, and, by the use of such language, it could not have been the intention of the Legislature to make each sale a separate offense, but only each day's unauthorized selling without regard to the number of sales made where it is the first offense, as designated in said proviso.

This being the first offense and the sales both being shown to have been made on the same day, but one offense was committed, and but one conviction could be had therefor.

The court erred in denying the plea of former conviction and in refusing to instruct a verdict for appellant.

The judgment is reversed, and the cause dismissed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. NEWMAN

Opinion delivered October 21, 1912.

1. APPEAL AND ERROR—ABSTRACT—SUFFICIENCY.—Rule 9, requiring appellant to furnish "an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision," is not complied with by filing a printed copy of the entire transcript. (Page 64.)

2. SAME—ABSTRACT—AMENDMENT.—Where attention to the insufficiency of the abstract is called before the case is submitted, and the delinquent party has in good faith attempted to comply with the rule, but failed, and offers to do so, further time is usually

given for that purpose; but where the case goes to submission, and the defective condition is subsequently discovered, the case will be affirmed for noncompliance with the rule. (Page 64.)

Appeal from Crittenden Circuit Court; *Frank Smith*, Judge; submission set aside.

W. F. Evans and *W. J. Orr*, for appellant.

A. B. Shafer, for appellee.

PER CURIAM. On examination of what purports to be the appellant's abstract, it is found to be no abstract or abridgment of the record at all, but a literal copy of the record. This is not a compliance with the rule of the court, for to print too much of the record is as much an infraction of the rule as to print too little. Rule 9, in plain terms, requires the appellant to furnish "an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision." This is required for the convenience of the court in the speedy dispatch of business; for, if the whole record is to be printed, the rule might as well be abrogated. Nor is the application of the rule different where the legal sufficiency of the evidence is challenged by an assigment of error. In that case it is only necessary to set out so much of the evidence as bears upon the particular issue alleged to be unsustained by evidence, and it is unnecessary to set out all the statements of every witness, including introductory and formal questions and answers. The purpose in requiring the abstract is to reduce the record under investigation to a minimum, and this is not accomplished where the judges are required to read through the whole transcript.

The practice has been that, where attention is called to the insufficiency of the abstract in advance of the submission of the case, and it appears that the delinquent party has in good faith attempted to comply with the rule but failed, and offers to do so, further time is usually given for that purpose; but where the case goes to submission, and the defective condition of the abstract is discovered thereafter, the case is affirmed for noncompliance with the rule. The present case has been regularly submitted, and

a strict enforcement of the rule would call for affirmance without giving appellant's counsel an opportunity to supply an abstract; but, inasmuch as there seems to have been a misconstruction of the rule with respect to printing the entire record, we deem it to be in the interest of justice not to inflict a drastic penalty. Hereafter the rules must be complied with, or the penalty will be strictly enforced. The submission of this case is, therefore, set aside, and appellant is required to furnish an abstract within two weeks from this date; otherwise the judgment will be affirmed.

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 7 OF CITY OF FORT SMITH v. BRUN.

Opinion delivered October 7, 1912.

1. MUNICIPAL CORPORATIONS—POWERS OF IMPROVEMENT DISTRICTS.—A board of improvement is authorized to form plans for making the improvement, and to do everything that is necessary and incident thereto; and, when the power of the board is not specifically limited by the petition and ordinance, it may exercise its own discretion in doing those things which are necessarily incident to the construction of the improvement asked for. (Page 67.)
2. SAME—IMPROVEMENT DISTRICT—VARIANCE.—In determining whether there is a material variance between an improvement asked for and one which the board of improvement plans to construct, the cost of the proposed improvement is an important element. (Page 69.)
3. SAME—PAVING DISTRICT—POWERS.—The power given to an improvement district to pave a certain street includes the power to furnish and to do all that is necessary, usual or fit for paving, including the construction of the improvement in a way that will also successfully drain the street. (Page 69.)
4. SAME—PAVING DISTRICT—STORM SEWERS.—A complaint which seeks to enjoin an improvement district authorized generally to pave a certain street from constructing underground storm sewers to carry off the surface waters is demurrable where it fails to allege that the surface waters can be as successfully carried off by gutters and that the cost of construction of such underground drainage is so great, in comparison with the cost of such gutters, as to make this part of the improvement a material variance from the improvement designated in the petition and ordinance. (Page 71.)

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland,* Chancellor; reversed.

Pryor & Miles, for appellant.

The improvement district having been duly and legally constituted for the purpose of paving the street, all things necessary to construct an adequate pavement are incident to the power conferred to pave. An adequate provision for the proper drainage of the street is necessary for its maintenance in good condition after the pavement is put down, and the power to provide for such drain is embraced in, and therefore incident to, the original power to pave. Whether the drainage shall be effected by meant of surface gutters, or by sewers under the surface, is a matter which, especially in a populous city, should be left to the judgment and sound discretion of the board of improvement. 20 Ia. 287; 119 Ill. 509; 28 Conn. 363; 41 N. E. 374.

FRAUENTHAL, J. This is an action to enjoin the board of improvement of a paving district organized in the city of Fort Smith from expending the money of said district in constructing a system of underground drainage or storm sewers therein. The plaintiff is an owner of real property situated in the improvement district, and in his complaint it is alleged that, in pursuance of the petition of a requisite number of owners of real property to be affected thereby, the city council had regularly passed an ordinance creating and establishing an improvement district known as Paving District No. 7 in the city of Fort Smith. According to the said petition and ordinance, said improvement district was organized for the purpose of "paving Garrison Avenue from the northwest side of First Street to the southeast side of Thirteenth Street from curb to curb on said avenue, and to the inside of the sidewalk on all cross streets and alleys between said First Street and Thirteenth Street, save and except that part of the said street to be paved by the Fort Smith Light & Traction Company."

The complaint further alleged "that the water falling on said Garrison Avenue has in the past been drained into gutters and carried along the length of said Garrison Avenue in said gutters on the surface from Sixth Street; that in the repaving of said Garrison Avenue the Board of Improvement, Paving

District No. 7, above referred to, has planned, and is now constructing, a system of underground drainage or storm sewer under the proposed paving of Garrison Avenue to take care of and carry off this surface water which falls on Garrison Avenue; that this contemplated storm sewer or system of underdrainage on Garrison Avenue will have a catch basin at the corner of each block, and water will be immediately taken into this storm sewer or system of underdrainage and carried along under said pavement to points on or near to Garrison Avenue, where it will flow into other storm sewers of the city of Fort Smith, thence into the Arkansas River."

It is alleged in the complaint that the power to take care of surface water is not incident to the power given to said board of improvement to pave said street. The complaint concludes with a prayer that the board of improvement "be perpetually enjoined and restrained from using the money raised by taxation to repave Garrison Avenue in building and establishing the above referred to system of underdrainage."

To this complaint the defendants interposed a general demurrer, which was overruled, and, the defendants refusing to plead further, a decree was entered in accordance with the prayer of said complaint. From this decree the board of improvement has appealed to this court.

It thus appears from the allegations of the complaint that the improvement district was organized and created in due compliance with all the statutory requirements. No claim is made that the board of improvement of said district did not have full power to undertake and make the improvement asked for in the petition and named in the ordinance creating the district. The improvement asked for was to pave Garson Avenue from curb to curb; and the sole question for our determination is whether the board of improvement, in forming the plans for making said improvement, had the power to undertake and construct a system of underground drainage or storm sewers for the purpose of taking care of the surface water thereon and draining said street.

The statutes of this State provide a procedure for the formation of improvement districts in cities and towns, and prescribe that the petition of the property owners shall "desig-

nate the nature of the improvement to be undertaken" (Kirby's Digest § 5667). Thereafter, a board of improvement, consisting of three persons, is appointed by the municipal council, which "is required to form plans for the improvement within their district as prayed in the petition" (Kirby's Digest § 5672). The nature of the improvement to be undertaken is fixed, therefore, by the petition and the ordinance, and the board of improvement derives its powers solely therefrom. It has the power to do all those things necessary to carry out the purposes of the organization of the improvement district, as set forth in the petition and ordinance.

In the case of *McDonnell* v. *Improvement District,* 97 Ark. 334, it was held that the statute does not require the petition to make particular specifications of the things to be done in order to make the improvement. In that case it is said that "all that is required is that the nature of the improvement be specified in general terms, so that the purpose of the organization may be set forth in the proceedings. Much must, of course, be left to the discretion of the commissioners in forming the plans for the improvement and making the estimate of the cost thereof." The board of improvement can not, however, substitute for the improvement named in and authorized by the petition and ordinance an entirely different and more expensive improvement. The nature and character of the improvement which it is authorized to form plans for and to make is prescribed by the petition and the ordinance passed in pursuance thereof. *Watkins* v. *Griffith,* 59 Ark. 345.

The board, however, has full power and authority to form the plans for making the improvement and to do everything that is necessary and incident thereto. The nature and purpose of the organization is fixed by the petition and ordinance, and, when the power of the board is not therein specifically limited, it may exercise its own discretion in doing those things which are necessarily incident to the construction of the improvement asked for. But it has not the power to form plans for constructing an improvement which varies materially from that asked for in the petition and authorized by the ordinance.

In the case of *Kraft* v. *Smothers,* 103 Ark. 269, the power of the board of an improvement district to construct a certain improvement was attacked upon the ground that

the improvement planned by the board varied materially from that asked for in the petition. In the petition the property owners asked for an improvement "for the purpose of building a sewer system therein and making proper connection of the same into a system of septic tanks." The plans for the improvement adopted by the board under the ordinance establishing the district provided for constructing a sewer system, for making connection into a system of septic tanks and conducting the effluent through standard sewer pipes into the Fourche River. In that case the court held that the improvement planned varied materially from that asked for because it would greatly enlarge the cost of construction, as well as change the character and extent of said improvement. The court said: "It would impose upon the property owners of the proposed district an enlarged burden which was not contemplated by the petitioners, and which could not have been reasonably anticipated by the property owners from the language of the petition." On this account it was held that the board did not have the power to make the improvement as planned by it.

The cost of the improvement is assessed and charged upon the real property situated in the district; and when the property owners by petition ask for the formation of a district and designate the nature of the improvement, it will be presumed that they understand its probable cost and contemplate that the burdens of such cost only will be imposed upon them. The cost of the improvement is therefore an important element in determining the extent and character of the improvement authorized by the petition and ordinance, and whether or not there is a material variance between the improvement asked and that which the board plans to construct.

In the present case, according to the allegations of the complaint, the improvement district was organized for the purpose of paving Garrison Avenue, a public street in the city of Fort Smith, a city of the first class. The purpose of the organization was therefore to construct upon this street a compact, hard surface or covering so as to make it convenient for travel. To do this it was necessary not only to cover the street with stone or brick, or other substance used for paving purposes, but it was also necessary to place the street in proper

condition to receive the paving material and also to provide for its proper drainage. To carry out this purpose of the organization, it was necessary to do all that is usual or fit for paving a street.

In Hamilton on the Law of Special Assessments, it is said: "Where authority is given by charter to 'pave' streets, it is generally understood and held to include the power to macadamize them and to provide for their proper drainage by the construction of gutters, and to do all that is necessary, usual or fit for pavings."

In the case of *Warren* v. *Healy*, 31 Ia. 31, it is said that the term "pave" will apply to include the construction of gutters. In making streets, it is necessary to construct them so that by proper drainage the water will be carried away.

In 2 Page & Jones on Taxation. § 869, it is said that an order for paving a street has been held to include curbing and guttering necessary for drainage. See also *Spokane* v. *Brown*, 8 Wash. 317; *Sawyer* v. *Chicago*, 183 Ill. 57; *City Street Improvement Company* v. *Taylor*, 138 Cal. 364; *Murphy* v. *Peoria*, 119 Ill. 509; *Cone* v. *Hartford*, 28 Conn. 363; *Kirkland* v. *Board of Public Works*, (Ind.) 41 N. E. 374.

It will thus be seen that the power given to pave a street includes the power to furnish and to do all that is necessary, usual or fit for paving, and that this necessarily includes the construction of the improvement in a way that will also successfully drain such street. It is true that, when one improvement is authorized, an entirely distinct and separate improvement can not be undertaken under such authorization. If the construction of a pavement is authorized, a sewerage improvement can not be undertaken. The two are distinct and separate, and are not necessarily incident to each other. The right, however, to deal with a public improvement as a whole must be determined by the unity of the work. If the various parts of the work are incident to the nature of the improvement authorized, then they are not separate and distinct improvements, though they may have different names. If the improvement of a street is authorized, and to make such improvement it is necessary to grade, macadamize and curb the street, the work undertaken is in fact but one improvement, although parts of the work are called by different names. The

manifest purpose of paving a street is to make the street fit for convenient and safe travel. To do this, it is not only necessary to cover it with some hard material, but it is also necessary to provide for its drainage. It is essential in making a paving improvement that means should be provided for carrying off the water falling on the surface of such street in order to make it fit for convenient and safe travel. This probably can be done, and ordinarily is done by gutters which carry the waters upon the surface of the street. But it can also be done by storm sewers, which carry the water underneath the surface thereof. If the petition and ordinance do not limit the powers of the members of the board of improvement in forming the plans for making the improvement, then they have the power to exercise their own discretion as to the manner in which the improvement shall be made. It is only when the board of improvement undertakes a work not incident to the improvement asked for that it can be said that it has exceeded its powers when the exercise thereof is not limited by the petition or ordinance. As above seen, it is well settled that the power to pave a street also carries with it the power to drain such street. It may be, on account of the physical conditions, that it is not practicable to successfully drain a street by carrying off the water in gutters on the surface. It may be that the street is so located that this could be more sucessfully done by a system of undergouund drainage or storm sewers. Under such circumstances, a storm sewer would not be a different or separate improvement, like the construction of an ordinary sewer, but would be a part of the work necessarily incident to paving the street, so that the object of furnishing a convenient, dry and safe surface for travel may be accomplished. The members of the board of improvement are officers to whom is confided the power to form plans for the improvement, and in carrying out the work it must be presumed that they have exercised their discretion within the powers confided to them. It can not be said as a matter of law that they have exceeded their powers under the authority given to them to pave a street by providing that the surface waters shall be carried off by underground drainage, instead of by gutters. This is the extent of the allegations made in the complaint. It is not alleged in the complaint that, as now paved,

or as the pavement is contemplated to be constructed, the surface waters can be as successfully or conveniently carried off by gutters as by storm sewers, or that the cost of the underground drainage is so great that the construction thereof would be a material variance from the improvement asked for by the petition and authorized by the ordinance. The mere allegation that storm sewers are not incident to a pavement improvement is not sufficient to show that its construction is unauthorized. The power to pave a street may include the power to construct drainage thereunder, and it will be considered to be incident thereto when exercised by a board of improvement unless it is alleged and proved that the surface waters can be as successfully carried off by gutters, and also that the cost of construction of such underground drainage is so great, in comparison with the cost of such gutters, as to make this part of the improvement a material variance from the improvement designated in the petition and ordinance.

It follows that the complaint does not allege facts sufficient to warrant the injunction granted, and that the court erred in overruling the demurrer thereto. The decree is reversed, and this cause is remanded with directions to sustain the demurrer, with permission given to the plaintiff to amend his complaint if he is so advised, and for further proceedings not inconsistent with this opinion.

DICKERSON v. STATE.

Opinion delivered October 7, 1912.

1. CONSPIRACY—SUFFICIENCY OF EVIDENCE TO PROVE.—In order to establish a conspiracy, it is not necessary to prove the unlawful combination between the parties by direct evidence, but it may be shown by circumstances. (Page 75.)
2. EVIDENCE—ACTS AND DECLARATIONS OF ACCUSED.—Acts and declarations of the accused, in the nature of voluntary admissions, though done and made after the crime is alleged to have been committed, are admissible against him. (Page 76.)

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

M. P. Huddleston, for appellant.

1. Instruction No. 11 should not have been given, as there was no proof of a conspiracy. 74 Ark. 554. When the conspiracy is established, the act of one is the act of all in furtherance of the common object. Wharton on Cr. Ev. §698; 59 Ark. 430. But the conspiracy must first be established *prima facie* and exclude every reasonable hypothesis except that of guilt. 97 Am. St. 776.

2. When a witness is cross examined on a matter collateral to the issues of the case, his answers can not be contradicted by the party putting the question. The witness can only be impeached by evidence that his general reputation for truth or morality renders him unworthy of belief or that he has made different statements in his testimony in chief, or relative to some matter not collateral to the issue. 147 S. W. 491; 58 Ark. 129; 76 *Id.* 302; 90 *Id.* 206.

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

1. Direct or affirmative testimony of a conspiracy is not required. It is sufficient if the circumstances justify an inference that there was concerted action. 77 Ark. 444; 2 Wharton, Cr. Law (10 ed.) § 1398; 4 Elliott on Ev. § 2936; Underhill on Cr. Ev. § 491; 20 Ark. 220; 32 *Id.* 220; 59 *Id.* 430.

It is for the trial judge to say whether a *prima facie* case is made, when it becomes a question for the jury to pass upon. 87 Ark. 94; 81 *Id.* 173.

2. Instructions 3 and 4 for defendant were properly refused. Defendant was convicted of aggravated assault which is a lesser degree of the offense charged. 73 Ark. 280.

3. The testimony of Clark was on a collateral matter and immaterial to the issue, and the rule does not apply.

FRAUENTHAL, J. The defendant, Joe Dickerson, Ben Bowlin and Lee Edwards were jointly indicted for the crime of assault with intent to kill. Their trials were severed, and defendant was convicted of aggravated assault, and his punishment fixed at a fine of $200 and imprisonment in jail for a period of six months. He seeks a reversal of the judgment upon the ground that there was not sufficient evidence to warrant the conviction, and because the court erred in its

rulings on instructions and in admitting certain testimony.

The party alleged to have been assaulted was J. B. Green, who was in the employ as foreman of the grinding department of a corporation engaged in the manufacture of handles. Defendant was also working for this company, but the factory had shut down for repairs on the day of the alleged assault. The party in the indictment named Lee Edwards had formerly been in the employ of said company, but had been discharged. On the day of the alleged assault the defendant, Edwards and Bowlin went to the factory, and the testimony tended to prove that the defendant and Edwards had been drinking intoxicating liquor, and were to some extent under its influence. Green was at the factory engaged in some of his duties, when he heard some one coming into the room, and, looking up, saw Edwards and defendant, closely following, coming towards him very fast. He spoke in a friendly way to Edwards, who did not answer, but at once struck at him with his fist. He dodged the blow, and in doing so staggered against the defendant, who at once took hold of him around the arms. Edwards cried out to the defendant to "hold him while I kill him," and at once struck Green over the head with a handle. Green cried out to the defendant to turn him loose, and asked him what he had done to him. The defendant, however, did not turn him loose, but continued to hold him, while Edwards was striking him with the handle. At length Green caught the handle and wrenched it from Edwards, and struck the defendant, at the same time forcing himself loose. About the same time a third person (probably Bowlin) struck Green on the head, and he either staggered or fell to the floor, when the defendant got on top of him and beat him over the head with a handle, crying out that Green had done him dirty, and that he was going to beat the life out of him. In the meanwhile, the company's superintendent and other parties came to Green's assistance and succeeded in forcing the defendant and his companions to desist from their further assault of him. As a result of the assault, Green's head was cut and bruised, and he lost consciousness for a time, and was confined to his bed for ten days or two weeks. There is some conflict in the testimony, but the jury were warranted in finding, we think, that, because he had been discharged, Edwards went to the

factory to assault Green, and that defendant accompanied him to aid and abet him. From the facts and circumstances, we are of the opinion that the jury were justified in inferring that the defendant had combined with Edwards to make the assault, and in pursuance thereof defendant did actually aid and abet Edwards in the assault and battery by first holding Green while Edwards struck him with a handle, and thereafter did actually beat Green himself with a handle while crying out that he would beat him to death.

Amongst others, the court gave the following instruction to the jury: "The theory and contention of the State is that the defendant and Lee Edwards and Ben Bowlin, with a common and unlawful purpose, sought out the said J. B. Green and assaulted him. If you find the facts so to be, and that during the progress of the assault they were all present participating in it, and aided and abetted each other, or that, being present, they were ready and consenting to assist, aid, advise, or encourage the assault, then all persons so participating are guilty of the same offense, whatever you may find that to be, and in that event, if you find the facts so to be, then each is responsible for the other's acts, and it will not be necessary for you to consider and determine the part each of the assailants respectively took in the assault."

It is urged that this instruction was erroneous for the reason that there was no proof made that there was a conspiracy formed between said three parties. It is not necessary, however, in order to establish a conspiracy, to prove the unlawful combination between the parties by direct evidence. This may be shown by circumstances. In the case of *Chapline* v. *State*, 77 Ark. 444, it was held that a conspiracy might be inferred, although no actual meeting among the parties is proved, if it be shown by testimony that the persons pursued by their acts the same unlawful object, each doing a part, so that their acts that were apparently independent were in fact connected. *Parker* v. *State*, 98 Ark. 575.

We are of the opinion that the facts and circumstances in this case were sufficient to show that there was a combination formed by the above-named parties to make the assault upon said Green. The instruction, therefore, given by the court

was warranted by the testimony, and is a correct statement of the law.

The defendant appeared as a witness in his own behalf, and in answer to questions asked him on his cross examination stated that he had left the mill crying out and threatening to fight, in a crazy manner, and "kind of came to himself" when an officer named Clark took hold of him and shook him. Subsequently, said Clark was called as a witness by the State, and testified that he did not take hold of or shake the defendant, but that defendant cried out that the union men were going to take the town, and when the witness asked him what he meant by his conduct he replied that he would go with him anywhere, as he was his friend, and that he would learn later what he meant. It is urged that the court erred in admitting the testimony of the witness Clark on the ground that it was introduced by the State in rebuttal to contradict the statement made by the defendant on his cross examination relative to a matter entirely collateral to the issue involved in the case.

The only particular in which the witness Clark contradicted the defendant was in stating that he did not take hold of or shake the defendant. This, we think, was a matter entirely immaterial to the issue involved in the case, rather than relating to an issue collateral thereto. If it can be considered as material in connection with the other testimony given by this witness, then it tended to prove the state of mind of the defendant, and was therefore competent to show the intent of the defendant in making the assault on Green, if in fact he struck Green with the handle, and this battery was made not in self-defense but unlawfully. The state of mind of the defendant and the intent entertained by him when the assault was made was a matter directly involved in the charge brought against him. It was therefore not collateral. The defendant's statements and conduct, testified to by Clark, were in the nature of voluntary admissions made by the defendant, and in a criminal case it is admissible for the State to prove such voluntary admissions, although made at a different time, and not competent for the defendant to prove them. *Butler* v. *State*, 34 Ark. 480.

Upon an examination of the entire record in this case, we are of the opinion that there is sufficient evidence to warrant

the verdict which was returned by the jury, and that no error was committed calling for a reversal of the judgment.

The judgment is therefore affirmed.

MILWEE v. BOARD OF DIRECTORS OF HORATIO SCHOOL DISTRICT.

Opinion delivered October 7, 1912.

1. STATUTES—IMPLIED REPEAL.—Where the Legislature takes up the whole subject of a former statute, and covers the entire ground thereof, and evidently intends it to be a substitute for it, the prior act will be repealed, though there may be no express words to that effect, and though there may be in the old act provisions not embraced in the new. (Page 79.)
2. SCHOOL DISTRICTS—POWER TO BORROW MONEY—REPEAL OF STATUTE.—Act of May 6, 1905, authorizing school districts to borrow money, repealed the prior act of March 17, 1903, on the same subject. (Page 80.)
3. SAME—CONVEYANCE BY—VALIDITY.—A mortgage executed by a majority of the directors of a school district pursuant to a resolution adopted by the board of directors is as binding as if it had been executed by the president and secretary of the board. (Page 81.)

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

STATEMENT BY THE COURT.

This suit was instituted by W. W. Milwee, and others, to enjoin the school board and the members thereof of the Horatio Special School District of the town of Horatio from borrowing money for the erection of a school building in the town and executing a mortgage to secure the payment thereof.

The chancellor found that the board of directors had duly adopted the resolutions authorizing the borrowing of fifteen thousand dollars and the execution of a mortgage as security therefor, and that their action was a proper exercise of their discretion under the facts in the case; that, notwithstanding the question was not submitted to the vote of the electors of the district, the board of directors had authority to borrow the money under Act. No. 248 of the Acts of 1905 without any such vote, and dismissed the bill for want of equity.

A. D. DuLaney, for appellants.

1. Section 4 of act 85, Acts 1903, is not repealed by implication by act 248, Acts 1905. It is not in irreconcilable conflict with nor repugnant to, any of the provisions of the later act. Sutherland, Stat. Construction (2 ed.) 465; 92 Ark. 270; 50 Ark. 133. See also Act 321, Acts 1909, § 3; act 169, Acts 1911, § 8.

2. The school district can only act through its board of directors acting in its organized capacity, and not its individual members. The act of the four directors on March 12, in attempting to execute a mortgage on the property, was without authority. Thompson on Corp. (2 ed.) § 1072.

3. If the board of directors were impowered to issue the bonds without a previous vote of the electors authorizing same, still, under the proof, they have abused their discretion in this case, and the finding of the chancellor on this point should be set aside. 29 Cyc. 1432; 35 Cyc. 1050.

James S. Steel, J. S. Lake and *James D. Head*, for appellees.

A vote of the electors was not required. Act 248, Acts 1905, does not purport to amend any former acts; and, since the Legislature necessarily had some purpose in view in its enactment, the conclusion must be reached that it intended by this bill to take up again and fully deal with the question of authority conferred on special school districts in incorporated towns to borrow money. The act is complete in itself, and on its face appears to be a revision of existing laws pertaining to the subject. The former act providing for a vote is thereby repealed. 10 Ark. 588-590; 26 Am. & Eng. Enc. of L. (2 ed.), 649, 720, 731, 734, 735; 42 Me. 53; Lewis, Sutherland, Stat. Construction, § § 270, 271; 27 Ark. 421; 31 Ark. 19; 46 Ark. 438; 43 Ark. 425-427.

Rose, Hemingway, Cantrell & Loughborough, as *amici curiae*.

The act of 1905 re-enacted the act of 1903 literally, except the fourth section thereof, which is entirely omitted, and is replaced by a concluding section providing that "This act shall take effect and be in force from and after its passage. *All laws and parts of laws in conflict herewith are hereby repealed.*"

The later act covers the whole subject-matter of, and is evidently intended as a substitute for, the former act.

The section providing for a vote of the electors is repealed by the later act. 10 Ark. 589; 65 Ark. 508; 72 Ark. 8; 27 Ark. 419; 70 Ark. 27; 76 Ark. 34; 80 Ark. 411; 82 Ark. 305; 80 Ark. 411; 88 Ark. 324; 92 Ark. 79; 78 Ark. 118.

KIRBY, J. (after stating the facts). It is contended for the reversal of the judgment:

First: That the directors of the Special School District of the town of Horatio were without power to borrow money and mortgage the property of the district to secure the payment thereof for the erection of a school building unless first authorized to do so by a majority vote of the electors of the district;

Second: That a valid mortgage could not be executed by the board, except through its president and secretary; and,

Third: That the board of directors abused their discretion in attempting to borrow the money for the erection of the school building which the necessities of the district did not require.

The act of March 17, 1903, sections 7696-7699, of Kirby's Digest, authorized and impowered all special free school districts in the State to borrow money to secure funds for the erection and equipment of necessary school buildings and to mortgage the real property of the district as security therefor, but such authority could not be exercised until a majority of the electors of the district at an annual school election, at which the question was submitted, first voted in favor thereof.

The Legislature at the 1905 session, by act No. 248, of May 6, 1905, re-enacted the first three sections of said act of 1903, leaving off section 4 thereof (section 7699, Kirby's Digest), which required the submission of the question of borrowing money to the electors of the district at an annual school election and a majority vote in favor thereof before it could be done. This act expressly repeals all laws in conflict and exempts Jefferson County from its provisions. Does it repeal, by implication, said omitted section?

"Where the Legislature takes up the whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intends it to be a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act

provisions not embraced in the new." *Lawyer* v. *Carpenter*, 80 Ark. 411; *Western Union Tel. Co.* v. *State*, 82 Ark. 305; *Pulaski County* v. *Downer*, 10 Ark. 588; *Clarendon* v. *Walker*, 72 Ark. 8; *Davies* v. *Holland*, 43 Ark. 425; *Wilson* v. *Massie*, 70 Ark. 27; *St. Louis & S. F. Rd. Co.* v. *Bowman*, 76 Ark. 34; *Campbell* v. *Samples*, 92 Ark. 79. In *United States* v. *Claflin*, 97 U. S. 546, the court said:

"It is a familiar rule that when a later statute is exclusive, that is, where it covers the whole subject-matter to which it relates, it will be held to repeal by implication all prior statutes on that matter, whether they are general or special."

In *Hampton* v. *Hickey*, 88 Ark. 324, this court held that a special act of the Legislature authorizing a special school district to borrow a certain amount of money was repealed by said general act of 1905, authorizing and impowering all special school districts to borrow money for the purpose of the erection of necessary school buildings" under such conditions and regulations as to time, amount, rate of interest and manner of payment as the board of school directors of said school district shall prescribe.

It is true the question here presented was not directly passed upon in said case, but the whole subject was taken up by the Legislature anew, and the latter act covers the entire ground of the former statute, except the provision requiring the majority vote of the electors before the power could be exercised, omitted therefrom, and was evidently intended as a substitute for the former statute, and said omitted section was thereby impliedly repealed.

It follows that the board was authorized to borrow money without the submission of the question to the electors of the district.

The board of directors, on March 11, 1912, first passed a resolution, authorizing the borrowing of the money and the execution of the mortgage, directing that the mortgage be executed by the president and secretary thereof. Later, at a meeting at which all of the members were present, it amended said resolution by providing that a majority of the members of the board of directors should sign it, and the court below found that on the 12th day of March, 1912, a majority of the board of directors, naming them, executed and acknowledged

a mortgage or deed of trust in conformity with the form of the mortgage set out in the resolution adopted by the board on March 11, 1912, authorizing the borrowing of the money, and that at a called meeting of the board of directors on April 6, 1912, at which all the members of the board of directors were present, the resolution authorizing the borrowing of the money was amended to allow a majority of the members of the board to execute the mortgage and sign and issue the bonds and ratifying the acts of the said majority of the members of the board in the execution thereof.

It is true that, under the law, the board of directors of special school districts of cities and towns are required annually to elect a president and secretary from their number, who shall draw all warrants on the treasury in pursuance to the orders made by the board, who shall, in case of the sale or exchange of the real estate of the district, execute deeds therefor, upon a majority vote of the board authorizing and directing it; and also this act prescribes that the mortgage and evidences of indebtedness "shall be in form in all respects as other instruments of like kind are required by law to be and shall have the same force and effect as they would if executed by natural persons." This language, however, has reference directly to the contents and binding effect of the instrument, rather than to the formal signing thereof. The board of directors, having the power in the first instance to borrow the money and execute the mortgage, duly adopted a resolution directing that it be done, and it could bind the district equally by ratification of its acts done in relation thereto. Said resolution, authorizing the borrowing of the money and directing the execution of the mortgage and evidences of indebtedness by the president and secretary of the board, left no discretion to said officers in the matter. They had no right to refuse to obey the board's directions and could have been compelled to execute the instruments in accordance with the resolution. Instead of this being done, the board duly amended the resolution and authorized the mortgage to be executed by a majority of the members thereof, which was done, and expressly ratified such signing, thereby as effectually binding the district as if the instruments had been signed by the president and secretary under its first directions.

Equity regards that as done which should have been done, and the electors of the district will not be heard in a court of equity to enjoin the board of directors from borrowing the money and the execution of the evidences of indebtedness and the mortgage as security, for the irregularity in the signing thereof, since they could not have interfered with nor prevented the board's action, had it been carried out by the president and secretary, in obedience to the expressed will of the board, and the court did not err in dismissing their petition for want of equity.

It is questionable from the transcript whether all the evidence before the court below is included here; and if it is not, it would result in an affirmance; but, if it is, we can not say that the chancellor's finding that there was no abuse of the discretion of the board of directors in determining the necessity for the school building and the borrowing of the money for its erection was against the preponderance of the evidence, and the decree is affirmed.

BIRONES v. STATE.

Opinion delivered October 14, 1912.

1. BURGLARY—VARIANCE—IDEM SONANS.—An indictment for burglary of the house of one Nowlin is sustained by proof of burglary of Nolan's house; the two names having substantially the same sound. (Page 84.)
2. INDICTMENT—WHEN OBJECTION WAIVED.—An indictment for burglary which in one count charged the entry of the house with intent to commit rape and grand larceny, is not objectionable on that account after verdict where the sufficiency of the indictment had not been challenged previously by demurrer or otherwise. (Page 84.)
3. BURGLARY—PROOF OF INTENT—SUFFICIENCY OF EVIDENCE.—Proof that defendant entered the bedroom of a young lady in the night where there was reason to suppose that he knew she was sleeping, and where articles of personal property were kept, will justify an inference that his intent was to commit either rape or grand larceny. (Page 84.)
4. SAME—IDENTIFICATION OF DEFENDANT.—It was not error to permit an eye-witness of a burglary to testify that she afterwards saw defendant at police headquarters and recognized him as the man who committed the crime. (Page 85.)

5. APPEAL AND ERROR—OBJECTIONS TO EVIDENCE—WAIVER.—On appeal objections to evidence admitted are waived where no exception was saved at the time to the court's ruling. (Page 86.)

6. INSTRUCTIONS—REPETITION.—Proper instructions requested were properly refused where they were embodied in the court's charge. (Page 86.)

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

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

1. There is no fatal variance between the allegation and the proof. The name "Nowlin" and "Nolan" are *idem sonans.* 72 Ark. 613; 1 Ark. 503; 20 Ark. 97; 12 Ark. 128; 62 Ark. 516; 35 S. W. (Tex.) 173; 91 Va. 808; 29 Cyc. 272 *et seq.*

2. There is no error in admitting the testimony touching the identification of the defendant at the city hall by the prosecuting witness. It was competent for her to tell the circumstances under which she next saw the defendant. 103 Ark. 165.

3. No exceptions were saved to the court's failure to exclude the testimony relative to frequent arrests of Baker, appellant's associate. Moreover, it was not improper for the jury to be informed of the character of the men with whom appellant associated. 53 Ark. 387.

McCULLOCH, C. J. The grand jury of Pulaski County returned two indictments against defendant, David Birones, one charging him with the crime of assault with intent to kill, committed by shooting at Miss Ruth Andrews, and the other charging him with the crime of burglary, committed by entering the dwelling house of Miss Mary Nolan in the night time with the felonious intent to ravish her, and also that he entered with the felonious intent to steal the property of said Mary Nolan. Pleas of not guilty were entered in each case, and by consent of the prosecuting attorney and defendant's counsel the two cases were tried together. The jury returned a verdict of guilty in each case, and defendant has prosecuted an appeal to this court.

No brief has been filed in behalf of the defendant, and we are compelled to look solely to the motion for new trial to determine what is relied on as ground for reversal, and only

such matters will be mentioned in the opinion as we deem worthy of discussion.

In the first place, the point is raised that there is a variance between the proof and the allegations in the indictment concerning the ownership of the house, it being alleged in the indictment that defendant entered the house of Miss Mary *Nowlin,* whereas the real name of the lady is Mary *Nolan.* The names having substantially the same sound, the variance is not sufficient to defeat the conviction under this indictment. *Rector* v. *Taylor,* 12 Ark. 128; *Bennett* v. *State,* 62 Ark. 516; *Taylor* v. *State,* 72 Ark. 613; *Burks* v. *State,* 35 S. W. (Tex.) 173; *Pitsnogle* v. *Commonwealth,* 91 Va. 808.

The indictment for burglary charged the entering of the house for two purposes, one with intent to commit rape and the other with intent to commit grand larceny. This was equivalent to charging the same offense committed in two different ways, and should have been embraced in separate counts of the indictment; but, inasmuch as the form and sufficiency of the indictment has not been challenged by demurrer or otherwise, it is too late after verdict to complain.

The testimony establishes the fact that Miss Andrews was spending the night with Miss Nolan in the apartments of the latter, and late in the night they discovered a man entering the room through a window, whereupon they both made an outcry, and he fired at Miss Andrews as they ran out of the room. The testimony of the two ladies coincided about the entry of the man into the room and the firing of the shots, and Miss Andrews positively identified the defendant as the man who committed the deed. She testified that she saw defendant at police headquarters when he was arrested a few days after the commission of the offense, and recognized him, and at the trial she pointed him out on the witness stand, and stated positively that he was the man who entered the room and fired the shot at her. Miss Nolan was unable to recognize the defendant. The evidence was, we think, sufficient to warrant the conviction for the offense named in each indictment. It is not disclosed by the verdict of the jury what the finding was as to the intent of the defendant, whether to commit rape or to commit grand larceny, but we are of the opinion that the jury were warranted in drawing the inference

from the circumstances that he entered the room with the intent to commit one of the felonies mentioned. He entered the bedroom of a young lady in the night time, where there is reason to suppose he knew she was sleeping, and where articles of personal property were kept, and it is not an unreasonable inference that he meant to commit larceny or to perpetrate the crime of rape upon the person of the young lady. The fact that, on account of alarm being given, he did not commit either of the offenses named is not conclusive of the fact that he did not enter for the purpose of committing one of those two offenses. *Harwick* v. *State*, 49 Ark. 514; *Monk* v. *State*, *ante* p. 12.

During the progress of the examination of Miss Andrews as a witness on the trial of the case, she was asked to relate the circumstances concerning her identification of defendant at the city hall just after his arrest. In reply to the question of the prosecuting attorney, she gave the following answer: "Well, Captain Clifton had planned for me to go in the adjoining room where he was sitting, and we went in first, and we were casually talking, and he was to be brought in and to be set in a chair facing me; that is how I got a good look at him." Defendant's counsel interposed an objection to any statement as to what took place at the city hall, whereupon the court ruled that "the State has a right to show, not what they may have told her, but where she next saw him and under what circumstances, without saying anything about what anybody else told her." The witness merely continued with the statement that she saw the defendant at police headquarters, and nothing else was related concerning the identification. The court at one time permitted another witness to testify that Miss Andrews identified the defendant at police headquarters, but subsequently the court withdrew this and directed the jury not to consider any testimony in that connection, except the bare statement of Miss Andrews that she saw the defendant at police headquarters and recognized him. In the recent case of *Warren* v. *State*, 103 Ark. 165, we held that what is termed an extrajudicial identification is inadmissible as original testimony. The ruling of the trial court in excluding the testimony of the witness, Wilson, was in accordance with the announcement of this court in the Warren case; but the testimony of Miss Andrews, in stat-

ing that she saw defendant at police headquarters and recognized him, in nowise violated the rule we have laid down. It was entirely competent for her to state how often she had seen the defendant before and after the commission of the crime, and whether she recognized him or not.

Another error of the court is assigned in the motion for new trial, in permitting a witness to testify concerning the frequent arrest of one of defendant's associates; but, as no exception was saved to the court's ruling at the time, we are not at liberty to pass upon the correctness of the ruling.

The court refused to give any of the instructions requested by defendant's counsel, but all of them which constituted correct statements of the law were embodied in the court's charge to the jury.

A careful examination of the record discloses no error, and the judgment must therefore stand affirmed. It is so ordered.

BIEDERMAN v. PARKER.

Opinion delivered October 14, 1912.

1. JUDGMENT—CONCLUSIVENESS.—A judgment is conclusive only between tne parties and their privies. (Page 89.)
2. SAME—EFFECT AS TO STRANGERS.—A judgment is evidence of nothing, in a subsequent action between different parties, except that it had been rendered. (Page 89.)
3. SHERIFF AND CONSTABLE—WRONGFUL SEIZURE UNDER ATTACHMENT—LIABILITY.—In levying an attachment or execution which specifies no particular property to levy on, a constable is bound at his peril to know that the property he seizes is the property of the defendant in the writ and subject to seizure. (Page 90.)

Appeal from Columbia Circuit Court; *Jacob M. Carter*, Judge on exchange; reversed.

Eliot, Chaplin, Blayney & Bedal, for appellants.

1. On appeal by the plaintiff, where the lower court has directed a verdict for the defendant, the evidence will be considered in the light most favorable to the plaintiff in determining whether the court erred in directing the verdict. And, if there was any testimony whatsoever on which the jury could

have found a verdict for the plaintiff, the judgment will be reversed. 96 Ark. 394; 146 S. W. (Ark.) 497.

The facts disclose a clear case of conversion, and the execution is no defense to the officer and sureties on his bond. 41 Ark. 285, 290; 67 Ark. 189; 82 Ark. 414.

2. The court erred in excluding testimony to contradict the recitals to the Parr judgment. A judgment of a justice of the peace is only *prima facie* evidence of its recitals and may be impeached by competent evidence. 82 Ark. 414; 43 Ark. 230; 58 Ark. 181.

W. H. Askew, for appellees.

1. The court was right in directing a verdict. The lumber was subject to a laborer's lien in favor of Parr, which was fixed by the action in the justice court and the lumber ordered sold. Without authority of law or from Parr the special constable allowed Cooper to give bond and remove some of the property. The regularity of the judgment against Young and Rhodes is not questioned. The property afterwards levied on and sold was there on the mill ground with the other lumber belonging to Young and Rhodes; and if it had ever been in possession of Robinson Lumber Company, it was not then, and was the property attached.

2. There was no error in excluding the testimony tending to impeach the integrity of the justice's docket entry. Cases cited by appellant confine the doctrine of *prima facie* evidence of the recitals of the justice's entry solely to the point of jurisdiction. See 82 Ark. 414; 43 Ark. 230; 58 Ark. 181. See also 16 Ark. 104, 112.

HART, J. This was an action against a constable and the sureties on his bond for the sale and conversion of certain lumber alleged to be the property of the plaintiff, who was trustee in bankruptcy of the Robinson Timber & Lumber Company and the Robinson Lumber Company. The answer denied the plaintiff's right to the property and justified under legal process. At the conclusion of the evidence the court directed a verdict for the defendants, and the plaintiff has appealed.

The facts, so far as are necessary for a determination of the issues raised by the appeal, are as follows:

Ed. Rhodes and Leake Young were partners under the

firm name of the Waldo Lumber Company, and were engaged in running a saw mill. In 1908 the firm sold a quantity of lumber to the Robinson Lumber Company. The lumber was stacked out to itself on the mill yard, and was delivered to an agent of the purchaser. Between sixty and ninety days after the sale of the lumber was made T. M. Parr sued Rhodes & Young before a justice of the peace, and the lumber was attached. The Robinson Lumber Company was not made a party to the suit. The judgment rendered by the justice of the peace, caption and style of the case being omitted, is as follows:

"On this, October 10, 1908, comes the plaintiff, T. M. Parr, by attorney, T. W. Hardy, and also comes the defendants, Ed. Rhodes and Leake Young, by their attorney, Mr. Lile, and, said cause coming on for hearing, the following judgment is entered herein by consent of plaintiff and defendants.

"It is ordered, considered and adjudged by the court that the plaintiff, T. M. Parr, have and recover of and from the said defendants, Ed. Rhodes and Leake Young, the sum of two hundred and eighty-five dollars for his debt for labor and services performed in the manufacture of 28,000 feet of hardwood lumber, which has been attached in this cause. It is further ordered and adjudged by the court that the plaintiff, T. M. Parr, have laborer's lien upon the said 28,000 feet of oak lumber to the amount of one hundred and forty dollars. It is further ordered and adjudged by the court that, in case the said one hundred and forty dollars is not paid within ninety days from this date, then the constable of this court is commanded and directed to sell said lumber under the attachment herein as required in cases of execution sales, and with the proceeds arising from said sale first pay the cost of this court and then with the residue to pay the said plaintiff the one hundred and forty dollars, for which he has a lien on said lumber."

The justice of the peace gave the constable authority to take a bond from the Robinson Lumber Company for the lumber, and the lumber was released from the attachment. Then a new justice of the peace and constable succeeded those who were acting at the time the judgment was rendered. In December, 1908, the justice of the peace who had succeeded the one who

had rendered the judgment issued an execution, and the constable levied it on the lumber. The Love Lumber Company became the purchaser at the execution sale for the sum of $223.75. After paying the costs of the suit, $210.05 remained, which was paid to T. M. Parr. Before the expiration of ninety days from the date of the judgment rendered in the justice's court, the Robinson Lumber Company tendered one hundred and forty odd dollars, the amount of the bond given by it, and the tender was refused. The lumber at that time had already been sold under the execution.

T. M. Parr testified that he was the plaintiff in the suit brought before the justice of the peace in September, 1908, and that he had been working for the Waldo Lumber Company as a laborer. He said he had never authorized the constable or any one else to release the lumber, and that he had never agreed to take a bond therefor.

It is manifest that the court erred in directing a verdict for the defendants. The testimony, as disclosed by the record, shows that the Waldo Lumber Company had sold and delivered the lumber to the Robinson Lumber Company between sixty and ninety days before it was attached in the suit of Parr against the Waldo Lumber Company in the justice's court. The Robinson Lumber Company was not made a party to the suit in the justice's court in which the lumber was attached. If the lumber belonged to the Robinson Lumber Company at the time it was attached in the suit before the justice of the peace, the seizure of the lumber under attachment in the justice's court was unauthorized and wrongful, and its subsequent sale under orders of the justice could only be justified by showing that the rights of the Robinson Lumber Company were adjudicated by the justice before ordering the sale. *Albie* v. *Jones*, 82 Ark. 414.

It is well settled that a judgment is only conclusive between the parties or their privies. *Avera* v. *Rice*, 64 Ark. 330; *Treadwell* v. *Pitts*, 64 Ark. 447; *Doss* v. *Long Prairie Levee Dist.*, 96 Ark. 454.

As we have already seen, the Robinson Lumber Company was not a party to the attachment suit before the justice of the peace, and it is well settled in this State that a judgment is evidence of nothing in a subsequent action between different

parties, except that it had been rendered. *Thomas* v. *Hinkle*, 35 Ark. 450; *Doss* v. *Long Prairie Levee Dist., supra.*

It will be observed that the record in this case shows that the lumber was sold and delivered to the Robinson Lumber Company before it was seized under the writ of attachment in the case of Parr *v.* Rhodes & Young, and the judgment of the justice of the peace is not evidence that Parr had a lien on the lumber superior to the rights of the Robinson Lumber Company. This is so because the Robinson Lumber Company was not a party to the suit. So far as disclosed by the record in the present appeal, Parr had no right to assert a lien against the lumber. It is true he testified that he had been working for the Waldo Lumber Company as a laborer just prior to the bringing of his suit against that company before the justice of the peace, but he does not state how much, if anything, the Waldo Lumber Company owed him, nor does he testify to any state of facts from which it might be inferred that he was entitled to a lien on the lumber which had been sold and delivered to the Robinson Lumber Company.

In levying an attachment or execution which specifies no particular property to levy on, the constable is bound at his peril to know that the property he seizes is the property of the defendant in the writ and subject to execution. *Meadow* v. *Wise*, 41 Ark. 285.

It follows that the court erred in directing a verdict for the defendants, and for that error the judgment will be reversed, and the cause remanded for a new trial.

GOODRICH *v.* BAGNELL TIMBER COMPANY.

Opinion delivered October 14, 1912.

1. BANKRUPTCY—PRIOR LIEN.—Where a creditor brought a creditor's suit to fix a lien on the property of an insolvent debtor sixteen months before bankruptcy proceedings were instituted against him, the creditor's lien is entitled to priority. (Page 93.)
2. FRAUDULENT CONVEYANCE—DEED FROM HUSBAND TO WIFE.—Where a wife permitted her husband to deal with her property as his own, and to obtain credit on the strength of such ownership, she will be estopped, as against his creditors, to claim ownership of same as consideration for a conveyance from him to her. (Page 94.)

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

J. N. Rachels, for appellants.

1. The demurrer should have been sustained. The complaint does not allege that George Goodrich became insolvent by reason of the conveyances alleged, nor that there is not yet property belonging to him subject to execution sufficient to pay the plaintiff's demand, nor the issuance of an execution and the return of same unsatisfied for failure to find property on which to levy. 67 Ark. 325 Cyc, 330; 20. 413, 603; 18 Ark. 172; *Id.* 123; 15 Fed. 541; 134 U. S. 405; 74 Ark. 161; 75 Ark. 127. See also 96 Ark. 531, 538; 29 Ark. Law Rep. 132.

2. Property accumulated with the wife's funds is not subject to the debts of the husband, even though such accumulation is brought about by the business sagacity and management of the husband. 75 Ark. 562; 89 Ark. 77.

3. If Goodrich conveyed to his wife without consideration, still such conveyance was not fraudulent if he retained property sufficient to pay the debts he owed at the time of the conveyance, and plaintiff as one of the creditors could not complain. 96 Ark. 531.

S. Brundidge, Jr., for appellee.

1. The decree should be affirmed for failure of appellant to comply with rule 9 in abstracting the testimony. This court will not explore the transcript for testimony omitted from the abstract. 57 Ark. 305; 89 Ark. 351; 87 Ark. 205.

2. The motion for a stay of proceedings on account of the filing by George Goodrich of a petition in bankruptcy and his having been declared a bankrupt was properly overruled. 103 Ark. 105.

3. By his own admission George Goodrich was insolvent at the time of the conveyance to his wife.

It is elementary law that a conveyance by an insolvent debtor of his property to his wife or other near relative is a badge of fraud. The evidence that the conveyance in this case was fraudulent is clear and convincing. 86 Ark. 230, and cases cited; 68 Ark. 162; 50 Ark. 289.

If land is purchased for a wife and deed taken in the name of the husband, and she allows it to remain so for six or seven

years, she would be estopped to claim title as against creditors of the husband. 69 Ark. 350; 71 Ark. 611.

WOOD, J. This is a suit by the appellee against the appellants to set aside certain alleged fraudulent conveyances. The complaint alleged that, in a suit pending between George Goodrich and the appellee, appellee, on the 15th day of December, 1908, obtained a judgment, which, with interest, now amounts to $1,200; that during the pendency of that suit and before the judgment was rendered appellant George Goodrich "transferred and conveyed all of his property, both real and personal, of every kind and character, to Mary E. Goodrich, his wife; that at the present time the said George Goodrich does not claim to be the owner of any real or personal property in his own right out of which judgment can be made."

The complaint further sets forth the various conveyances that were alleged to have been made, consisting of real and personal property, and alleged as follows: "Plaintiff states that all of said conveyances were made for the purpose of putting the property of the said George Goodrich beyond the reach of his creditors, and were made for a nominal consideration, and said conveyances were made in fraud of the rights of the plaintiff herein." And, further, "plaintiff charges that all of said transfers were made for the purpose of defrauding plaintiff, and with the fraudulent intent and purpose of placing the property of the said George Goodrich beyond the reach of his creditors."

The appellants demurred, setting up that the complaint "does not state facts sufficient to constitute a cause of action." It does not appear that any ruling on the demurrer was sought or made; but appellants answered separately, admitting that on the 24th day of June, 1905, George Goodrich conveyed to Mary E. Goodrich certain real estate (describing it); denied that the conveyance was made in consideration of the sum of $371 mentioned in the deed, but admitted that the sum was given by Mary E. Goodrich at the time, and averred that the property so conveyed was, prior to the conveyance, the sole and separate property of Mary E. Goodrich, the same having been bought and paid for by her, and was held in the name of George Goodrich because of an error in the making of the deed

of purchase therefor to him when the property had been purchased and paid for by Mary E. Goodrich.

The answer further denied that any of the transfers were made for the purpose of placing the property of George Goodrich beyond the reach of his creditors.

During the progress of the case appellant George Goodrich moved the court to stay the proceedings for one year, setting up that he had filed his petition in bankruptcy, and that the plaintiff's claim had no priority, and that he would be discharged from the payment thereof by the bankruptcy proceedings. The record shows that the trustee in bankruptcy was made a party defendant in the present suit, and he answered, setting up that he was entitled to all of the assets of appellant George Goodrich as trustee in bankruptcy, and prayed that as such trustee he be allowed to recover the money and property of the appellant George Goodrich. The court overruled the motion to stay the proceedings.

This ruling of the court was correct. The appellee, by its suit to cancel the alleged fraudulent conveyances, instituted about sixteen months before the bankruptcy proceedings were begun, acquired a specific lien on the property alleged to have been fraudulently conveyed which would entitle it to a priority in the distribution of the proceeds from the property, and the suit of the trustee in bankruptcy would not defeat appellee's right to have such proceeds applied to the payment of its claim in the distribution of the estate of the bankrupt. See *Boyd* v. *Arnold,* 103 Ark. 105; *Taylor* v. *Taylor,* (N. J. Ch.) 45 Atl. 440.

On the question of whether or not the conveyances were fraudulent, the testimony is voluminous, and it could serve no useful purpose as a precedent to discuss it in detail. The chancellor found that the conveyances as set up in the complaint were fraudulent, and the decided preponderance of the evidence shows that his finding is correct.

The appellant George Goodrich, testifying on the 13th of June, 1911, stated that he "had been insolvent eight or nine years." While the testimony in the record shows that from the year 1902 property, real and personal, amounting to $34,000, managed by appellant George Goodrich, as shown by his account with the banks, went through his hands, there is

nothing in the record to show what his liabilities were during all this time, and the chancellor was fully warranted in accepting his testimony to the effect that he was insolvent during the time stated by him. The appellant George Goodrich must be held to have known more about his financial condition than any one else, and there is nothing in the record to contradict his testimony showing that he was insolvent at the time of the alleged fraudulent conveyances to his wife.

The appellants claimed that the land alleged to have been fraudulently conveyed was the property of appellant Mary E. Goodrich. Even if this be conceded, it can not avail appellants, for the reason that the evidence shows that appellant Mary E. Goodrich, from the time of her marriage to her husband for a period of about forty-five years, permitted her husband to handle her money as his own. He did business for his wife for many years in her name as her manager, and then for several years in his own name, but he used funds obtained from her and mixed them indiscriminately with his own. The testimony of Mrs. Mary E. Goodrich shows that soon after their marriage she received $3,000. She turned the whole of it over to her husband, and thereafter she allowed him to manage her property and receive money from her and handle it as his own. She said she never kept an account of the money that she turned over to him; that he never paid any of the money back that he received from her. In other words, so far as creditors were concerned, there was nothing to put them on notice that the real estate in controversy was her separate property. Appellant George Goodrich obtained the deed in his own name to the land in suit in July. 1900, and held the same as his own until the 24th of June, 1905, when the deed to his wife was executed, a period of about five years. For at least a part of this time George Goodrich, according to his own testimony, was insolvent; yet he was doing business all these years on money and real estate which appellant Mrs. Mary E. Goodrich, after the institution of this suit, claimed belonged to her, but which until then she permitted him to hold and manage as his own.

As was said in *Cowling* v. *Hill*, 69 Ark. 350-1: "As the legal title to this land was in the husband, both he and his

wife must have known that his creditors were dealing with him under the belief that it belonged to him."

In *Driggs & Co.'s Bank* v. *Norwood,* 50 Ark. 42, we held (quoting syllabus): "Where a husband collected his wife's money and used it as his own, without objection on her part, for a period of more than ten years, and obtained credit on the faith of its being his own, the wife could not afterwards assert her claim to such money or its proceeds against the husband's creditors. Her assent to the husband's use of the money would in such case be presumed, in the absence of proof to the contrary."

The facts of this record bring the case at bar well within the doctrine above announced.

The doctrine announced by this court in the above case concerning alleged fraudulent conveyances, which we need not repeat, fully warranted the chancellor, under the facts and circumstances disclosed by this record, in declaring the conveyances set up in appellee's complaint fraudulent and void. See *McConnell* v. *Hopkins,* 86 Ark. 225, and cases there cited.

The judgment is correct, and is therefore affirmed.

HAYDEN *v.* HAYDEN.

Opinion delivered October 14, 1912.

1. ADMINISTRATION — DEMANDS AGAINST ESTATES — VERIFICATION.—In suits against estates, either by ordinary action or before the probate court, it is necessary to produce at the trial an affidavit of the justice of the claim and of its nonpayment made before commencement of the action, in substantial compliance with Kirby's Digest, § 114, or the claimant will be nonsuited. (Page 97.)
2. SAME—WHAT ARE "DEMANDS."—The term "demand" in Kirby's Digest, § 114, is comprehensive, and includes all claims capable of assertion against the estates of deceased persons, whether arising out of contract or tort, and whether the suit to establish the same is begun by ordinary action or in the probate court. (Page 98.)
3. SAME—SUFFICIENCY OF VERIFICATION.—A verification of a complaint in the ordinary form, that the statements therein are true, is not a substantial compliance with Kirby's Digest, § 119, requiring an affidavit to claims against estates which shall allege "that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due." (Page 98.)

Appeal from Little River Court; *Jeptha H. Evans*, Judge, on exchange; reversed.

James D. Head, for appellant.

1. A claim against a deceased person must be verified by affidavit. Kirby's Dig., § 114. Such affidavit must be made prior to the commencement of suit, and where none is produced it is the duty of the court, on motion praying therefor, to enter judgment of nonsuit against the plaintiff. Kirby's Dig., § 119. The statute requiring verification is mandatory and must be fully complied with. 25 Ark. 318; 30 Ark. 756; 45 Ark. 299; 48 Ark. 304; 66 Ark. 327.

Motion for nonsuit may be taken advantage of at any time before final judgment. 2 Eng. 78; 14 Ark. 246; 21 Ark. 519.

E. F. Friedell, for appellee.

The affidavit to the complaint, made prior to the filing of the suit, was a substantial compliance with the statute, and was sufficient. 90 Ark. 340; 97 Ark. 296.

McCULLOCH, C. J. This is an action instituted by Mattie Hayden, in her own right as widow of Enoch Hayden, deceased, and as administratrix of said decedent, against the executor of the estate of D. R. Hayden, deceased, to recover the value of certain crops of cotton, corn, and alfalfa, the property of said Enoch Hayden, deceased, alleged to have been wrongfully converted by said D. R. Hayden to his own use. It is alleged in the complaint that Enoch Hayden died in April, 1905, in possession of a certain tract of land in Little River County, on which he had planted the crop aforesaid, and that thereafter said D. R. Hayden did enter upon said tract of land and convert the crop raised that year to his own use; the crop, when matured and gathered, alleged to be of the value of $561. The death of D. R. Hayden is alleged and the appointment of his executor, and judgment was prayed in the sum above mentioned, together with the costs of the action. The defendant moved the court for a nonsuit on account of failure on the part of the plaintiff to exhibit an affidavit as required by the statute concerning claims against estates of deceased persons. The court overruled the motion, and defendant filed an answer denying that D. R. Hayden wrongfully took possession of the aforesaid crop, but alleged that, on the contrary, he was

landlord of Enoch Hayden, and after the latter's death took possession of the lands for the purpose of cultivating and gathering the crop, which he did at his own expense, and that the value of the crop amounted to less than the indebtedness due him as landlord. It appears from the evidence adduced that Enoch Hayden occupied the land in question as tenant of D. R. Hayden; that he died in April, 1905, after having cultivated a portion of the land, and that thereafter D. R. Hayden took possession and completed the cultivation of the crop and gathered it and sold the same. The case was tried upon the theory, conceded to be correct, that D. R. Hayden was the landlord of Enoch Hayden, and that he took possession of the crop as such, and the point at issue was whether or not the plaintiff agreed with D. R. Hayden, after the death of her husband, for him to take possession of the land and crop, and as to the value of the crop gathered from the land, the expenses of cultivating and gathering the crop, and the amount due D. R. Hayden as landlord. The jury returned a verdict in favor of the plaintiff in the sum of $150, and defendant, after the overruling of his motion for new trial, appealed to this court.

The statutes of this State prescribe the mode by which demands against estates of deceased persons shall be exhibited and enforced, and, among other things, prescribe that "the claimant shall append to his demand an affidavit that nothing has been paid or delivered toward the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due." Kirby's Digest, § 114. The statute further provides that "if the affidavit required for authenticating claims against deceased persons be not produced in an action against an executor or administrator for a debt against the deceased, the court shall, on motion, enter a judgment of nonsuit against the plaintiff; and the affidavit must appear to have been made prior to the commencement of the action." Kirby's Digest, § 119.

It has been repeatedly held by this court that "in suits against estates, either by ordinary action or before the probate court, it is necessary to produce at the trial an affidavit of the justice of the claim and of its nonpayment made before commencement of the action, or the claimant will be nonsuited."

Ryan v. *Lemon*, 7 Ark. 78; *State Bank* v. *Walker*, 14 Ark. 234.

The term "demand" is comprehensive, and includes all claims capable of assertion against the estates of deceased persons, whether arising out of contract or tort, and whether the suit to establish the same is begun by ordinary action or in the probate court. *Green* v. *Brooks*, 25 Ark. 318; *McIlroy Banking Co.* v. *Dickson*, 66 Ark. 327; *Planters' Mutual Ins. Assn.* v. *Nelson*, 80 Ark. 103; *Estate of Halleck*, 49 Cal. 111; *Gay* v. *Louisville*, 93 Ky. 349; Schouler on Executors, § 429.

The statute (section 119, Kirby's Digest) requiring the production of the affidavit is mandatory, and, unless same is produced, on motion nonsuit must be ordered. *Ross* v. *Hine*, 48 Ark. 304. The affidavit need not follow the language of the statute literally, but must substantially comply therewith. *Eddy* v. *Loyd*, 90 Ark. 340; *Wilkerson* v. *Eads*, 97 Ark. 296. The verification of the claim in this case does not substantially comply with the statute, for it does not contain a statement, either directly or by inference, that "nothing has been paid or delivered toward the satisfaction of the demand except what is credited thereon, and that the sum demanded, naming it, is justly due." The only affidavit in the record is the one in the ordinary form of verification of the complaint, reciting that the statements made in the complaint are true. The complaint, in substance, merely alleges that D. R. Hayden wrongfully converted certain property, of the value named, to his own use, and judgment is prayed for in that amount. It does not state whether anything has been paid on the demand, nor that the sum demanded is justly due. We are of the opinion that the verification wholly fails to comply with the statute, which is mandatory in its terms, and the court has no discretion but must order nonsuit. The Legislature has prescribed the terms upon which a demand against a deceased person may be asserted, and nothing remains to the court but to obey the legislative mandate. The judgment is therefore reversed, and the cause remanded with directions to nonsuit plaintiff.

HOOKER *v.* SOUTHWESTERN IMPROVEMENT ASSOCIATION.

Opinion delivered October 14, 1912.

1. TAXATION—TAX DEEDS—CONFLICTING PRESUMPTIONS.—Where the plaintiff in a suit to remove a cloud upon his title held under a deed from the State Land Commissioner conveying land forfeited for taxes, and the defendant under a clerk's tax deed, each deed constitutes *prima facie* evidence of a valid tax sale, but neither is conclusive against the other. (Page 99.)
2. CORPORATIONS—RIGHT OF FOREIGN CORPORATION TO SUE IN STATE.—The act of May 29, 1907, requiring foreign corporations to pay a franchise tax as a condition of doing business in the State, does not prevent a foreign corporation from suing in the courts of the State if it is not transacting any business in the State. (Page 100.)
3. TAXATION—SALES TO STATE—CERTIFICATE.—Under the revenue law in force in 1877, the only certificate of sales of forfeited lands to the State which the clerk was required to make was a certificate to the State Auditor after the date of expiration of the time for redemption. (Page 100.)
4. SAME—NECESSITY OF WARRANT.—A sale of land for taxes made in 1901 for the taxes of the preceding year was void where the county clerk issued no warrant authorizing the collection of such taxes. (Page 100.)

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

C. F. Greenlee, for appellant.

H. A. Parker, for appellee.

MCCULLOCH, C. J. Both parties to this action claim title under certain tax sales to the forty-acre tract of land in controversy, appellee (who was plaintiff below) claiming title under a forfeiture to the State in 1877, and appellant claiming under a subsequent purchase at tax sale in the year 1901 for the taxes of 1900. The lands are wild and unoccupied. Appellee instituted this action to cancel appellant's tax title, alleging that the same was void on several grounds. Appellant answered, assailing the validity of the tax forfeiture under which appellee claims title, and also denied that the alleged defects existed in his own title. The chancery court decreed in favor of appellee, holding that its title under the tax sale of 1877 was valid and conveyed the title to the land, and that the subsequent tax sale under which appellant claims title was void.

The deed from the State Land Commissioner to appellee's grantor, and likewise the clerk's tax deed to appellant, each

constitutes *prima facie* evidence of a valid tax sale; but neither is conclusive against the other where tax titles are conflicting. *Rhea* v. *McWilliams*, 73 Ark. 557.

Appellee's right to maintain this action is challenged on the ground that it is a foreign corporation and has not complied with the laws of the State by paying the franchise tax prescribed in the act of 1907. It does not appear in proof that appellee was transacting any business in this State, and did not therefore fall within the terms of the statute requiring payment of the franchise tax. Section 1, act May 29, 1907. See also *White River Lumber Co.* v. *Southwestern Improvement Association*, 55 Ark. 625; *Rachels* v. *Stecher Cooperage Works*, 95 Ark. 7.

Appellee's title is assailed on the ground that the tax sale upon which it is based is void for two reasons, first, that the clerk failed to attach his certificate to the delinquent list or to the record of tax sales, and, second, that the sale was made on a day not authorized by law.

As to the first assault, it can be disposed of by the statement that there was no statute at that time expressly requiring the clerk to certify the delinquent list or to make any particular certificate to his record of the tax sale. The only certificate which the statute at that time required the clerk to make of sales to the State was the one to be transmitted to the Auditor after the date of the expiration of the time for redemption.

The revenue law then in force provided that tax sales should be made on the second Monday in June; but the General Assembly of 1877 passed a special act postponing the collection of delinquent taxes for the year 1877 in Monroe County, and providing that the tax sale should be held on the third Monday in August; and that was the day on which the sale in question was made. See act March 7, 1877.

There is nothing in the record upon which a successful assault on the validity of appellee's tax title can be based, therefore it is our duty to treat it as valid.

There is an agreement to the effect that the record shows there was no warrant made by the county clerk authorizing the collection of the taxes for the year 1900. This renders the sale void. *Keith* v. *Freeman*, 43 Ark. 296; *Liddell* v. *Stone*, 101 Ark. 328.

It follows that the chancery court was correct in sustaining appellee's title and in declaring appellant's title to be void.

Decree affirmed.

METROPOLITAN LIFE INSURANCE COMPANY v. JOHNSON.

Opinion delivered October 14, 1912.

1. INSURANCE—STATEMENTS OF APPLICATION—CONSTRUCTION.—Whether statements in an application for insurance are warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation which they bear to other parts of the policy or application, all reasonable doubts being resolved in favor of the assured. (Page 105.)
2. SAME—WARRANTY.—A warranty, being a part of the contract itself, as contradistinguished from a representation which is a mere inducement to the policy, must necessarily appear in the contract itself or be so referred to in the policy as to indicate that it is intended to form a part of the contract. (Page 105.)
3. SAME—EFFECT OF FALSE REPRESENTATIONS.—Where answers in an application for life insurance constituted merely representations, a misrepresentation or omission to answer will not avoid the policy unless wilfully or knowingly made with intent to deceive. (Page 105.)

Appeal from Craighead Circuit Court, Jonesboro District; *William J. Driver*, Judge; affirmed.

STATEMENT BY THE COURT.

Fanny Johnson sued the Metropolitan Life Insurance Company upon a policy issued upon the life of her sister, Hattie Bentley. No controversy is made as to the issuance of the policy and the death of the assured, but the payment of the policy is resisted on the ground that the insured made certain false answers in response to questions asked her in her application, and that said answers were warranties. The policy of insurance was not introduced in evidence. The application is dated December 31, 1910, and, so far as is material to the issues raised by the appeal, is as follows:

"To the Metropolitan Life Insurance Company:

"To induce the Metropolitan Life Insurance Company to issue policy, and as consideration therefor, I agree, on behalf of myself and of any other person who shall have or claim

interest in any policy issued under this application, as follows:

"Wherever nothing is written in the following paragraph, it is agreed that the declaration is true without exception.

"2. I have never had any of the following complaints or diseases: apoplexy, asthma, bronchitis, cancer or other tumor, consumption, disease of brain, disease of heart, disease of kidneys, disease of liver, disease of lungs, disease of urinary organs, dropsy, fistula, fits or convulsions, general debility, habitual cough, hemorrhage, insanity, jaundice, paralysis, pleurisy, pneumonia, rheumatism, scrofula, spinal disease, spitting or raising blood, ulcer or open sores, varicose veins, except .....

"4. The following is the name of the physician who last attended me, the date of attendance and the name of the complaint for which he attended me: Doctor Lutterloh, 1907, malarial fever.

"5. I have not been under the care of any physician within two years unless as stated in previous except .....

"11. No one of my parents, grand-parents, brothers or sisters ever had consumption or any pulmonary or scrofulous diseases, except.....

"I hereby declare that the application to the Metropolitan Life Insurance Company for an insurance on my life was signed by me, and that I renew and confirm my agreements therein as to the answers given to the medical examiner, and I hereby declare that said answers are correctly recorded hereon.

"Signature of applicant. Hattie Bentley.

"Every answer must be true or the policy will be void. Dated at Jonesboro, Ark., this 31st day of December, 1910."

Dr. J. H. Campbell, on behalf of the defendant, testified: "I am a practicing physician, and knew Hattie Bentley in her lifetime. She died about the 23d day of August, 1911, and I waited upon her in her last illness. Her symptoms were hemorrhages and expectorations and fever, dysentery and pleuric pains. I diagnosed her case as phthisis consumption. 'Phthisis' means disease of the lungs. I waited on her as a physician before that time. In 1908 I treated her for chills and fever. The last time I treated her was in July, 1909, and at that time she had a slight hemorrhage. I thought she had consumption at that time. In October, 1910, she had another

hemorrhage, and I then came to the conclusion she had consumption. I waited on Hattie Bentley's mother in 1895 and 1896. She had consumption. I prescribed for Lee Bentley, a brother of Hattie Bentley, in December, 1911, or January, 1912. He had a hemorrhage."

Dr. C. N. Lutterloh, for the plaintiff, testified as follows: "I treated Hattie Bentley about the 24th of May, 1911. She was suffering with pneumonia. If she had consumption, I did not find it out in treating her. I treated her mother for malaria. Neither Hattie Bentley nor her mother had consumption that I know of."

The brothers and sisters of Hattie Bentley testified that she did not have consumption, and that none of her brothers and sisters nor her mother had it.

The defendant requested the court to give the following instructions:

"(1) You are instructed that the answers of the insured, Hattie Bentley, to the questions in the application were warranted by her to be true; and if you find that her answers to any such questions were untrue, you will find for the defendant.

"(2) You are further instructed that if you find that the insured was suffering with consumption or phthisis prior to the time she applied for insurance with the defendant company, you will find for the defendant.

"(3) If you find that the insured was, prior to her application, last attended by another physician than stated in her said application, you will find for the defendant.

"(4) If you find that the mother, brothers, or sisters or other immediate members of the family of the insured died or were affected with consumption, you will find for the defendant."

The court refused to give instruction numbered 1, as asked by the defendant, but gave said instruction by inserting the word "knowingly" before the word "untrue," in the latter part of the instruction.

Instruction numbered 2, as asked by the defendant, was given in the form requested. The court refused to give instruction numbered 3, asked by the defendant, and gave instruction numbered 4 in a modified form as follows:

"If you find from a preponderance of the evidence that the mother, brothers or sisters or other immediate members of the family of the insured died, or were affected, with consumption prior to the application, and that the applicant had knowledge of the fact that the death of any such member or members of her family was due to such disease, or that any such member or members of her family had any such disease at the time, your verdict should be for defendant."

The jury returned a verdict for the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Gordon Frierson, for appellant.

1. The court erred in modifying instruction 1 requested by appellant by inserting the word "knowingly" before the word "untrue." The applicant's statements were made warranties, and it is immaterial whether or not she had knowledge of their falsity. 113 Ind. 159; 125 N. Y. 761; 48 N. Y. S. 753; 5 O. Dec. 268; 16 Pa. Sup. C. 520; 50 Vt. 630; 114 Wis. 510.

2. Instruction 3, requested, should have been given. Appellant was entitled to have the truth of the applicant's statement that the last physician to attend her was Doctor Lutterloh, in 1907, submitted to the jury. 58 Ark. 528; 72 Ark. 620; 18 L. R. A. (N. S.) 362.

3. Instruction 4 was correct as asked. The court erred in modifying it.

Hawthorne & Hawthorne, for appellee.

1. Where the policy of insurance has not been brought into the record, this court will not presume that statements made by the applicant to the medical examiner were warranties. Whether or not such statements are warranties depends upon the policy itself, whether they are covered by or referred to therein and are agreed to be taken as warranties. 58 Ark. 528; 59 Ill. 123; 2 So. 125.

Statements contained in an application for life insurance will not be construed as warranties unless both the provisions of the application and the policy, taken together, leave no room for any other construction, 39 L. R. A. 326; 111 U. S. 335; 188 U. S. 726.

2. The court was right in modifying the first instruction;

and even then it was too broad, and more favorable to appellant than the law required. 94 Ark. 390; 58 Ark. 528; 72 Ark. 620; 29 S. E. 615; 102 N. W. 1020; 52 S. W. 862; 107 Fed. 402; 12 Am. St. Rep. 393.

HART, J., (after stating the facts). The correctness of the modification to the defendant's instruction depends upon whether or not the answers to the questions made by the applicant, as set out in the statement of facts, were warranties or representations merely. In the case of *Providence Life Assurance Society* v. *Reutlinger*, 58 Ark. 528, the court said: "Statements or agreements of the insured which are inserted or referred to in a policy are not always warranties. Whether they be warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation they bear to other parts of the policy or application. All reasonable doubts as to whether they be warranties or not should be resolved in favor of the assured." (Citing authorities.)

The policy itself is the contract for insurance. In the case at bar the policy was not introduced in evidence, and, so far as the record discloses, the application was not inserted in it, nor was it referred to in any way in the policy. A warranty, being a part of the contract itself, as contradistinguished from a representation, which is a mere inducement to the policy, must necessarily appear in the contract itself in express terms or be so referred to in the policy as to clearly indicate that the parties intended it to form a part of the contract. *Spence* v. *Central Accident Ins. Co.*, 236 Ill. 444, 19 L. R. A. (N. S.) 88; *Mutual Benefit Life Ins. Co.* v. *Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Daniels* v. *Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 418, 59 Am. Dec. 192. Moreover, the language of the application shows that the answers to the questions propounded to her were intended by the parties to be representations merely, and not warranties.

It follows that, the application not being a part of the policy, any statements contained therein are representations and not warranties. A warranty differs from a representation in creating an absolute liability, whether made in good faith or not. The reason is that a noncompliance with a warranty operates as an express breach of the contract, while a misrepresentation

renders the policy void on the ground of fraud. The questions propounded in the application, as set out in the statement of facts, call for answers founded on the knowledge or belief of the applicant, and in such cases a misrepresentation or omission to answer will not avoid the policy unless wilfully or knowingly made with an attempt to deceive. 25 Cyc. 801, and cases cited. See also *Reppond* v. *Nat. Life Ins. Co.*, (Tex.) 11 L. R. A. (N. S.) 981; *Aetna Life Ins. Co.* v. *Rehlaender*, 68 Neb. 284, 4 A. & E. Ann. Cas. 251.

The plaintiff introduced testimony tending to show that neither the applicant nor her mother or brothers or sisters had consumption at the time her application was made for insurance.

The right of the plaintiff to recover depended upon whether or not the answers of the applicant to the questions propounded to her were made in good faith or not. Hence the court did not err in modifying the instructions asked by the defendant.

Therefore the judgment will be affirmed.

SCHOOL DISTRICT NO. 22 OF POINSETT COUNTY *v.* CASTELL.

Opinion delivered October 14, 1912.

1. SCHOOLS—EMPLOYMENT OF TEACHER BY TWO DIRECTORS.—A contract for the employment of a teacher, entered into at a meeting of a school board at which only two of its members were present, and of which meeting the third member had no notice, is invalid. (Page 108.)
2. SAME—NOTICE OF DIRECTORS' MEETINGS.—The requirement of the law that, before two of the directors of a school board could act in the absence of the third director, they must have given him notice of the meeting is not met by proof that there was a general understanding that two of the directors could act in the absence of the third director and without notice to him. (Page 109.)

Appeal from Poinsett Chancery Court; *C. D. Frierson*, Chancellor; reversed.

Going & Brinkerhoff, for appellant.

1. A contract entered into with two of three directors of a school district at a special meeting of which previous notice had not been given, and which meeting the third director did not attend, is invalid. 69 Ark. 159; 90 Ark. 335; 52 Ark. 511; 67 Ark. 236.

2. It can not be claimed that the third director ratified the contract in this case. The facts in *School District No.* 2 v. *Goodwin,* 81 Ark. 143, as so totally different from the facts here as to make that case inapplicable.

J. F. Gautney and *E. L. Westbrooke,* for appellee.

If the contract as originally executed was invalid, the evidence shows that it was acquiesced in by the third director and thereby validated. 81 Ark. 143, 144, 145; 83 Ark. 491; 67 Ark. 236.

FRAUENTHAL, J. This is an action instituted by a school district through its directors seeking to enjoin appellee from using the public schoolhouse of the district and from teaching a school therein and also to cancel a contract made with him to teach said school, which it is alleged was invalid. It is alleged in the complaint that a contract had been entered into with appellee to teach the school, but only two of the school directors had joined in its execution, and for that reason it was invalid. It was also alleged that the appellee was incompetent and had failed to perform his duties as teacher, and since the contract was made his license as a teacher had been revoked by the county superintendent of public schools. To this complaint appellee filed an answer in which he denied each of the above allegations and averred that he had been duly employed to teach the school for ten months and was faithfully carrying out said contract. Upon the filing of the complaint, a temporary restraining order was issued which was subsequently dissolved, and upon final hearing of the case the complaint was dismissed, and a judgment rendered in favor of appellee for damages for expenses incurred by him for paying railroad fare, hotel bills and other items in obtaining the dissolution of the temporary restraining order, amounting to a total of $30.63. It appears from the testimony that on September 4, 1911, appellee entered into a written contract with two directors of the school district by the terms of which he agreed to teach the school for a period of ten months from that date. He at once began teaching the school and continued for three weeks, when complaints were made by patrons charging that he was incompetent and failing to discharge correctly his duties as such teacher. He was requested by the two directors to quit teaching the school,

which he refused to do. Thereupon, at the suggestion of these two directors, the superintendent of public instruction of the county saw him and requested him to quit teaching the school, and on his failing to do so declared his license as a teacher revoked. This suit was then instituted, and the appellee did not teach the school thereafter. The appellee taught the school for three weeks, and we think there was testimony sufficient to warrant the finding of the chancellor that he was a competent teacher and performed his duties properly, and that the revocation of his license was made without notice or hearing, and therefore was unauthorized and invalid. The undisputed testimony, however, shows that the contract for teaching the school was entered into by only two of the directors of the district. The third director had no notice of, and was not present at, the meeting at which this contract was made, and did not know that the contract had been made. He did not know that appellee had been employed as such teacher, and there was no evidence adduced showing that he knew that appellee was teaching the school during said three weeks. It appears that the two directors who signed the contract lived in one end of the district and the third director lived at some distance at the other end; that there were two schools in the district; and that the directors had a general understanding or tacit agreement that the two directors would employ a teacher at one of these schools and the third director at the other. The third director testified that he did not know of appellee's contract until the suit was instituted; that if he had known that any one was complaining of his employment he would not have signed the contract, and that he joined the other directors in their action in seeking to restrain appellee from further teaching the school.

As stated by counsel for appellee in their brief, the sole questions presented by this appeal for determination are:

(1) Whether the contract signed by only two directors of the school district was binding, and

(2) If not, was it acquiesced in and ratified by the third director so as to validate it?

It has been repeatedly held by this court that a contract entered into at a meeting of a school board at which only two of its members are present, and of which meeting the third had no

notice, is invalid. *School Dist.* v. *Bennett,* 52 Ark. 511; *Burns* v. *Thompson,* 64 Ark. 489; *Springfield Furniture Co.* v. *School Dist.,* 67 Ark. 236; *School Dist.* v. *Adams,* 69 Ark. 159; *School District* v. *Allen,* 83 Ark. 491; *School Dist.* v. *Garrison,* 90 Ark. 335.

The manifest purpose of the school law in providing for a board consisting of three members is to obtain the advantage of the counsel of three directors at a meeting for transacting the school district's business. The fact that the testimony in this case shows there had been a general understanding or agreement between the directors of this school district that two of them could act in the absence of the third and without prior notice to him of a meeting for such action would not meet this requirement of the statute. Such an agreement or custom would simply lead to the encouragement of a neglect of and failure upon the part of one of the directors to perform his duty, for which a penalty is prescribed by our statute.

It is conceded that the contract made by two directors with appellee was, according to the undisputed evidence adduced in the case, invalid at its inception, but it is urged that it was acquiesced in and ratified by the third director and thus made binding on the district. Reliance for this contention is made upon the case of *School District* v. *Goodwin,* 81 Ark. 843. In that case it was held that the contract for the employment of a school teacher, made at a meeting of two directors of which the third had no notice, was binding if acquiesced in and ratified thereafter by the absent director. In that case, however, the testimony tended to prove that the teacher opened and began teaching the school under her written contract with the knowledge and acquiescence of this absent director. The teacher continued to teach the school for two months, and the absent director, as the secretary of the school board, drew warrants in this teacher's favor for each of the completed months which she taught. Testimony showed that all parties in authority, including the absent director, had knowledge of the fact that the contract of employment had been made with the teacher when she opened the school, and by their acts and conduct acquiesced in the contract, defective though it was, by knowingly permitting her to continue teaching for nearly half of the life of the contract. It was held that such evidence

was sufficient to prove the acquiescence in and the ratification of the contract by the entire board.

In the case at bar, however, the undisputed evidence shows that the absent director did not know that the contract of employment had been made with appellee, or that he was teaching the school. Without such knowledge the absent director could not have acquiesced in the contract which was made, and therefore there could not have been any ratification of it by him. It follows that the contract under which appellee was proceeding to teach this school was invalid and not binding upon the school district. The decree is accordingly reversed, and this cause is remanded with directions to enter a decree in accordance with the prayer of the complaint.

CRANDELL v. HARRISON.

Opinion delivered September 30, 1912.

APPEAL AND ERROR—LOCAL ASSESSMENTS—TIME FOR APPEALING.—Under Kirby's Digest, § 5542, providing that abutting property owners may be required to construct sidewalks, and that if the owner refuse to do so the same may be done by the city and a lien declared in favor of the city, the same to be enforced by "suits in equity to be brought in the manner and under the terms now provided by law for the foreclosure of property by improvement districts so far as applicable," and *Id.*, § § 5706, 5709, providing that in foreclosure suits by improvement districts the transcript on appeal shall be filed in the Supreme Court within twenty days after the decree was rendered, *held*, that an appeal from decree enforcing a lien in favor of a city for the construction of a sidewalk will be dismissed where the transcript is not filed in the Supreme Court within twenty days after the decree appealed from was rendered.

Appeal from Boone Chancery Court; *T. Haden Humphreys*, Chancellor; appeal dismissed.

J. W. Story, for appellant.

Pace & Pace, for appellee.

MCCULLOCH, C. J. This is an action instituted by the city of Harrison against appellant to enforce a lien in favor of the city for the cost of constructing a sidewalk in front of appellant's property, which he had refused, upon notice, to construct. A decree was rendered in favor of the city, and an appeal was taken to this court, but the transcript was not filed

here until nearly sixty days after rendition of the decree. The statute provides that if the property owner fails or refuses, after notice, to construct a sidewalk, the same may be done by the city at the owner's cost, and a lien shall be declared in favor of the city, the same to be enforced by "suits in equity to be brought in the manner and under the terms now provided by law for the foreclosure of property by improvement districts, so far as applicable." Kirby's Digest, § 5542. The statute regulating foreclosure suits by improvement districts provides that on appeal to this court the "transcript shall be filed in the office of the clerk of the Supreme Court within twenty days after the rendering of the decree appealed from," and that "no appeal shall be prosecuted from any decree after the expiration of the twenty days herein granted for filing the transcript in the clerk's office of the Supreme Court." Kirby's Digest, §§ 5706 and 5709. It is manifest from the language of the statute that the Legislature meant to provide a method of procedure in suits like this the same as in improvement district suits and to place the same restrictions thereon with reference to appeals as well as all other steps taken in the litigation. This being true, it follows that the appeal has not been prosecuted by filing transcript within the time prescribed by the statute, and, as no excuse is given for the delay, the question whether this court has the power to extend the time for cause does not arise. The appeal is therefore dismissed.

UNITED STATES BEDDING COMPANY v. ANDRE.

Opinion delivered October 14, 1912.

1. AGENCY—IMPLIED AUTHORITY OF AGENT.—To justify an implication of authority in an agent, it must appear that the act of the agent is not merely advantageous to or convenient for the principal, or even effectual in transacting the business in which he is engaged, but the act must be practically indispensable in order to execute the duty delegated to him. (Page 114.)
2. SAME—AUTHORITY OF TRAVELLING SALESMAN.—A travelling salesman has no implied authority to enter into a contract for advertising his principal's business in a newspaper or upon bill boards. (Page 114.)
3. SAME—AUTHORITY OF AGENT.—One who deals with an agent is put upon notice of the limitations of his authority, and must ascertain what that authority is, and, if he fails to do so, he deals with the agent at his peril. (Page 115.)

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

W. J. Lamb and *J. W. Rhodes, Jr.*, for appellant.

One dealing with an agent is bound to ascertain the nature and extent of his authority; and, if he deals with the agent without such knowledge, he does so at his own peril. 62 Ark. 33, 40; 92 Ark. 315, 320; 94 Ark. 301, 305; 102 S. W. 1066, 1069. The alleged contract was not within the apparent scope of authority of the agent. The duty of a travelling salesman is to solicit and transmit orders for goods, and extends no further. 46 Ark. 210, 214, 215; 43 Pac. 383; 86 Pac. 845; 6 Am. & Eng. Enc. of L., (2 ed.) 224; 53 Am. Rep. 745; 18 L. R. A. 667, note; 102 S. W. 1068.

Appellee, pro se.

The proof shows that the travelling salesman acted for the appellant in making the contract, and that appellant ratified it. 37 N. E. 1084; 115 Mo. 1. See, also, 49 Ark. 320; 96 Ark. 456; 93 Ark. 528.

FRAUENTHAL, J. This is an action instituted by appellee to recover for certain work and labor which he alleged he performed under a contract made with appellant through its agent. Appellee is engaged in a bill-posting business in the town of Osceola, and appellant is a mercantile corporation located in the city of Memphis. In the conduct of its business, appellant had in its employ a travelling salesman who was authorized to solicit orders for and make sales of its goods. Among its customers in Osceola was a retail firm to whom in shipping goods it also sent large printed advertisements which could be posted on bill boards. Appellee claimed that he had entered into a contract with appellant's salesman whereby he was employed to post said advertisements on his bill boards. Appellant denied that such contract was entered into by its salesman, and claimed that if it was he was unauthorized to make it.

The trial resulted in a verdict for appellee for the amount for which he sued.

The testimony on the part of appellee tended to prove that on March 10, 1911, Mr. Swift, the manager of said retail firm in Osceola, called him to his place of business and stated

that appellant's salesman came to see him about making a contract for advertising, and he thereupon entered into said contract with the salesman by which he agreed to post said advertisements on his bill boards for six months for the price of forty-four dollars. A day or two thereafter Mr. Swift received a letter from appellant, stating that its travelling salesman had advised it of the price appellee wanted for posting said advertisements, and that it refused to make such contract. As soon as he received this letter, Mr. Swift notified appellee that appellant refused to make the contract, or that it did not consider that it had a contract with him. It appears that appellee began posting the advertisements probably a day or two before receiving this notice and continued posting them for a short time thereafter, procuring them from Mr. Swift, and that he failed to post them further only because Mr. Swift had no more advertisements on hand. There was no testimony adduced upon the trial of any express authority given by appellant to its salesman to make this conract. On the other hand, the president of appellant's company testified that the company never gave its salesman any authority to make any contract with appellee; that no authority to make a contract of this character was ever given to the salesman at any time; and that said salesman never at any time made a contract for advertising for it. He testified that the sole power and authority given to the salesman was to solicit orders for goods and to make sales thereof.

The case was tried chiefly upon the theory that the contract for posting advertisements was as a matter of law within the apparent scope of the authority of appellant's salesman to make as its agent, and that it was within the province of the jury to determine whether or not under the evidence it was within the apparent scope of his authority to make this contract in this particular case. A number of instructions were given by the court in which it stated to the jury in effect that appellant was bound by any contract made by its salesman with appellee for posting said advertisements, if they found that "such agreement was such a one as was within the apparent scope of his authority to make."

The power of an agent to bind his principal must be determined by the actual authority which has been given by the

principal to him. Such authority may be given expressly, and it may arise also from implication. An agent has authority to do all that he is expressly directed to do; and he also has implied authority to act in accordance with the custom or usage of the business which he is employed to transact and to do what is reasonably necessary to accomplish that which he is directed to do. This implied authority to do acts by which the principal will be bound which are not expressly authorized is also spoken of as those acts which are within the apparent scope of the agent's authority. But, to authorize an inference of authority in an agent, it must appear that the thing done or transaction made was necessary in order to promote the duty or carry out the purpose expressly delegated to him. It is not sufficient that the act of the agent is advantageous to or convenient for his alleged principal, or even effectual in transacting the business in which he is engaged. The act of the agent must be practically indispensable and essential in order to execute the duty actually delegated to him. *Beckford* v. *Menier,* 107 N. Y. 407.

His implied authority is limited to those acts which are of like kind with the very act he is expressly impowered to do and from which the authority is implied, but his authority can never be extended by implication to do an act or make an agreement which is beyond the obvious purpose of his employment. The purpose for which a travelling salesman is employed is to solicit orders and make sales of goods; unless he is specially authorized to do so, he has no implied authority to do any act other than is usually done by other salesmen of like character; that is, to do those things and make those agreements which are necessary and usual to accomplish the purpose of this agency. Being employed for one purpose, he has no authority to do another, either actual or implied. In 1 Clark & Skyles on Agency, § 244, it is said: "A travelling salesman, like other agents, has implied authority to do all acts or make all contracts that are reasonably necessary and proper or usually done or made by other agents in the same or similar line of business. * * * in the absence of special authority to bind the principal, a drummer can merely solicit and transmit an order." It has been held by this court that a travelling salesman is only authorized to solicit orders and make sales, and has no implied authority to collect therefor; and that such salesman

has no implied authority to rescind a sale after it has been made. *Meyer* v. *Stone*, 46 Ark. 210; *American Sales Book Co.* v. *Whitaker*, 100 Ark. 360; *Lee* v. *Vaughan's Seed Store*, 101 Ark. 69.

In the case of *Tarpy* v. *Bernheimer*, 16 N. Y. Supp. 870, an action was instituted for advertising defendant's business in plaintiff's paper by order of defendant's agent. It appeared that the latter was agent only for selling the goods of the defendant, collecting bills and representing defendant before a board of excise. One of the defendants testified that the agent had no authority to contract bills for him or the firm, and that no paper containing such advertisement had been received by him or the firm. It was there held that these facts were insufficient to warrant a finding that the agent had authority to contract bills for such advertising.

In order to solicit orders for or to make sales of goods, it is not indispensable that the travelling salesman shall advertise them in a newspaper or upon bill boards. Such advertisements may be advantageous to the principal or to those buying from him; but a great many other expensive things might be done which would prove advantageous to the principal and such buyers, and yet none of them can be considered indispensable for the purpose of making the sale, and is not ordinarily understood to be incidental to the authority given to a travelling salesmen. The power to make contracts for advertising can not be implied from the power to sell goods and solicit orders, and therefore is not within the apparent scope of the authority of the travelling salesman in this case to make. A person dealing with an agent is at once put upon notice of the limitations of his authority, and must ascertain what that authority is. *Berry* v. *Barnes*, 23 Ark. 411; *City Electric Street Railway Co.* v. *First National Bank*, 62 Ark. 33.

Such person can not presume that such authority exists; he can not rely upon the representation of the agent as to what his authority is; he must make inquiry and use due diligence to learn the nature and extent of such authority. If he does not, he deals with the agent at his own risk; and if the authority of such agent is disputed, it devolves upon him to prove it.

In the case at bar there was no testimony adduced tending to prove that the travelling salesman ever made a contract of the kind sued on, or that it was the custom or a usage of such sales-

man to make such a contract. The undisputed testimony adduced showed that this agent was a travelling salesman authorized to solicit orders for and sell goods. As a matter of law, therefore, the power to make the contract sued on was not within the apparent scope of this travelling salesman's authority. It follows that the court erred in the instructions given in which it stated that appellant was bound by this contract if the jury found from the testimony that it was within the apparent scope of the agent's authority to make it.

For the above errors contained in the instructions given by the court, the judgment is reversed, and this cause is remanded for a new trial.

MARSHALL BANK v. TURNEY.

Opinion delivered October 21, 1912.

1. GIFT—NECESSITY OF DELIVERY.—In the case of a gift either *inter vivos* or *causa mortis*, delivery of the thing given is essential to a completed gift. (Page 118.)
2. SAME—SUFFICIENCY OF DELIVERY.—Where a father delivered two notes to his son to be collected and to place the proceeds in the bank to the father's credit, there was not such a delivery to the son as would conconstitute a gift. (Page 118.)
3. APPEAL AND ERROR—FILING MOTION FOR NEW TRIAL OUT OF TIME—PRESUMPTION.—Where a motion for new trial was filed out of time, it will be presumed, in the absence of a contrary showing, that the court granted permission that the motion should be so filed. (Page 119.)
4. SAME—DETERMINATION—DISMISSAL.—Where the judgment is reversed in a cause that is fully developed, it will not be remanded for a new trial, but may be dismissed on appeal. (Page 119.)

Appeal from Searcy Circuit Court; *George W. Reed*, Judge; reversed.

S. W. Woods, for appellant.

1. Giving the testimony its strongest probative force in favor of appellee, it fails to establish a gift. Thornton on Gifts and Advancements, 105-8; 44 L. R. A. 208; 18 L. R. A. 170; 23 L. R. A. 184; 1 Ark. 83; 79 Ark. 69; 72 Ark. 307; 43 Ark. 307; 59 Ark. 191; 60 Ark. 169; 20 Cyc. 1209, 1211 *Id.* 124, 125; 8 Am. & Eng. Enc. of L. (1 ed.) 1314; 122 N. E. 747.

2. It was error to permit appellee to testify to alleged conversations and transactions with the deceased, over the objections of appellants. Kirby's Dig., § 3093; 79 Ark. 69; 52 Ark. 550; 46 Ark. 306.

Appellee, pro se.

1. The appeal should be dismissed because the motion for new trial was not filed within the time required by law. Kirby's Digest, § 6218. A mere statement by an attorney that he was "unavoidably prevented" from filing the motion for new trial within three days is not sufficient.

2. The evidence sustains the verdict.

McCULLOCH, C. J. The plaintiff, John G. Turney, instituted this action to recover a sum of money deposited with the Marshall Bank of Leslie, Arkansas, in the name of his father, Dr. George Turney, during the latter's lifetime.

The undisputed facts are that Doctor Turney held two notes, executed to him by one Pate, for balance of purchase price of a tract of land, and he turned the notes over to the plaintiff with instructions to collect the same and deposit the money in the bank. Plaintiff collected the sum of $561 at different times during his father's lifetime, and deposited it with instructions to the cashier of the bank to place it to the credit of his father's account. During his father's lifetime he drew out a portion of it on checks to which he signed the former's name, thereby reducing the amount to $513.60, which was in the bank at the time of his father's death. Subsequent to that event he drew out further amounts for the purpose of paying debts of the estate, thus reducing the amount in the bank to the sum of $361.74. The bank paid those checks under an agreement with plaintiff that he would return the same to the bank if the payments were found to be unauthorized. Thereafter John Allen was appointed administrator of the estate of Doctor Turney, and the balance then in the bank to the credit of Doctor Turney was paid over to the administrator. This suit is against the bank, and against Allen as administrator, and Sarah Turney, the widow of Dr. George Turney.

In the trial below the plaintiff recovered a judgment against all of the defendants for said amount, which was paid over to the administrator, and the defendants appealed to this court.

There are numerous assignments of error as to rulings of the court in admitting evidence and in giving and refusing instructions, but we pass them all over without discussion except the one assignment that the verdict is not supported by the evidence, as the conclusion we reach upon that assignment is finally decisive of the case. We are of the opinion that, according to the undisputed evidence, the money in bank was not the property of the plaintiff, and that he was not entitled to recover the same, It is unnecessary to determine whether the alleged gift of the money by Doctor Turney to the plaintiff, if consummated by delivery, constituted a gift *inter vivos* or a gift in view of death, "*donatio causa mortis*," as expressed in the Latin phrase. In either kind of gift delivery of the thing is absolutely essential to the completed gift. *Ammon* v. *Martin*, 59 Ark. 191; *Hatcher* v. *Buford*, 60 Ark. 169. The plaintiff's own testimony shows that his father never intended to deliver the notes to him otherwise than for collection, nor that he intended to hold the money thus collected otherwise than as agent for the purpose of depositing it in the bank. We quote his own statement of the facts concerning the placing of the money in his hands: "He says, 'You take this money and protect me, and when I am gone I will expect you to pay all my debts, pay everything,' and I said, 'Father, I will place this money in the bank and in your name,' and he objected to that and said, 'Why?' and I said, 'I might die before you, and if I should my own administrator might come in and get the money and turn you outside,' and he said, 'I guess you are right.' "

The money was placed in the bank in the name of Doctor Turney, according to the understanding expressed above. This positively and absolutely excludes any idea of a delivery to the plaintiff, for it was not in his possession at all, either actual or constructive, after it was deposited in the bank. The other witnesses introduced by the plaintiff corroborate his statement, and the testimony of each of them goes to show that Doctor Turney turned the money over to his son to place in the bank and to attend to it for him, and not for the purpose of parting with his possession and losing dominion and control over it. This being true, plaintiff is not entitled to recover the money, and the judgment in his favor can not be sustained.

It is argued here by plaintiff that the judgment should be affirmed for the reason that the motion for new trial was not filed within the time prescribed by the statute. The record shows that the motion for new trial was filed by express permission of the court; but, even if this were not so, the presumption would be indulged, in the absence of a showing in the record to the contrary, that the court granted special permission for the motion for new trial to be filed out of time. *Fordyce* v. *Hardin*, 54 Ark. 554.

The judgment is reversed, and, as the case is fully developed, it need not be remanded for a new trial, but will be dismissed here.

It is so ordered.

McCORD v. WELCH.

Opinion delivered October 21, 1912.

EJECTMENT—EQUITABLE TITLE.—An equitable title is not sufficient to maintain ejectment.

Appeal from White Circuit Court; *Hance N. Hutton*, Judge; affirmed.

J. N. Rachels and *John E. Miller*, for appellant.

1. Amicable family settlements are encouraged, and when fairly made, strong reasons must exist to warrant interference by a court of equity. 15 Ark. 275; 41 *Id.* 270; 64 *Id.* 19; 84 *Id.* 610; 98 *Id.* 93. The cause was improperly transferred to the law court.

2. Proof of seizin and actual possession and "descent cast" makes a *prima facie* case for relief unless a better title is shown. 94 Ark. 59; 31 *Id.* 334; 40 *Id.* 108; 62 *Id.* 51. It was error to direct a verdict.

S. Brundidge and *Harry Neelly*, for appellee.

1. The cause was properly transferred to equity. Appellee had been in possession for twenty years or more. 81 Ark. 227. In ejectment plaintiff must recover on the strength of his own title. 96 Ark. 42.

2. The proof of the lost deed is too indefinite, vague and uncertain. 89 Ark. 44.

3. Plaintiffs had no title, as John H. Perkins had parted with his legal title to McCord before his death.

McCulloch, C. J. Appellants are the children and heirs at law of Anna D. McCord, deceased, who, it is alleged, was the owner at the time of her death, in the year 1891, of a tract of land in White County consisting of thirty acres; and they instituted this action to recover possession from appellee. The action was originally instituted in the chancery court of White County, but, on motion of appellee, and without objection on the part of appellants, the case was transferred to the circuit court of White County, where it proceeded to final judgment as an ejectment suit. On the trial of the case, after all the testimony had been adduced on both sides, the court gave a peremptory instruction to the jury to return a verdict in favor of appellee.

The only question, therefore, for our consideration is, whether there was sufficient evidence to warrant the submission of the issues to the jury.

It appears from the undisputed testimony that a tract of land, consisting of sixty acres, of which the land in controversy formed a part, was originally owned by John H. Perkins, who was the father of Anna D. McCord. He sold the land to his son-in-law, W. C. McCord, who was the husband of Anna D., and took his notes for the sum of $400 to cover the purchase price. The testimony adduced by appellants established the fact that John H. Perkins executed to W. C. McCord a deed conveying said lands to the latter, but that, after the death of Perkins, Mrs. McCord and the other children of Perkins treated the land as a part of the estate, and entered into an agreement for the division of the same. The testimony tended to show that the heirs allotted to Mrs. McCord the land in controversy and executed a deed to her conveying the same. That deed, having been lost, could not be produced, but appellants attempted, by testimony, to account for its execution. The testimony also tended to show that W. C. McCord consented to that division of the property and that his purchase money notes, which had never been paid, were returned to him and destroyed, but he did not join in the conveyance of the land or even surrender his deed which had never been recorded. Subsequent to his wife's death, he conveyed the land to one

Irvin, and the legal title passed by mesne conveyances to appellee. In this state of the proof, the trial court took the case away from the jury by a peremptory instruction in appellee's favor, and we are of the opinion that it was proper to do so. According to the undisputed evidence, the legal title was transmitted from Perkins to W. C. McCord by the former's deed, and thence to the appellee. The legal title had never been vested in appellants, whatever may be said of their equitable rights in the land, as it is well established that an equitable title is not sufficient to maintain ejectment. *Percifull* v. *Platt*, 36 Ark. 456; *Stricklin* v. *Moore*, 98 Ark. 30.

It is unnecessary to discuss the question whether, under the proof in this case, the appellants have any equitable rights in the land capable of assertion at this time, inasmuch as the case was transferred from the chancery court and tried in the circuit court as an ejectment suit without objection on their part.

No error was committed by the trial court, and the judgment is therefore affirmed.

NORMAN *v.* CAMMACK.

Opinion delivered October 21, 1912.

1. APPEAL AND ERROR—JUDGMENT VACATING DEFAULT JUDGMENT—APPEALABILITY.—A complaint by a defendant which seeks to vacate a default judgment on the ground that it was procured by fraud practiced by defendant's attorney is sustained by Kirby's Dig., § 4431, authorizing a new trial for fraud practiced by the successful party; and, the proceeding being in effect an independent action, a judgment granting relief is final and appealable. (Page 123.)
2. SAME—NECESSITY OF BILL OF EXCEPTIONS.—A judgment will not be reversed on appeal for insufficiency of the evidence where the evidence on which it was based is not brought up by bill of exceptions. (Page 123.)
3. INSTRUCTIONS—APPLICABILITY TO ISSUES.—When, in an action to recover on a note given for the purchase of stock in a corporation which became insolvent soon after the sale, there was no issue raised, either by the pleadings or the evidence, as to a failure of consideration for such note, it was error to instruct the jury to find for the defendant if there was no consideration for the note. (Page 127.)

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

Geo. W. Norman and *J. C. Knox*, for appellant.

1. It was error to overule the demurrer to the amended and substituted answer. Cammack was barred. Kirby's Dig., § 6220; 33 Ark. 161; *Ib.* 454.

2. Instruction No. 3 for defendant was erroneous. The question of no consideration was not in issue.

George & Butler and *Compere & Compere*, for appellee.

FRAUENTHAL, J. This is an action instituted by M. F. Norman, the plaintiff below, upon a note executed to her by the defendants. The note was for $3,800, dated February 20, 1906, and due January 1, following. It was signed by A. W. Cammack Company, W. T. Files, J. C. Norman and A. W. Cammack. The suit was instituted against the makers of the note, and was made returnable at the January, 1909, term of the circuit court. At that term of the court W. T. Files filed an answer, and the case as to him was continued. Judgment by default was then taken against the remaining defendants. Subsequently, during the same term of court, the judgment by default against the defendant Norman was set aside, upon motion of plaintiff's attorney. At the following term of said court, A. W. Cammack filed a complaint seeking to vacate said default judgment against him upon the ground, amongst others, that it had been obtained by fraud practiced by the plaintiff's attorney. To this complaint the plaintiff made answer, and the proceeding seeking to vacate said judgment was submitted to the court upon said complaint, the response and the evidence of witnesses; and the court entered a judgment vacating said default judgment and permitting the said defendant Cammack to file answer to the original complaint upon said note. That suit proceeded to trial and resulted in a judgment in favor of the defendants, from which this appeal is prosecuted.

From the judgment vacating the default judgment the plaintiff at the time prayed an appeal, but did not prosecute a separate appeal therefrom. No bill of exceptions was made of the evidence adduced upon the hearing of the complaint seeking the vacation of the default judgment, nor was any

motion for new trial filed. The appeal from that judgment is brought up with the appeal taken from the final judgment rendered in the trial upon the merits of the case, and the rendition of the judgment vacating the default judgment is assigned as one of the errors which calls for a reversal of said final judgment.

The proceeding seeking the vacation of the default judgment was warranted by section 4431 of Kirby's Digest. It was in effect an independent action for that purpose, and the judgment entered therein was final in settling the rights of the parties to a vacation of the default judgment, and was appealable. *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 163. In order to have such judgment reviewed upon appeal for any errors committed in its rendition, it was essential that the evidence adduced upon the trial of the proceedings should have been preserved by bill of exceptions, as in any other case appealed to this court; otherwise it will be presumed that there was sufficient evidence to support the findings made by the court rendering the vacating judgment. In such judgment it is recited that from the evidence the court found that the default judgment was procured through the fraud of plaintiff's attorney and the attorney whom defendant Cammack had employed to represent him to make defense to that suit. This was sufficient to justify the rendition of the judgment vacating the default judgment; and if the appeal prayed by plaintiff from that judgment has been properly perfected, although no separate appeal therefrom has been taken to this court, no alleged errors committed by the court in rendering that judgment have been properly preserved, so that they can be reviewed upon appeal. It follows that the judgment vacating said default judgment must be affirmed.

In their answer to the original complaint the defendants W. T. Files and A. W. Cammack admitted the execution of the note sued on, but alleged that it was executed for a certain interest which the plaintiff owned in a mercantile corporation, and they resisted recovery upon the ground (1) that plaintiff by her agent made false representations as to the assets and liabilities of said corporation which had induced the execution of the note, and (2) that the note was signed upon agreement that said Files should have thirty days in which to examine

whether said representations as to said assets and liabilities were true, and, if not, he would have the right within that time to refuse to make the purchase, and thereupon would be entitled to a return of said note. The testimony which was introduced upon the trial of this case is quite voluminous, and we find it only necessary to state in brief manner the testimony showing the contentions of the respective parties, in order to present the grounds for our determination of this appeal.

It appears from this testimony that James C. Norman and R. C. McBride were the owners of a mercantile business which they had conducted for some years, and in 1903, with the remaining stock of goods as the chief asset, they, in connection with A. W. Cammack, organized a mercantile corporation known as the A. W. Cammack Company with its place of business located at Portland, Arkansas. These three parties were the sole stockholders of the corporation, each being the owner of 120 shares of its capital stock, each share of which was of the par value of $25. In 1904 the plaintiff purchased an interest in this corporation. She was represented at all times in her transactions with this corporation and with the defendants by her husband, John C. Norman, who is the uncle of James C. Norman. She invested in that company something in excess of $6,000, obtaining therefor 160 shares of the capital stock of the A. W. Cammack Company, and an interest in a gin company owned by that corporation; and her husband as her agent assisted for a year or two thereafter in running the business of the company. Subsequently, the plaintiff desired to sell her entire interest in the corporation and gin company, and the controlling questions involved in this case are, to whom did she sell said interest, and what were the terms and conditions of the sale?

The testimony introduced upon the part of the defendants tended to prove that on February 20, 1906, James C. Norman approached said Files about making a purchase of plaintiff's interest in said corporation. Files thereupon met with plaintiff's husband and Jas. C. Norman and A. W. Cammack at the company's office on that day, and he and plaintiff's agent then entered into an agreement relative to the purchase of said interest. This testimony tended to prove

that John C. Norman, as plaintiff's agent, and James C. Norman then represented to the said Files that the property of the mercantile corporation consisted of a stock of goods which inventoried $7,000 and of book accounts amounting to $4,000, and of some mules, and that the stock in the gin company amounted to $1,500; that the liabilities of the corporation amounted to $2,000. That it was then agreed that the plaintiff would sell her interest in said companies to said Files for $3,800, for which the note was then executed by him, with James C. Norman and A. W. Cammack as sureties. That Files did not know anything relative to the assets and liabilities of the corporation, and it was agreed that he should have thirty days in which to investigate these; and if he found that the representations were not true, he should notify said James C. Norman and A. W. Cammack, and thereupon there would be no purchase and sale of the plaintiff's interest, and the note should be returned to him. There was also testimony adduced by defendants tending to prove that the representations made as to the amount of the stock of goods and accounts owned by the corporation were false, and that its liabilities were larger than represented. Within three or four days after February 20, Files learned this, and at once notified said Norman and Cammack that he was not satisfied and would not make the purchase. There was also testimony tending to show that Cammack at once notified plaintiff's husband and agent of the refusal of Files to purchase plaintiff's interest, and that he came to Portland at a later date and promised to surrender the note, but later refused to do so.

Testimony on the part of the plaintiff tended to prove that plaintiff sold her interest in the corporation and gin company to the A. W. Cammack Company for $3,800, for which that corporation executed this note with W. T. Files, James C. Norman and A. W. Cammack as sureties thereon; that she did not sell her interest in the corporation and gin company to said Files at all. This testimony tended also to prove that James C. Norman, in addition to the shares of stock owned by him in the corporation at its organization, had subsequently acquired the 120 shares owned by said McBride, and that on February 20, 1906, he sold this McBride stock to said Files for $500, for which Files executed to him his due bill, and this was

the sole interest which Files at any time purchased or owned in the corporation. This testimony further tended to prove that no false representations had been made to Files as to the assets or liabilities of the corporation, and that no agreement had been made with him that the note sued on should be held thirty days to await an examination of said representations as to the corporation by said Files before it should become effective.

These, briefly stated, were in substance the contentions of the parties as to the issues made by the pleadings in this case. The defendants contended that the plaintiff sold her interest in the mercantile corporation and gin company to said Files, and that he executed the note as principal, with said Norman and Cammack as sureties thereon; that representations were made to him as to the assets and liabilities, which he had a right to examine within thirty days before the note should become effective, and, if he found them untrue, it should be returned to him. That within the stated time he found that the representations made relative to the assets and liabilities of the corporation were false, and notified the parties of his refusal to purchase. The plaintiff contended that she had sold her interest in the properties of the corporation and gin company to the A. W. Cammack Company, which corporation signed the note through its president, A. W. Cammack, and that the defendants signed it as sureties for that corporation. On the trial of the case there was testimony adduced tending to show that the company was in bad financial condition in February, 1906, and that it continued for a year or so thereafter, when it failed and its stock became worthless. But there was no plea made by the defendants that there was a failure of consideration for which this note was executed, and such plea was not made an issue in the case.

The court gave certain instructions requested by the plaintiff, and refused to give a number of instructions requested by her, the rulings upon which it is urged by her counsel were such errors as to call for a reversal of the judgment. We do not deem it necessary to set any of these instructions out or to note them in detail. It is sufficient to say that we have examined them and do not find that any of the rulings in the

giving and refusing of instructions asked by plaintiff was so prejudicial as to call for a reversal of this case.

At the request of the defendant the court gave three instructions. Two of them refer to the issues made by the pleadings in the case, and we think correctly presented those issues. The third instruction given at the request of the defendants was as follows; "If the jury find from the preponderance of the evidence that no consideration was paid or delivered for said note, then your verdict will be for the defendant."

This instruction related to a matter which was not made an issue in the case. As above stated, the defendants did not in their answer plead a failure or want of consideration of the note. No evidence was introduced or directed to the issue as to whether or not there was a want or failure of consideration for the execution of this note. That was not an issue in the case, and did not call for the introduction of testimony thereon. If, as contended by the plaintiff, she sold her interest in the corporation to the A. W. Cammack Company, and the defendant signed the note sued on as sureties for that company, then they would be liable although subsequently the corporation became insolvent, because under such circumstances there was sufficient consideration for the execution of the note. The above instruction No. 3 was therefore entirely abstract and misleading. It may be that, because this corporation subsequently failed, the jury believed that at the time the note was executed it was in a failing condition, and for that reason there was no consideration for the note. On this account the instruction given was highly prejudicial to the rights of the plaintiff.

For the error in giving said instruction, the judgment must therefore be reversed, and the cause remanded for new trial.

REECE v. LESLIE.

Opinion delivered October 21, 1912.

1. LANDLORD AND TENANT—TENANCY BY THE MONTH—NOTICE TO TERMINATE.—In the case of a tenancy from month to month it is necessary to its termination, in the absence of an agreement between the parties

for notice of a different time, that the tenant should have thirty days' written notice to terminate it, the notice ending with a monthly period. (Page 129.)

2. SAME—QUESTION FOR JURY—DIRECTION OF VERDICT.—In an action of unlawful detainer by a landlord to recover premises leased by the month, it was error to direct a verdict for the plaintiff where plaintiff only gave fifteen days' notice to terminate the tenancy, and there was a dispute in the testimony as to whether there was an agreement that the lease might be terminated on fifteen days' notice. (Page 129.)

Appeal from Searcy Circuit Court; *George W. Reed*, Judge; reversed.

STATEMENT BY THE COURT.

Appellees brought suit in unlawful detainer against appellants for the possession of a certain storehouse in the town of Marshall.

The facts substantially are that W. A. Lindsey, at the time the owner of the property, in July, 1910, rented it to appellants, who went into possession thereof on August 1, 1910, and were to pay rent therefor at the rate of $25 per month. On December 15, 1911, Lindsey gave appellants written notice, in proper form, to vacate the property on January 1, 1912, and afterwards sold and conveyed the property to appellees, who, on December 26, 1912, gave appellants written notice to vacate the property on January 1, 1912. Appellants continued to occupy the property and suit was filed on January 20, 1912. No claim is made that appellants were behind with the payment of their rent.

Lindsey testified that he rented the property to them for an indefinite time, for a monthly rental of $25 per month, and that they were to vacate and surrender possession upon his giving them ten of fifteen days' notice. Appellants stated that there was no definite term agreed upon, but it was their understanding that they were to have, at least six months' notice to terminate their tenancy.

The court refused to give the instructions requested by appellants, instructed a verdict for appellees, and rendered judgment for double the amount of the rental value of the property, from which appellants appealed.

A. Y. Barr, for appellants.

1. Appellants being in possession, appellees bought

with notice of whatever rights or equities they possessed. 76 Ark. 25; 1 Tiffany on Landlord and Tenant, 865; 2 *Id.* p. 1429, § 196; 65 Ark. 471. A tenancy by the month can only be terminated on a month's notice. 65 Ark. 471.

2. Notwithstanding the common law rule, the parties can agree on the length of notice to be given. 58 Ark. 612; 2 Tiffany on Landlord and Tenant, 1432, § 196.

3. Kirby's Dig., § 4696, only applies to tenants for life or years.

S. W. Woods, for appellees.

1. Appellants were tenants at will. Any holding over after the expiration of the time would be at will, and on three days' notice unlawful detainer is the proper suit. 36 Ark. 518; Kirby's Dig., § § 3630, 3664. It may be brought by the lessor or his assignees. 41 Ark. 535; 18 *Id.* 284; 24 Cyc. 1040; 12 A. & E. Enc. Law, 757s. to 757w. (1 ed.), Kirby's Dig., § 3664; 36 Ark. 518.

2. A parol lease for longer than a year is void. 30 Mich. 237; 82 Mo. 688; 120 N. Y. 37; 52 Ga. 18.

3. Double rent was properly allowed. Kirby's Dig., § 4696; 74 Ark. 12.

KIRBY, J., (after stating the facts). The uncontradicted testimony shows that appellants were to pay rent from month to month, and, if theirs was a tenancy by the month, it was necessary, in the absence of an agreement between the parties for a different time, that appellants should have thirty days' written notice to terminate it, the notice ending with a monthly period. *Stewart* v. *Morrell,* 65 Ark. 471; *Frizzell* v. *Duffer,* 58 Ark. 612.

The testimony is in conflict as to whether or not a shorter time was agreed upon for the giving of notice, the appellee and its grantor claiming that it was agreed between the parties that they should have fifteen days' notice, which was given, and the appellants contending that they were entitled under the agreement to six months' notice.

If it was a tenancy by the month, as it appears to have been, it devolved upon the appellee to show that it had been terminated by the notice for the length of time notice was agreed to be given by its grantor, or, in the absence of such

agreement, for the length of time required by law before the bringing of suit, and, there being such conflict in the testimony, the court erred in directing a verdict.

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

UNITED STATES EXPRESS COMPANY v. LONG.

Opinion delivered October 21, 1912.

1. CARRIER—LOSS IN TRANSPORTATION—LIABILITY.—A shipper can not recover of a carrier for loss in weight of ginseng and other roots shipped over the carrier's route where the shipper testifies that he was not very careful about getting the exact weight of the packages before shipping them, and the consignee did not weigh them when received, since the loss in weight, if any, might have occurred after the articles were delivered to the consignee. (Page 135.)
2. EVIDENCE—RES INTER ALIOS ACTA.—In an action against a carrier for loss in weight of articles shipped, letters which passed between the plaintiff and his consignees are inadmissible in evidence. (Page 136.)

Appeal from Madison Circuit Court; *J. S. Maples*, Judge; reversed.

STATEMENT BY THE COURT.

The appellee alleged that on the 30th day of June, 1910, he delivered to the appellant at Pettigrew, Arkansas, two sacks of ginseng roots of the weight of twenty pounds and one sack of golden seal of the weight of eight pounds for transportation to New York City, consigned to himself. He alleged that appellant had failed to deliver the shipment to James Rowland & Company, to whom he ordered the shipment delivered, and that by reason of the failure he had been damaged in the sum of $150.

The appellant denied that appellee had delivered to it the roots alleged of the weight as alleged, but averred that appellee had delivered to appellant on the 30th day of June, 1910, three packages consigned to himself at New York City, and that appellant had no way of knowing that the appellee desired said sacks to be delivered to James Rowland & Company until it received a letter from appellee to that effect, dated at Huntsville, Arkansas, August 15, 1910; that appellant, immediately upon receipt of the letter, delivered all of

said sacks or packages to James Rowland & Company; that James Rowland & Company receipted for the sacks, showing the same in good condition. Appellant denied damages.

The appellee testified substantially as follows: That on the 30th day of June he shipped three bags of roots, weighing twenty-eight pounds, through the appellant company, consigned to himself at New York City; that there were nineteen or twenty pounds of ginseng roots in two bags and six or seven pounds of golden seal and one and one-half or two pounds of seneca roots in the other bag. The roots were packed in light cloth material sacks and well sewed up. On the 15th of August, 1910, he wrote the appellant company stating that he had expressed the roots, as indicated, on June 30, 1910, and that he had sent James Rowland & Company an order for the roots some time ago and directed the appellant company to deliver these roots to James Rowland & Company, New York City. He stated that he received from Rowland & Company a statement showing that it had sold for the account of appellee ten pounds of seneca roots for $4.00; eight and one-fourth pounds of ginseng roots for $49.50; and five and one-half pounds of golden seal roots for $9.63, which, after a deduction of $5.46 for express and commissions, left a balance of $57.67, for which amount Rowland & Company sent him a draft, which he returned to them. He stated that he was not very careful about getting the exact weight of the three packages before he expressed them.

On behalf of the appellee, the shipping clerk of James Rowland & Company, New York City, testified that on August 20, 1910, he received from the appellant the roots in controversy. He didn't weigh the roots. There were three bags of them. He received them August 20, 1910, and gave a receipt for them. He didn't know the price per pound of roots of the class received on the 1st day of July, nor on the 20th day of August. He stated that the sacks were in good condition when received to all outward appearances; that they were packed in bags of thin cloth material.

James Rowland, a witness for appellee, testified that James Rowland & Company received the shipment of roots through the appellant company on August 20, 1910. He didn't know the number of pounds of the different kinds of

roots that were received at the time the same were received. He only signed for them as so many sacks of roots. There were three sacks or bags; they were all sewed up tight, and the roots were perfectly dry. He stated that the express company failed to find the three sacks at its office on his first inquiry as to the shipment. His company then wrote the appellee that the roots could not be found, and asked that a tracer be sent after them, and some days after that the roots were delivered to James Rowland & Company. The witness was unable to state the specific date that he called on appellant for the delivery of the roots. He stated that he didn't remember the date of the order from appellee directing the appellant to deliver the roots to James Rowland & Company; stated that James Rowland & Company received $63.13 for the roots when sold, and, after deducting the expressage and commissions, sent appellee a draft for the balance of $57.67, which he returned. The witness was unable to state the market value of roots of the kind mentioned on the first day of July or on August 20.

Witness Van Ronk, of the firm of James Rowland & Company, testified that he sold the roots in controversy. The shipment of roots seemed to be in good condition when received. The bags were all sewed up. His company didn't weigh the roots when they were received. He signed for them as so many packages. He sold the roots for the prices as stated in the testimony of the former witness. He didn't know the market value of roots of the kind mentioned on the first day of July or the 20th of August, 1910. The roots were received on the 20th and sold on the 22d of August, 1910. The three packages turned over to his company had the name of T. G. Long written or stamped or printed on each of the packages at the time they were received by his company. The only record the company made of the receipt of the goods was the following: "Aug. 20, 1910. From T. G. Long, Huntsville, Ark., *via* U. S. Ex. 3 bags herbs."

Over the objection of the appellant, the above witness exhibited three letters which the court permitted to be read in evidence. These were letters written by James Rowland & Company to appellee. The first was dated August 11, 1910, and was as follows:

"New York, August 11, 1910.

"T. G. Long, Esqr., Huntsville, Arkansas.

"Dear Sir: Your letter of the 8th inst. received. When we received your first letter, we asked the express company to make delivery, but they had been unable to find the three sacks. Think it would be well for you to have the agent at your station send tracer through, ordering delivery to us.

"Yours truly,
(Signed) "James Rowland & Co."

It is unnecessary to set out the other letters. It was shown on behalf of appellant that it received three packages of roots, shipped by the appellee, at its office in New York on July 5, 1910. The shipment was consigned to T. G. Long, New York City. Appellant delivered the three packages to James Rowland & Company, 84 Hudson St., New York, August 20, 1910, on written order from the shipper, T. G. Long. The receipt for same was introduced, as follows:

"Messenger's freight 286. Way-Bill No. 37
August 20, 1910.

From New York (O. H. Dept.) N. Y.
To 84 Hudson St. (55 W. 23rd St.)
(Weight—28 pounds—3 bags).
Consignee
James Rowland & Co.

38448, Shipper,
Pettigrew, Ark.
Our charges $2.30. Received from United States Express Co. in good order and condition the above mentioned articles.

"Dated August 20, 1910.
"H. Viebrock."

The witness further testified that there was no call for these goods to his knowledge until the express company made the delivery after receiving instructions from the shipper. He says that they were delivered at New York, and were ready for delivery on July 5, and they were not delivered because the party to whom they were consigned, towit, the appellee himself, had no local address, and was unknown to the express company.

The court instructed the jury, to which no exceptions were reserved. The jury returned a verdict in favor of the appellee for $132.03, and from a judgment in favor of appellee for such sum this appeal has been duly prosecuted.

W. N. Ivie, for appellant.

1. The express company delivered the sacks as soon as they could be delivered, and there is no evidence to support the verdict. A new trial will be granted where the verdict is directly against the evidence. 21 Ark. 468; 24 *Id.* 224. So, where the verdict shocks one's sense of justice, a new trial should be granted. 10 Ark. 638; *Ib.* 491; 26 *Id.* 309; 39 *Id.* 491.

2. Where illegal evidence is permitted and the other evidence is not sufficient to sustain the verdict, the judgment will be reversed. 14 Ark. 502.

Appellee, pro se.

Judgments are not reversed for mere errors in admitting evidence. 20 Ark. 216; 56 *Id.* 35. The cause was fairly submitted under proper instructions. 47 Ark. 469; 49 *Id.* 122. Where there is any legal evidence, this court will not reverse. 46 Ark. 142; 47 *Id.* 196.

WOOD, J., (after stating the facts). 1. The testimony is not sufficient to sustain the verdict. The complaint shows that appellee sues for failure and neglect "to deliver said shipment of roots to the consignee James Rowland & Company," and "that by reason of the failure of the defendant to deliver said shipment of roots he has been damaged in the sum of $150."

The proof on behalf of the appellee himself shows that the appellant did deliver the roots in controversy to James Rowland & Company on August 20, 1910. One of the members of the firm of James Rowland & Company testified as follows: "I received these roots on August 20, 1910. I gave a receipt for these three bags, but did not weigh them. The sacks were in good order when received, to all outward appearances. They were packed in thin bags of cloth material."

The appellee himself testified that the roots were packed in light cloth material sacks and well sewed up when he shipped them. He also testified: "I was not very careful about getting the exact weight of these three packages before I expressed them."

The waybill in evidence showed that there were three bags of roots, and that they were billed as twenty-eight pounds. The waybill was numbered 37, and the express number of the shipment to identify it was 38,448. This is precisely the character of the shipment that was delivered by order of the appellee to James Rowland & Company, as shown by the latter's receipt.

The appellee therefore fails to show any cause of action for nondelivery of the goods by the appellant.

The testimony on behalf of the appellee showed that Rowland & Company received the bags as of the weight of twenty-eight pounds, the same weight he shipped them under. Their agent who received the bags showed in his testimony that he gave the receipt for the bags as weighing twenty-eight pounds, as shown by the waybill, but that he did not weigh them. There is no testimony therefore to show that, if these bags weighed twenty-eight pounds when they were delivered to the appellant at Pettigrew, as claimed by appellee, they did not weigh twenty-eight pounds when they were delivered through appellee's order to Rowland & Company in New York City. It should be taken, under the uncontroverted proof here, that the appellant company delivered the shipment just as it had received it from the appellee, in good condition, to appellee's order in New York City. If there was really a loss in the weight of these roots, as appellee claims, his testimony wholly fails to show that that loss occurred by reason of the failure of the appellant to deliver. The loss, if any, under the undisputed facts of this record, must be held to have occurred after the goods were delivered to Rowland & Company in New York City, and not before.

The evidence shows that the goods were delivered to Rowland & Company on August 20, and that they were not sold until August 22. The loss of the roots, if any, might have taken place, so far as the proof shows to the contrary, between the time that Rowland & Company received them and the time they sold them. The burden was on the appellee, and he has failed to trace the loss of these roots to the appellant. The jury must not be allowed to speculate as to when and where the loss occurred. It was the duty of the appellee to prove by facts and circumstances that the loss, if any, occurred through the failure of the appellant to deliver, as alleged in the complaint.

2. The conclusion we have reached makes it necessary to determine whether the introduction of the letters, exhibits "B, C & D," was prejudicial error, and in view of a new trial it is only necessary to state that these letters were incompetent. 14 Enc. of Ev. 718.

For the error in overruling appellant's motion for a new trial the judgment is reversed, and the case remanded for a new trial.

FARMERS' BANK v. JOHNSON.

Opinion delivered October 14, 1912.

APPEAL AND ERROR—DIRECTING VERDICT—REVIEW.—Where there is any evidence tending to establish an issue in favor of the party against whom a verdict is directed, it is error to take the case from the jury; and in determining on appeal the correctness of the trial court's action in directing a verdict for either party the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed.

Appeal from Searcy Circuit Court; *Geo. W. Reed,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant brought suit against W. S. Johnson, I. R. Goodman and others, alleging that they were indebted to the State of Arkansas in a certain amount, on a note given for the payment of fines adjudged against W. S. Johnson; that they purchased of said bank the sum of $400 in Searcy County scrip at ninety-five cents on the dollar, with which to pay said note; that the other defendants, except Goodman, came to the bank on the 16th day of August, 1909, and agreed that they would execute their note to the bank in the sum of $380 with 10 per cent. interest, due in ninety days, for said scrip; that Goodman came in later, and said he was getting old and preferred that he and the others should pay the amount in cash; that the other defendants signed the note dated on said date for the amount; and that later, on September 6, the defendant Goodman came to the bank and requested it to accept $100 in cash and the said note as security for the payment of the said $380, the purchase price of the scrip, but they refused to do so; that

Goodman thereupon deposited the cash with the plaintiff, and requested it to allow the business to remain in that condition until he could see the other defendants and ascertain whether they would pay the other $280 in cash on the indebtedness, and said that if they declined to do so he would pay the said sum in cash, or sign the note along with the other defendants; that upon this promise, and upon his direction, it delivered the scrip to the sheriff in payment of the note held by him; that the cash deposit made by Goodman with the note was held in the bank, subject to the order of the defendant, and that no part of the $380 agreed to be paid for the scrip had been paid, etc.

The defendants answered separately, denying the allegations of the complaint. W. T. Givens denied each allegation in the complaint, denied any authority of any of the parties to bind him to pay for the scrip or any liability therefor.

I. R. Goodman adopted the answer of W. T. Givens for his own, denied any indebtedness whatever to the bank, and pleaded the statute of frauds.

Copies of each of the notes were exhibited with the complaint, and the cashier of the bank testified that in August, 1909, he wrote the defendant, I. R. Goodman, offering to sell him some county scrip; that Goodman replied that he would be at the bank about a certain time and came on the day mentioned, and he sold him the scrip. Before Goodman came over, W. S. Johnson and some of the other defendants had called at the bank and taken out a note to be executed for the scrip. When Goodman came in, he pulled said note out of the drawer that had been signed by W. S. Johnson and the others and told Goodman to sign the note. He said that he was getting old, and that he had already been out some money on Bill Johnson, and would rather pay his part of it and be released, that he told him he would not let the scrip go unless he signed the note and the scrip was paid for, and "Goodman replied that he would sign the note or pay for the scrip, and told me to go ahead and let them have the scrip. I sold him the scrip at ninety-five cents on the dollar, and it amounted to $380. Goodman said: 'Give the scrip to Bill Johnson and he would give it to Barnett.' I gave a check on the Marshall Bank for the scrip, and made the check direct to

Barnett, and it was payable in Searcy County warrants."

"I sold the scrip on the promise of I. R. Goodman. At the close of the deal, he said that he would go and see the boys, and they would either come in and pay it off or come in and sign the note up, and as he started out he pulled out $100 from his pocket and said, "I have a hundred dollars here that I might leave. I may need it in the deal for my part,' and left it and I gave him a receipt for it. The $100 has never been paid on the debt, nor has anything else been paid or delivered in settlement of the debt and the whole $380, together with the interest on it, is due and unpaid."

On cross examination, he said that only W. S. Johnson and I. R. Goodman of the parties interested were present at the time he let them have the scrip, but the others had been in to see about it before that, but didn't close a deal.

He answered further as follows:

"Q. At the time I. R. Goodman was in the bank, as you have stated, did you inform Mr. Goodman that you would accept his proposition and let the scrip out? A. No, I didn't; he said he would come back and sign the note or pay for the scrip. Q. Yet you went on and let the scrip out? A. Yes, sir; because I thought he would do what he said he would do. Q. You did not tell him that you would let the scrip out on what he had said? A. No, sir.

W. S. Mays, the father of the cashier, testified that he was in the bank at the time Goodman was talking to his son, the cashier, about the purchase of the scrip and heard him say he was getting old and wanted to get rid of such notes as that, and had some money to leave there for his part. That he did leave $100, but that he had forgotten just how he said it should be applied. "He had promised to go on the note with the other parties. I believe it was his son-in-law. If it couldn't be made without him going on it, he would sign it. Ed, my son, told me he considered he was the only responsible party in the whole deal."

Another witness testified that Goodman told him afterwards that he had fixed it at the Farmers' Bank for the Johnson note to be paid off, and he would have to pay it all unless the others would do what they agreed to do. He said he had

made an arrangement at the bank for them all to pay their part and pay off the debt, etc.

The sheriff of the county testified that Bill Johnson handed him the order from Ed Mays for the $400 in county scrip, which he took in satisfaction of the note.

The court thereupon instructed the jury to return a verdict for the defendants, and from the judgment thereon the bank appealed.

S. W. Woods, for appellant.

1. The facts in this case do not bring it within the statute of frauds. 12 Ark. 174; 22 How. 28; 45 Ark. 67; 42 Ark. 285; 40 Ark. 429.

2. The court erred in directing a verdict for appellees. 76 Ark. 520; 71 Ark. 445; 71 Ark. 303; 63 Ark. 94.

E. G. Mitchell, for appellee.

The case falls within the statute of frauds. Kirby's Dig., § 3654; Lawson on Contracts, 108; 1 Ark. 415; 1 L. R. A. (N. S.) 445 and note; 2 McCrary 167; 7 Fed. 81; 94 Ill. App. 6; 110 Ga. 142, 35 S. E. 280.

KIRBY, J., (after stating the facts). The testimony on the part of the appellant tends to show that the bank cashier sold and delivered the scrip for the sum of $380 on the promise of I. R. Goodman to pay the whole amount in cash if he could procure $280 of it from the other defendants, or execute the $380 note in payment therefor, in case the cash was not paid.

It is true, he made a statement also that he did not tell Goodman that he would let the scrip out on what he said, but, from his answers to the other questions at the time, it is probable this statement was made relative to selling the scrip upon the Goodman proposition to pay the $100 in cash himself and keep the note of the other defendants for the payment of the balance.

Where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury; and in determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the

verdict is directed. *Williams* v. *St. Louis & S. F. Rd. Co.*, 103 Ark. 401.

If no other testimony had been introduced upon the trial, and the jury had returned a verdict in favor of appellant, it could not have been reversed for want of sufficient testimony to support it, and the court erred in directing the verdict against it.

The case does not appear to have been fully developed, and for said error the judgment is reversed, and the cause remanded for a new trial.

SUPREME ROYAL CIRCLE OF FRIENDS OF THE WORLD *v.* MORRISON.

Opinion delivered October 14, 1912.

INSURANCE—BENEFIT SOCIETY—CONSTITUTION AND BY-LAWS.—The constitution and by-laws of a fraternal order become a part of the contract insuring its members, and, if not inconsistent with the terms of the certificate, will be binding as part of the contract.

Appeal from Howard Circuit Court; *J. T. Cowling*, Judge; reversed.

Jones & Price and *W. C. Rodgers*, for appellant.

1. The certificate of the society forms a part of the contract, and the court erred in holding that it was in conflict with the constitution and by-laws of the order, and in entering judgment in accordance with such holding. 73 Ark. 470; 75 Ark. 435; 76 Ark. 410; 79 Ark. 266; 96 Ark. 113; 80 Ark. 108; 88 Ark. 243; 19 Tex. Civ. App. 18; 83 U. S. 610; 74 Ark. 1, 8; 80 Ark. 419; 81 Ark. 512, 514; 94 Ark. 499, 502. Above authorities sustain the proposition that the constitution and laws of a fraternal order are a part of the contract of insurance. See also 97 Ark. 50; 53 Ark. 255; 74 Ark. 1; 67 Ark. 506; 98 Ark. 421.

2. The provision in the constitution and by-laws for an equitable gradation of dues and benefits is both just and necessary. It is shown that the assured had every opportunity to know the by-laws, and the presumption is that he knew the by-law in question. "Both sides are alike bound to comply with the

constitution and by-laws." 35 N. Y. S. 124; 1 Marv. 187, 40 Atl. 956; 14 Daly, 389; 118 Cal. 6.

3. The court having expressly found as a fact that the assured was over fifty-five years old, this special finding should have controlled, and the verdict should have been for the defendant. 40 Ark. 298, 327; 46 Ark. 17, 25; 50 Ark. 85, 97; 73 Ark. 428, 430; 74 Ark. 144, 147.

4. The laws of the order being a part of the contract sued upon, assured, in accepting the certificate, accepted also those laws. 98 Ark. 421.

5. The act of March 29, 1905, does not apply to benefit societies, and the court therefore had no jurisdiction to render judgment for penalty and attorney's fee. 97 Tex. 264; 83 Tex. 460; 81 Tex. 71.

W. P. Feazel, for appellee.

1. The policy, being an unconditional promise to pay the assured's beneficiary the sum of $300 upon his death, must prevail over any law of the order not made a part of the policy by the policy itself, which is in conflict with the terms of the policy. 52 Ark. 201; 55 Ark. 210; 97 Ark. 56; Niblack on Societies, 39; 98 Am. St. Rep. (La.) 469; 181 Mass. 111; 104 Fed. 638, 44 C. C. A. 93.

2. The court properly rendered judgment for penalty and attorney's fee. The statute makes no distinction between insurance companies, and applies to all alike. 92 Ark. 379; 86 Ark. 115.

FRAUENTHAL, J. This is an action instituted upon a certificate of insurance issued upon the life of Anderson Morrison, and in which appellee was duly designated as beneficiary. Appellant is a mutual benefit association organized under the laws of this State. It consists of a supreme body known as the "Supreme Royal Circle," which issues certificates of insurance upon the lives of its members and of numerous subordinate bodies or lodges, one of which was located in Howard County and known as "Beautiful Star, No. 268." Anderson Morrison became a member of the subordinate lodge, and made written application for the insurance. The certificate was issued by the supreme body on February 27, 1911, and the insured died within one year thereafter. It was alleged that the certificate

provided that appellant would pay the beneficiary three hundred dollars upon the death of the insured; that only fifty dollars had been paid thereon; and recovery was sought for the remainder. Appellant resisted recovery on the ground that by virtue of the by-laws of said order it was provided that if a member was over the age of fifty-five years and not more than sixty years old, and died during the first year, his beneficiary should receive one-sixth of the amount of his policy; that said Anderson Morrison was, at the time he became a member of the order and obtained said certificate, over the age of fifty-five years, and died within one year thereafter; that it had paid to the beneficiary the sum of fifty dollars which it alleged was the full amount due on the insurance contract. The written application was taken by one R. B. Martin, who represented appellant as an organizer of lodges. In the application as it was sent to appellant it is stated that the age of the insured was forty-nine years. But there was testimony adduced tending to show that when it was signed the applicant stated an age greater than fifty years, and that later and without his knowledge said Martin changed in the application the age to forty-nine years. The certificate of insurance provided as follows:

"The Supreme Royal Circle, through its executive officer, the supreme president, hereby agrees, in case of the death of the member aforementioned, to pay to such beneficiary as he may designate in writing on the reverse of this instrument the sum of three hundred dollars * * * ; provided, that the aforementioned member shall have fully and faithfully complied with the laws, rulings and regulations of the supreme, grand and subordinate circles of this order; otherwise this certificate is void and without force."

The by-laws of the order provide as follows: "Law No. 28. On the payment of one dollar per quarter in advance, each friend will be entitled to receive three hundred dollars as death benefit, * * * subject, however, to the modifications that may be made from time to time by the legislative department of the order."

"Law No. 44. Any member over fifty-five, and not more than sixty, his beneficiaries shall receive one-sixth of the amount of his policy if death occurs during the first year; * * * "

The case was submitted to the court sitting as a jury, who

found that the applicant for the certificate sued on was more than fifty-five years of age at the time he made such application; and that appellant paid his beneficiary the sum of fifty dollars, which was not accepted in full of all claims under the certificate; and there was sufficient evidence to warrant these findings. The court further found that the by-laws of the order and the certificate of insurance were in conflict as to the amount for which the appellant was liable, and held that the terms of the certificate were controlling. It thereupon rendered judgment in favor of appellee for the sum of two hundred and fifty dollars. It also rendered judgment for the recovery of damages and attorney's fees under the provisions of the act of the General Assembly of 1905 (Acts 1905, p. 308).

The sole question involved in this case is: to what amount was the beneficiary entitled under the contract of insurance herein sued on? The contract was made by a fraternal order with one of its members. Under certain provisions of its by-laws, this order was impowered to insure the lives of its members. The general rule is that the assured becomes a member of a benefit society by virtue of his certificate, and he must take notice of the provisions of its constitution and by-laws, and this rule obtains although the provisions of the constitution and by-laws are not recited in or made a part of the certificate. *Woodman of the World* v. *Hall,* 104 Ark. 538.

The constitution and by-laws of a fraternal order become a part of the contract insuring its members, and, if not inconsistent with the terms of the certificate, will be binding as a part of the contract. This principle has been approved in several opinions rendered by this court. *Block* v. *Valley Mut. Ins. Assn.,* 52 Ark. 202; *Johnson* v. *Hall,* 55 Ark. 210; *Woodman of the World* v. *Jackson,* 80 Ark. 419; *Supreme Lodge K. & L. of H.* v. *Johnson,* 81 Ark. 512; *Woodman of the World* v. *Hall, supra.*

In some of these cases it was expressly provided in the application or certificate of insurance issued that the laws and constitution of the order should be and become a part of the contract. But, whether recited in the certificate or not, and whether made expressly a part of the contract or not by the certificate or application, the constitution and by-laws of a mutual benefit society become a part of the contract of insur-

ance by virtue of the membership of the assured, and are binding if not inconsistent with the terms of the certificate. It is only when the provisions of the by-laws and the terms of the certificate are conflicting that the question arises as to which of these are controlling. It has been held by some authorities that when the two are in conflict the by-laws will govern for the reason that the society can make no contract in violation of the provisions of its constitution and by-laws. *Boward* v. *Bankers' Union,* 94 Mo. App. 442; *Goodson* v. *Nat. Masonic Accident Association,* 91 Mo. App. 339.

Other authorities hold, however, that if the society is impowered to issue such certificate and the by-laws are not expressly made a part thereof the terms of the certificate will control, upon the ground that the order will be deemed in such event to have waived the provisions of the by-laws; and also because the contract should be construed, if it is ambiguous, most liberally in favor of the assured. *Davidson* v. *Old People's Mut. Ben. Society,* (Minn.) 1 L. R. A. 482; Niblack on Benefit Societies, 294.

But we do not deem it necessary in the determination of this case to pass upon this question, for the reason that the provisions of the by-laws are not in conflict with the terms of the certificate sued on. According to the plan of insurance adopted by this order, the amount of the premium or assessment to be paid by a member is not graduated according to his age; whatever his age may be, the assessment or premium to be paid by him is the same. It is only provided that the amount of insurance shall be less than three hundred dollars in the event the member is over the age of fifty years, and still less in the event he is over the age of fifty-five years. All members of the age of fifty and under pay the same premium or assessment and receive the same amount of insurance. All members over the age of fifty pay the same premium or assessment as those under that age, but receive a less amount of insurance; and the amount which this latter class receive is a certain proportion of the amount named in the policy. By virtue of said by-law No. 44, when the member is over fifty-five years old and less than sixty, his beneficiary receives "one-sixth of the amount of his policy if death occurs during the first year." Now, the rights that grow out of a contract of insurance

in a fraternal order are necessarily governed by different rules of law from those which grow out of insurance sold by an ordinary insurance corporation. In the former the assured by virtue of his certificate becomes a member of the order and is presumed to know the provisions of its constitution and by-laws which become a part of the contract of insurance, whether expressly made so by the certificate or not. It is only where the two are in conflict that any question arises, and that is as to which is then controlling. It follows that the provisions of the by-laws are read into the certificate. According to the plan of insurance adopted by this society, it would appear that only one form of certificate is issued by it, and the amount named in such certificate or policy is always three hundred dollars. The by-laws being a part of the contract, the certificate must be read in connection with the by-laws, and the two in effect provide that the beneficiary shall receive upon the death of the member the sum of three hundred dollars, or a proportionate part thereof according to the age of the insured; that is to say, in the event the member is fifty years old or under his beneficiary shall receive three hundred dollars, and in the event the member is over the age of fifty years his beneficiary shall receive a proportionate part of that amount.

In the case at bar, without any misrepresentation on the part of the insured, his age was understated in the application. He became a member of this order and desired to obtain the insurance which it issued according to the correct age which he gave. The amount of the assessment of premium which he was required to pay was the same, whether he was forty-nine or fifty-five years of age. By becoming a member of this order, he is presumed to have acquainted himself with its constitution and by-laws and known that at his age he would obtain insurance for only a proportionate part of the sum named in the certificate. The provisions of the by-law and the certificate, read together, thus form an uniform and harmonious plan for the insurance of members of various ages based on the payment of the same assessment or premium. It follows that the above by-law of the society and the terms of the certificate are not in conflict, but, in the event the insured was over the age of fifty-five years and less than sixty years of age and his death occurred within one year after the issuance of the certificate, his bene-

ficiary was entitled to one-sixth of the amount named in the policy. The court, sitting as a jury, made a special finding that the insured was over the age of fifty-five years, and died within one year after the issuance of the certificate, which finding is conclusive.

Under the terms of the contract of insurance, therefore, the appellee was only entitled to receive the sum of fifty dollars, and this sum the court further found was paid by appellant to her. It follows that the court, on the special findings made by it, should have rendered judgment in favor of appellant. *Little Rock & Fort Smith Ry. Co.* v. *Young,* 74 Ark. 144.

The judgment is therefore reversed, and the case dismissed.

SPEER HARDWARE COMPANY *v.* BRUCE.

Opinion delivered October 14, 1912.

MECHANICS' LIEN—IMPROVEMENTS ON ADJACENT PROPERTY.—One who, under contract with the owner of a lot, connected a building thereon with the water main by laying a pipe across the property of adjoining proprietors with their consent is entitled to a mechanics' lien for the entire pipe, and such lien may be enforced against one who subsequently purchased the lot from such owner.

Appeal from Sebastian Chancery Court; Fort Smith District; *J. V. Bourland,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This action was brought by Bruce Brothers to recover ninety dollars and interest, the contract price for installing a water service in a certain building in the city of Fort Smith, at the time the property of B. C. Bates, now owned by appellant and to have a mechanics' lien against the property foreclosed.

The complaint alleges that Bates was the owner of a certain tract of land in the city of Fort Smith, describing it, upon which was situated a corrugated iron building; that appellants, on September 27, 1911, entered into a contract with him to install a water service and meter upon said property for ninety dollars and installed said service, and, not being paid for same, they duly filed their claim for mechanics' lien. That

after the filing of the lien appellant became the owner of the property by purchase at a sheriff's sale.

The answer denies that Bruce Brothers entered into the contract to install the water service upon the premises described in the complaint, and alleges that the contract with Bates was for the laying of 227 feet of pipe; that only seventy-five feet of said pipe were laid on the premises described in the complaint and upon which the lien is claimed; that the balance of said pipe was laid upon the property of other persons." That the value of the pipe, meter and faucet on the premises was only $31.25, and denied that appellees were entitled to a lien for more than that sum, with interest and costs, which was tendered in court.

The agreed statement of facts shows that it became necessary to have a water supply upon the premises, and the best method of obtaining it was to tap the city main about 227 feet distant; that with the consent of the intermediate owners the main was tapped and the pipe laid in the ground to the premises and over them to the place where it entered the building and the meter and faucet attached; that only about seventy-five feet of the pipe was placed on the premises described in the complaint, the cost of said seventy-five feet, with the meter and faucet, being $31.25; that appellant acquired the ownership of the building through a sale under attachment after a lien was filed in the office of the clerk.

The lower court found that appellees were entitled to a lien for the entire amount sued for, $92.30, including the value of all the pipe laid, and rendered a decree for foreclosure of a lien for that amount. From this judgment the appeal comes.

Kimpel & Dailey, for appellant.

Appellees are entitled to a lien only for $31.25, the agreed value of the work done and materials furnished upon the property belonging, by purchase, to appellant. Kirby's Dig., § § 4970, 4971; 8 So. (Ala.) 25; 19 Ill. 613; 74 Ark. 510, 515, 516.

H. C. Mechem, for appellees.

Where the owner of a lot contracts with another for labor and materials to install water service upon his lot, the installation of which service requires the laying of the pipe through the property of an intervening owner in order to reach the

water supply, who consents thereto, the party performing the work, etc., is entitled to a lien for the whole of the contract price against the lot where the service is installed, notwithstanding the greater portion of the pipe was laid through the lot of the intervening owner. 97 Mass. 133; 21 N. Y. 505; 71 S. W. 1019; 141 Mass. 523; 89 Tenn. 453; 76 N. E. 518; 52 Fed. 43; 59 Fed. 20; 53 S. E. (W. Va.) 473; 63 Ark. 367.

KIRBY, J., (after stating the facts). The question for determination is whether appellees are entitled to a lien on the premises for the contract price of the work done, some of the materials not being placed upon the property, or only for the value of the pipe and fixtures actually put upon the premises. The statute provides: (sections 4970-1-2, Kirby's Digest):

"Sec. 4970. Every mechanic, builder, or other person who shall do or perform any work upon or furnish any material * * * for any building, erection, improvement upon land * * * under and by virtue of any contract with the owner or proprietor thereof, or his agent, contractor, upon complying with the provisions of this act, shall have his work or labor done, or materials * * * furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection, or improvement be upon any lot of land in any town, city or village, then such lien shall be upon such building, erection or improvements and the lots or land upon which the same are situated."

"Sec. 4971. The entire land, to the extent aforesaid, upon which any building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvements as that part thereof which is covered with the same, shall be subject to all liens created by this act, to the extent and only to the extent, of all the right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement for whose immediate use or benefit the labor was done or things furnished."

"Sec. 4972. The lien for the things aforesaid, or work, shall attach to the buildings, erection or other improvements for which they were furnished or work was done, in preference

to any prior lien existing upon said land before said buildings, erections, improvements, were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter," etc.

Appellant contends that it is only liable for the agreed value of the material furnished and the work done upon the property belonging to the owner and actually placed thereupon, and that no lien could be fixed against it for work done and the materials furnished in laying the pipe through the lands of other persons, with their consent, to reach the water main.

The premises and appurtenances passed to appellant by the conveyance thereof, and it is not disputed that the water service was installed upon the property, as already indicated, and in use when it was conveyed. It became, when constructed, an appurtenance to the property and passed with it, so far as the rights of the original owner were concerned.

In *Philbrick* v. *Ewing*, 97 Mass. 133, the court held that a pipe line running from a sink in a house across the lot upon which it was situated, and across the lot of another by his consent to a source of water supply in which he had rights, passed to the grantee of the owner of the building as appurtenant thereto, although it was not mentioned in the deed of conveyance, and that he could not after a sale enter upon the lot of the other person and take the pipe therefrom and carry it away; saying:

"The pipe was put in by his tenant, and afterwards purchased by him from the tenant as one entire thing. It was designed for the use of tenant's house, and for no other purpose. If it extended into the land of a third person and into a highway, it does not appear that the owner of the land objects to its continuance or authorizes defendant to remove it. We are therefore of the opinion that the whole of it, at the time of its conveyance to plaintiff, was a fixture and annexed to the house and passed by the deed. We suppose that it is a common thing in cities for the owner of a house to connect it by pipe with the pipe in the street belonging to the water company, and that such a pipe would pass by the sale of the house, although the owner of the house did not own the soil of the street. So, in case of a drain pipe connected with a common

sewer, on the sale of a house the vendor could not take it away." See also *Lampman* v. *Milks*, 21 N. Y. 505; *Paine* v. *Chandler*, 134 N. Y. 385; *Mulrooney* v. *O'Bear*, 71 S. W. (Mo.) 1019; *Beatty* v. *Parker*, 141 Mass. 523.

In this last case, a mechanics' lien was enforced against the property for the whole cost for putting a drain pipe therein from the house to the sewer in the street; the court saying: "The drain pipe was part of the house, and the house was built upon a street in which there was a sewer and was fitted for the use of the city water to which connection with the sewer was essential. The pipe inside of the house and outside of it was necessary to the use of the house, and a part of it and was included in the contract for building it. The house will be incomplete without the pipe, and it would pass by deed of the house as a part of it. It is immaterial whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee in the street was not in the respondent. The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe which could pass by deed of the lot. Currier was employed by the respondent to erect the house, including the laying of the pipe."

It will not be questioned that the owner of the fixtures and service had the right to the use of it after its construction to supply the premises with water, the purpose for which it was constructed, and that it was an improvement thereon, within the meaning of the statute. Neither will it be questioned that it will pass appurtenant to the premises upon a conveyance thereof, so far as the owner is concerned, nor that upon a sale of the premises under the mechanics' lien law the owner's right, title and interest therein would pass to the purchaser at such sale. Appellants, therefore, have the right to such service and improvement with the property so purchased, so far as the record here shows, it not being claimed that the adjacent owners, through whose lands the pipe extended beyond this property to the main have complained or objected to the use thereof. The purpose of the mechanics' lien law is to secure the workmen and mechanic for the labor done and materials furnished in the improvement to the property, and it is to be

liberally construed to effectuate this purpose. It was necessary to lay the line of pipe from the building to the main, in order that the service could be installed and the improvement made, and it is assumed that the pipe was rightfully laid through the lands of the adjoining owners to the water main. It did not thereby become their property, and the right to the use thereof belonged to the owner of the house upon which the improvement was made and passed to appellants under their purchase. The lien attached to the premises, building and ground upon which it was situate for the entire value of the improvement, notwithstanding part of the pipe line was situated off the property on adjoining lands. For other cases permitting a mechanics' lien for pipes laid in the streets and not entirely upon the premises upon which the lien was sought to be foreclosed, see *Steger* v. *Arctic Refrig. Co.*, 89 Tenn. 453, 14 S. W. 1087; *Wells* v. *Christian*, 76 N. E. 518; *O'Neal* v. *Taylor*, 53 S. E. (W. Va.) 471; *Nat'l Foundry & Pipe Works* v. *O'Connor Water Co.*, 52 Fed. 43.

Appellants rely strongly upon the case of *Eufaula Water Co.* v. *Addyston Pipe Co.*, 8 So. 25, in support of their contention. That suit was to recover for piping materials furnished to be used in the construction of water works in the city of Eufaula and to fix a lien therefor and enforce it against a one-acre lot of the water company situated just beyond the corporate limits of the city. The lot was the site of the water company's pumping station which forced the water into its stand pipe one-half mile distant, and the piping furnished was used in making the line between the pumping station and the standpipe, a distance of three thousand feet, and extended from a point twenty-five feet within the lot in question outside the building thereon to the reservoir or standpipe, being for its whole length, except twenty-five feet, on land which did not belong to the water company, but in which it had an easement for the purpose of laying the pipe. The court denied the lien for the full amount of the claim. That was an attempt, however, to enforce a mechanics' lien for materials furnished, which were used in the construction of a waterworks system for a city against a particular part of it, the lot on which was situated the pumping station, when the improvement was not made upon the particular lot, but was an improvement of the entire water

plant, and a sale of the particular part of the property against which the lien was attempted to be enforced if the purchaser were permitted to remove the property bought, would have destroyed the water supply system in which the entire city was interested. There is no analogy between that case and this, and we regard it as entitled to little weight in favor of appellant's contention here.

The decree is affirmed.

KOEN v. MILLER.

Opinion delivered October 14, 1912.

1. BILLS AND NOTES—TO WHOM PAYMENT MAY BE MADE.—Payment to the original holder of a negotiable note, secured by a mortgage, of the amount due is at the risk of the one making it unless it is authorized by the true owner or justified by possession of the securities. (Page 155.)
2. AGENCY—EFFECT OF AUTHORITY TO COLLECT INTEREST.—Authority to an agent to collect interest on a note secured by mortgage does not afford ground for inferring authority to collect the principal where the agent is not intrusted with the possession of the securities. (Page 156.)
3. BILLS AND NOTES—PAYMENT—AUTHORITY TO COLLECT.—A purchaser of a note from a bank is not estopped to deny that the bank had authority to collect the principal thereof where the bank is not in possession of the note at the time of payment, although it was authorized to collect interest thereon, and where the purchaser does nothing to mislead the maker, who pays the notes under a mistaken belief that the bank is still the owner. (Page 156.)

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

STATEMENT BY THE COURT.

This is an action by an assignee of a note and mortgage against the maker to recover judgment upon the note and to foreclose a mortgage given upon real estate to secure the same.

The maker relied upon the defense of payment to defeat the action. The evidence on the part of the plaintiff, B. L. Miller, tends to show a state of facts substantially as follows:

On the 18th day of April, 1908, the defendant, F. B. Koen, executed a negotiable promissory note to the Bank of Siloam

for $2,200. The note was due twelve months after date, and bore interest at the rate of 10 per cent. per annum from date until paid, and was payable at the Bank of Siloam, Siloam Springs, Arkansas. On the same day he gave a mortgage on certain real estate, situated in Benton County, Arkansas, to secure said note. On the 21st day of May, 1908, the Bank of Siloam, for value received, by an instrument in writing assigned said mortgage to the plaintiff, B. L. Miller. On the same day the note was indorsed by the bank to Miller, and the note and mortgage were delivered by the bank to Miller. Miller was a stockholder in the bank, and had a private box in the vaults of the bank where he kept his papers. He placed the note and mortgage in his private box, and they thereafter remained in his possession until the bank failed. On the 8th day of August, 1910, two days after the bank had closed its doors, Miller took the note and mortgage from his private box in the bank and placed the same in the hands of the State Bank, of Siloam Springs, for collection. Koen told the cashier of the bank, when the note was presented to him for collection, that he had already paid the principal and interest to the Bank of Siloam, and declined to pay it to the State Bank. Upon being pressed for payment by the cashier of the State Bank, he finally paid the interest due upon an agreement that the time of payment of the principal of the note should be extended for another year. He made the payment of the interest under protest. On August 18, 1909, Koen paid to the Bank of Siloam $300.65, being the amount of interest then due on the note.

F. B. Koen, one of the defendants, testified substantially as follows:

"I executed the note and mortgage involved in this suit and paid the interest in August, 1909, to the officers of the Bank of Siloam. On March 29, 1910, I sent the Bank of Siloam a draft for $3,000 to cover my indebtedness, and told them to put the balance to my credit. Afterwards I went to the bank to get my note and mortgage, and they told me they would have to send a release to Bentonville, but that they would give it to my wife the first time she came in. I did not know that this had not been done until I got a notice from the State Bank in September, 1910, that the note was in its

hands for collection. I then went to Davey, the cashier, and Morris, the president, of the Bank of Siloam, and they both admitted that I had paid the note to their bank. I never knew that B. L. Miller had any interest in the note and mortgage. When I sent the bank the $3,000, I authorized it to turn the note and mortgage over to my wife. I thought I would have a balance still in the bank, and thereafter drew checks against that." When the bank failed, it appeared that F. B. Koen had on deposit the sum of $769.26, and that he presented his claim therefor to the receiver of the bank. In regard to this, however, Koen testified that at the time he made proof of his account to the receiver, he supposed that amount was due him after paying off his note and mortgage, that he did not then know that Miller claimed to be the assignee of the note and mortgage, and supposed that the bank had paid off the note and mortgage with the $3,000 draft which he had sent them in March, 1910.

R. S. Morris, president of the Bank of Siloam, corroborated Koen in his statement that he paid the Bank of Siloam the note and mortgage involved in this suit. Morris also stated that the note and mortgage had been assigned to B. L. Miller, and that the bank was his agent in negotiating loans and collecting interest. Miller testified that he had authorized the Bank of Siloam to collect the interest on said note and mortgage, but denied that it had any authority to collect the principal. He said that he took the note and mortgage into his possession when the same was assigned to him, and that the Bank of Siloam never thereafter had them in its possession.

The chancellor found in favor of the plaintiff, B. L. Miller, and a decree was entered accordingly. The defendants, F. B. Koen and Eddeth Koen, have appealed.

R. F. Forrest, for appellant.

The evidence clearly demonstrates that the Bank of Siloam was appellee's agent not only for the collection of the interest but also the principal sum named in the note, and he is bound by the acts of his agent.

Walker & Walker, for appellant, in a supplemental brief.

Miller was, at the time he claims to have purchased the note and mortgage sued on, a *stockholder* in the Bank of Siloam.

The evidence does not disclose that appellant and his wife had any notice, or were put in possession of any facts to place them on notice, that appellee was the owner of the note and mortgage. By his failure to record the assignment of the mortgage, his failure to notify Koen of his claim of ownership of note and mortgage, by leaving same with the bank and permitting it to collect the interest and to receive the principal when due, Miller is estopped from denying that the bank was his agent. 16 Cyc. 726; *Id.* 772, and cases cited in note 16; *Id.* 775-6, notes 23, 25, 26 and authorities cited.

Whether the Bank of Siloam had authority from Miller or not to collect the principal of the note and mortgage, he can not recover if the bank was possessed of apparent authority. 49 Ark. 330; 96 Ark. 456; *Id.* 505; 90 Ark. 104; 50 Ark. 383; Wharton, Agency, § § 405-466; Ewell's Evans, Agency, 397 *et seq.*; 2 Kent's Com. 632; 2 Smith's Leading Case 118, and notes; 44 Ark. 348.

Williams & Williams, for appellee.

The evidence shows that appellant acknowledged the debt and made a payment on it, after the failure of the Bank of Siloam. It further shows that he did not pay the note and mortgage to appellee nor the principal of the note to the Bank of Siloam; but if he did pay it to the bank, such payment was without authority, the bank not being Miller's agent for that purpose, and he would not be bound by its act in receiving payment.

HART, J., (after stating the facts). It is conceded that the Bank of Siloam had no express authority to collect the principal of the note and mortgage involved in this suit. The evidence shows that the note was negotiable, and that the note and mortgage were assigned to the plaintiff for value before the maturity thereof, and that the Bank of Siloam, the payee of the note, did not have the note and mortgage in its possession after the assignment thereof.

In the case of *Winer* v. *Bank of Blytheville*, 89 Ark. 435, we held: "If the maker of a negotiable note pays the same to the payee, who is not the holder, he is not discharged from his obligation to the holder without showing that the payee was authorized to receive payment or that the holder led him to believe that he was so authorized."

This rule applies to notes secured by a mortgage or deed of trust, and it is generally held that payment to the original holder of a negotiable note, secured by a mortgage, of the amount due is at the risk of the one making it unless it is authorized by the true owner or justified by possession of the securities. *Marling* v. *Milwaukee Realty Co.* (Wis.), 5 L. R. A. (N. S.) 412, 7 A. & E. Ann. Cas. 364; *Hoffmaster* v. *Black,* 78 Ohio State 1, 21 L. R. A. (N. S.) 52, and case note; *Smith* v. *First Nat'l Bank* (Okla.) 29 L. R. A. (N. S.) 576, and case note.

The reason for the rule is that a mortgage executed as security for the payment of a negotiable note is a mere incident thereto, and partakes of the negotiability of the paper it secures. A mortgagor executing a mortgage as security for a negotiable note is charged with knowledge that the note is negotiable, and he makes payments to the original mortgagee without the production of the note at his peril, and the payments so made are of no effect as against an indorsee thereof who had possession at the time the payments were made.

It is conceded that the Bank of Siloam had authority to collect the interest on the note and mortgage in question, but there was no evidence from which it can be inferred that the Bank of Siloam had any authority to collect the amount of the principal or that it had possession of the note or mortgage.

"Authority of an agent to collect interest on a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities." Jones on Mortgages, § 964; *Richards* v. *Walker,* (Neb.) 68 N. W. 1053; *Hollinshead* v. *Jno. Stuart & Co.* (N. D.) 77 N. W. 89; *Thompson* v. *Buelher,* (Neb.) 95 N. W. 854; *Joy* v. *Vance,* (Mich.) 62 N. W. 140; *Trull* v. *Hammond,* (Minn.) 73 N. W. 642; *Klindt* v. *Higgins,* (Iowa) 64 N. W. 414.

Finally, it is contended by counsel for defendants that the plaintiff is estopped to deny that the Bank of Siloam had authority to collect the principal of the note. In the case at bar the defendant knew the note was negotiable, and knew that it was intended to pass from owner to owner by indorsement. He knew it was liable to pass at any moment, and that the last person thus receiving it could require at his hands the

full amount of the note. He had only to see to it that he received his note when he paid his money.

As stated in the case of *Hollinshead* v. *Jno. Stuart & Co., supra;* "If he neglected this simple requirement, demanded no more by the law than by common prudence, he paid at his peril; and, if loss occurs, he must bear it. One party or the other must suffer, and he, being the party in fault, must bear the burden."

In the case of *Bartel* v. *Brown,* (Wis.) 80 N. W. 801, the court said: "The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal sum on any such paper has such authority, possession of the paper itself by such person, or proof *aliunde* of express authority, is indispensable. As said by the court in *Smith* v. *Kidd,* 68 N. Y. 130, "Any other practice would be dangerous in the extreme." "If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security. That is the best evidence of authority. The payor is negligent if he relies on anything less, and must abide the event of being able to stablish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction. To that familiar doctrine there are many authorities, a large number of which are collated in Jones, Mortg. § 964."

In the instant case the plaintiff did nothing whatever to mislead the defendant. The defendant does not claim that the plaintiff, either by his conduct or acts, did anything to mislead him, but, on the contrary, he states that he thought the Bank of Siloam was the owner of the note and made the payment to them under that belief, and not because he thought the bank was acting as agent of the plaintiff.

The decree is therefore affirmed.

H. D. WILLIAMS COOPERAGE COMPANY *v.* CLARK.

Opinion delivered October 21, 1912.

1. APPEAL AND ERROR—OBJECTION IN GROSS TO INSTRUCTIONS GIVEN.—A general objection to several instructions will not be considered on appeal if any one of them is good. (Page 159.)

2. SAME—OBJECTION IN GROSS TO INSTRUCTIONS REFUSED.—A general objection to several instructions refused will not be considered on appeal if any one of them is bad. (Page 160.)

Appeal from Cleburne Circuit Court; *George W. Reed*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought suit against appellant for treble damages for the unlawful cutting and removing of certain timber from his lands. It was alleged that it unlawfully and wilfully entered upon his lands in June, 1911, and cut and removed 28,456 feet of white oak timber therefrom, of the value of $300, and damaged and caused a waste of other timber, growing thereon, of the value of $200, and prayed judgment for treble damages.

The appellant admitted appellee's ownership of the lands, and that its employees entered thereon and cut and removed 19,773 feet of timber; denied that it cut the amount claimed by appellee, and that it was of the value as alleged by him, and that it caused any damage or waste to the other timber standing thereon. It denied that it unlawfully and wilfully entered upon the lands and cut and removed the timber therefrom, and alleged that it was done by its employees without its knowledge and consent, and that only 19,773 feet of timber was taken.

The testimony tends to show that appellant's employees cut fifty-eight oak trees, on the lands of appellee, which stood along a road, and were within about half a mile of the switch on the Missouri & North Arkansas Railroad, in easy hauling distance thereof; that the trees would run from fifteen to thirty inches in diameter, and were long-bodied, and that some of them were more than thirty inches.

Appellee and two others testified that they scaled the timber, and it amounted to 28,456 feet. He stated that the fair market value of it was $235. It was also testified that the trees could be cut into logs for $1.00 per thousand, hauled to the railroad for $2.00; and when delivered there were worth from $24 to $36 per thousand feet. There was also testimony to the effect that timber not taken was damaged to the extent of $75. One witness testified that he saw Clarence Jones, the foreman of appellant company, in charge of the gang when they were cutting the timber, and told him it was on the Clark

land, and he said it didn't make any difference. There was other testimony tending to show that the timber was cut by mistake, and that as soon as Sam Giddon, another employee of the company, was notified he immediately stopped the cutting of the timber.

The testimony, on appellant's part, tended to show that only 19,773 feet of timber was taken from the lands, and that $3 per thousand feet was a good price for the standing timber.

No survey of appellant's lands adjoining the lands of appellee, from which the timber was cut, was made prior to the cutting of his timber.

The court gave three instructions, "to the giving of which the defendant objected and excepted, and had its exceptions noted of record." It refused the three asked by defendant. The jury assessed the damages at $775.00, and from the judgment thereon this appeal is prosecuted.

J. H. Harrod and *A. Y. Barr*, for appellant.

S. W. Woods, for appellee; *E. G. Mitchell*, of counsel.

1. The court did not err in giving instruction No. 2. But its correctness is not properly before this court for consideration, since it was not objected to when given, and the question of its correctness could not be raised for the first time in the motion for new trial. 73 Ark. 259. A general objection to two or more instructions given is bad, and will not be considered on appeal if any of them are good. 32 Ark. 223; 59 Ark. 312; *Id.* 370.

2. A general exception to the court's refusal to give several instructions asked will not be considered on appeal if any of them are bad, or properly refused. 75 Ark. 181.

KIRBY, J., (after stating the facts). Appellant contends that the verdict is excessive, and that the court erred in giving instruction No. 2 over its objection and in refusing to give the three instructions requested by it.

Said instruction numbered 2 relates to the statute requiring persons desiroous of cutting and removing timber from any land in the State for the purpose of making staves or to be sawed into lumber, when the boundaries of the land are not already ascertained and known, to have such lands surveyed and the metes and bounds marked and plainly established before cutting the timber therefrom.

The court's action in giving this instruction can not be reviewed here, because of the general objection made to all three of the instructions given, as follows:

"To the giving of which the defendant objected and excepted and had its exceptions noted of record."

This objection was general and embraced all the instructions in gross, and such objections are not considered here if any of the instructions are good. *Wells* v. *Parker*, 76 Ark. 42; *Young* v. *Stevenson*, 73 Ark. 480; *Dowell* v. *Schisler*, 76 Ark. 482.

Appellant's exceptions to the refusal to give its three requested instructions were likewise in gross. "To the court's refusal to give the three above instructions the defendant at the time objected and saved its exceptions, which were noted of record," and it is equally true that a general exception to the refusal to give several instructions requested collectively will not be considered on appeal, if any of such instructions are bad. *Young* v. *Stevenson, supra.*

Two of the requested instructions were covered by one already given by the court, and it is doubtful whether the other was a correct statement of the law.

It was not claimed that the lands of the cooperage company adjoining those of the appellee, from which the timber was cut, had been surveyed and the boundaries ascertained and known, nor did appellant attempt to show that its employees engaged in cutting the timber were acquainted with the boundaries of its lands, further than to say they had a plat of the lands in their possession. A plat of land does not necessarily designate the boundaries thereof on the ground plainly and clearly where it could not be easily mistaken, and there was some testimony from which it could be inferred that the foreman of the employees engaged in cutting the timber knew where the boundary line of Clark's land was before the timber was cut.

The questions whether appellant had reasonable cause to believe and did believe at the time the trespass was committed that the timber belonged to it, as well as the value thereof, were fairly submitted to the jury and upon conflicting testimony they found in appellee's favor. The testimony is sufficient to sustain the verdict, if it was the intention

of the jury to allow treble damages, which the law warranted under the circumstances. *Doniphan Lbr. Co.* v. *Case*, 87 Ark. 169; *Newhouse Mill & Lbr. Co.* v. *Avery*, 101 Ark. 34.

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

DENTON v. MAMMOTH SPRING ELECTRIC LIGHT & POWER COMPANY.

Opinion delivered October 21, 1912.

1. MASTER AND SERVANT—INJURY TO SERVANT—PRESUMPTION.—Where a servant is injured while employed in his master's service, the fact of the accident carries with it no presumption of negligence on the master's part. (Page 165.)
2. SAME—MASTER'S NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—A servant injured in the master's service can not recover for the master's negligence where under the evidence it is a matter of conjecture whether the injury was due to the master's negligence or to some other cause. (Page 166.)

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

STATEMENT BY THE COURT.

This is an action by appellant against appellee to recover damages for personal injuries received by him in the course of his employment. The material facts are as follows:

Appellee is a corporation engaged in erecting, maintaining and operating an electric power plant in the town of Mammoth Spring, Fulton County, Arkansas, and in September, 1910, appellant was in its employ assisting in the work of repairing its lines. Appellant had had some experience in repairing telephone and telegraph lines before he went to work for appellee. On the 12th day of July, 1910, appellant commenced to work for appellee, and his work until the latter part of August consisted in digging holes, setting poles and stringing wire on them. He was then put to work helping to repair appellee's lines in the town of Mammoth Spring, and had been at work with live wires or wires carrying very heavy charges of electricity for about two days when he was injured. On the day appellant was injured, he and De Holt, another servant of appellee, started to climb a pole which had live

wires on it. The foreman of appellee called Holt back, saying there was not room on the pole for both of them to be safe. Then appellant started up, and the foreman told him to get on the inside of the pole, and then he could clear the wires as he went up, and he turned on the pole and went up on the inside. The pole was double-armed; the wires from the power house were on the first arms, and the wires going up in town were on the second arms. Attached to the post was a guy-wire, which was not insulated, and which did not have a circuit breaker in it. The guy wire was fastened around the pole about four inches below the lower cross arm, and extended from there downwards to a guy stub and from there into the ground. Two of the wires were carrying a very heavy voltage, and these were called the primary wires; the other wires were carrying electricity, and were called the secondary wires, and were not nearly so heavily charged as the primary wires. If a person should come in contact with one of the live wires on his arm and another portion of his body should be in contact with one of the secondary wires, while he would not get the full primary voltage, he would get about one-half or a little over one-half of it. It would burn him, and would kill him if he should stay there long enough. The evidence also shows that if a person should come in contact with one of the live wires and the guy wire that would make a circuit. It would have injured or killed him according to the length of time the contact continued.

The appellant testified: "I had helped put the guy wire on the pole the day before, and appreciated the danger of working among live wires, but did not know the danger of coming in contact with a live wire and the guy wire at the same time. The foreman did not explain this danger to me when I started up the pole. He did tell me that the wires were hot; by which I understood that some of the wires were live wires. I climbed up the pole, as directed by the foreman, and had worked for about thirty minutes when I was injured. It was a very hot day, and I was wet with perspiration at the time I was hurt. My work consisted in helping to tighten the wires. I had on climbers, and was standing on the second arm. My head was above the wires, and my feet were on a level with the lower wires. I was sitting straddle of this arm.

It was dark and cloudy, and was threatening to rain. The business men of the town could not get along without the lights in their stores, and we just went ahead with the current on. "I was up on the pole pulling this slack, and the lightning was blazing something fierce, and the last I knew there was a streak of lightening, and I did not know anything." He was asked: "Q. You may state to the jury if you had any knowledge or appreciation of the danger?" "A. I always knew that if you got on both of the primary wires something would happen, but I did not know anything about the guy wire. I never had thought about that." On cross examination he was asked: "Q. Now, you knew also that these live wires, these uninsulated wires, that it was dangerous to come in contact with them, did not you?" "A. Two of them at one time, yes, sir." "Q. You do not know whether you come in contact with two live wires or with a live wire and a guy wire?" "A. I can't say that I can answer that question." In referring to a statement relative to the injury alleged to have been made by him, he was asked: "Q. I will ask you if you did not further state that you might have come in contact with the primary wires that your arm might have come against it and made a circuit with one of the lower wires, and that it might have touched the guy wire and hurt it that way?" "A. I can answer that like I did the other." "Q. You can surely say whether it might have occurred that way or not?" "A. No, no one will ever know or even can tell whether that happened that way." "Q. That is what I thought?" "A. I thought you knew that without asking questions, no man can tell, when he is shocked by electricity, how it happened."

Another witness for appellant testified that he looked up immediately after appellant was shocked, and that appellant's arm was lying over a wire, and that his foot was tilted in against the pole, that his head and shoulders were above the wires, and that his foot or leg, as best he could judge, was against the guy wire. That the power house was near by, and that the foreman ran to it at once and cut off the current. That appellant then fell to the ground, and they picked him up and carried him into a house.

The physicians who examined him testified that his

right arm was burned pretty badly just above and just below the elbow, that there was some small burns on his hip and one further down below the knee. His arm had to be amputated, and the burn below the knee was longer in healing than those on the hip.

The appellee adduced evidence tending to show that the appellant knew and appreciated the danger of working among live wires, and had so represented himself at the time he was hired by appellee. The appellant in rebuttal denied this, and said that he had only worked two days among live wires at the time he was injured.

The court directed a verdict for appellee, and the case is here on appeal.

David L. King, for appellant; *Lehman Kay*, of counsel.

1. Courts should submit questions of fact arising upon the issues to the jury under proper instructions if there is any question about which different conclusions might be drawn. *Headrick* v. *Williams Cooperage Co.*, 97 Ark. 553. It is error to direct a verdict if there is any testimony to support the allegations, giving it its strongest probative force. 21 Am. & E. Ann. Cases, 1002.

2. It is the master's duty to exercise reasonable care to furnish reasonably safe place to work and appliances. 126 S. W. 191; 142 Mo. App. 248; 132 S. W. 32. Plaintiff was not warned of latent defects, nor did he assume the risks nor was he negligent. 22 A. & E. Ann. Cas. 1002; 89 Ark. 527; 89 Ark. 537; 77 *Id.* 367. The primary cause was the negligence of the master. 4 Thompson on Negligence 498; 98 Ark. 227. Risks of latent dangers are not assumed by a servant. 81 Ark. 275; 73 *Id.* 49; 29 *Id.* 275.

3. The question of negligence is not of age but of intelligence, and is for the jury. 27 S. W. 66; 43 Am. St. 30.

C. E. Elmore and *McCaleb & Reeder*, for appellee.

1. This case falls within two of the exceptions to the general rule as to a master's duty to furnish safe place to work, etc. 1 Labatt on Master and Servant, § 29; 61 S. C. 491; 84 Ga. 491; 84 *Id.* 14; 133 S. W. 777.

2. Plaintiff was injured on account of his own negligence.

91 Ark. 107; 63 *Id.* 65; 76 *Id.* 436; 77 *Id.* 458; 78 *Id.* 100; 80 *Id.* 261.

3. The burden was on plaintiff to prove negligence and proximate cause. 87 Ark. 217; 82 *Id.* 372; 18 S. W. 172; 87 Ark. 321; 26 Cyc. 1149, note 9. It was an accident purely, and no recovery can be had. 105 N. W. 197; 33 L. R. A. 492; 32 *Id.* 700; 113 N. Y. 378; 60 Am. St. 433.

4. Plaintiff assumed the risk. 135 S. W. 892; 95 Ark. 136; 560; 96 *Id.* 500; Jones on Tel. and Tel., § 198.

HART, J., (after stating the facts). Where the servant has been injured while in the course of his employment, the fact of the accident carries with it no presumption of negligence on the part of the master, and it is an affirmative fact for the injured employee to establish that the employer had been guilty of negligence. *St. Louis, I. M. & S. Ry. Co.* v. *Harper*, 44 Ark. 524.

In the case of *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, Mr Justice Brewer, speaking for the court, said:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is liable and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In the case of *Coin* v. *John M. Talge Lounge Co.*, 222 Mo. 488, 17 A. & E. Ann. Cas. 888, the court held: "If an accident causing injury to a servant may have resulted from either one of two causes, for one of which the master is liable and for the other of which he is not, the servant, in an action to recover for the injury, must show with reasonable certainty that the cause for which the master is liable produced the injury; and, if the evidence merely leaves this to conjecture, the plaintiff must fail in his action."

To the same effect see *Green* v. *Southern Railway Company*, 5 A. & E. Ann. Cas. 165, and case note; *Schultz* v. *C., M. & St. P. R. Co.*, 116 Wis. 31.

If the appellant was injured by coming in contact with the primary and secondary wires with his body, it is evident that he can not recover, for he himself testified that he knew and fully appreciated this danger. He admits that he knew some of the wires were heavily charged with electricity before he began to climb the pole, and that he fully understood the risk he ran in working among them. Therefore, if he was injured by his body coming in contact with the primary and secondary wires, he must be deemed to have assumed the risk. Neither the appellant nor any of his witnesses undertake to to say just how the accident happened. The appellant himself testified that it could have been produced by any one of three causes: (1) by coming in contact with two wires, (2) by lightning, (3) by coming in contact with one of the primary wires and the guy wire at the same time.

Under the testimony there is no more reason to suppose that it was due from one of these causes than the other. The cause of the accident is purely a matter of conjecture, and "a servant can not recover where it is merely a matter of conjecture, surmise, speculation or supposition, whether the injury was or was not due to the negligence of the master." 2 Labatt on Master & Servant, 167.

Therefore, the court properly directed a verdict for appellee, and the judgment is affirmed.

LASER v. FORBES.

Opinion delivered October 21, 1912.

1. PLEADING—AMENDMENT—WAIVER OF OBJECTION.—Where plaintiff filed an amended complaint, setting up a new cause of action, the effect of such amendment was the institution of a new suit; and where the defendant filed answer thereto without objecting to the amendment, he will be held to have waived the right to object thereto. (Page 168.)

2. SALE OF LAND—BREACH OF CONTRACT—RESCISSION.—Where defendant, owning ten or more blocks of ground, sold two blocks to plaintiff, and agreed "to surface grade and lay sewer pipe in front of above property and build a four-foot cement sidewalk along the street line of said property, provided these improvements will be made as fast as 25 per per cent. of the moneys received from the sale of the property will pay for the same," the specified improvements were to be made not upon

the property owned by defendant, but upon the two blocks sold to plaintiff; and where defendant failed to make the improvements as required, plaintiff will be entitled to a rescission. (Page 171.)

3. SAME—RIGHTS OF PARTIES.—Where a purchaser who executed a note to his vendor for part of the purchase money sued to rescind and recover the purchase money paid, and the evidence shows that the note was past due and unpaid, but the vendor did not ask that same be set off, the note remained a binding obligation, unaffected by the judgment for plaintiff for the sum paid, including the note. (Page 172.)

Appeal from Garland Circuit Court; *Calvin T. Cotham*, Judge; affirmed.

S. W. Leslie, for appellant.

In 95 Ark. 580 it was held that appellee could not recover the price paid on the blocks and hold the blocks too, but only the damages sustained. No approximate amount of damages to the $1,500 awarded was shown, nor the lots proved to be worthless. No damages were shown, and the findings of the court are totally unsupported by any evidence.

H. H. Myers and *C. Floyd Huff*, for appellee.

Plaintiff amended his complaint and prayed to rescind on remand of this cause. 95 Ark. 580. The failure of one party to comply with a contract releases the other. 60 Ark. 320; 64 *Id.* 228; 67 *Id.* 156. Refusal or neglect to perform his part by one justifies the other in treating the contract as rescinded. 22 Ark. 258; 38 *Id.* 174.

KIRBY, J. This is an action which was originally instituted to recover damages for the alleged breach of a contract entered into by defendant whereby he had agreed to sell to plaintiff certain land in an addition to the city of Hot Springs and to make certain improvements thereon. A trial was had upon this action, resulting in a judgment in favor of plaintiff for damages, amounting to the purchase money which he had paid on the contract. The case was appealed to this court, and the judgment reversed on the ground that the measure of damages to which plaintiff was entitled upon the cause of action he had instituted was not the amount of the purchase money he had paid, but the amount of the actual damages which he had sustained by reason of the alleged breach of the contract. The basis of that decision was that

the action was not founded on allegations that by reason of said breach the contract had been rescinded, but only that defendant had committed a breach resulting in the damage for which a recovery was sought, and thereby recognizing the continued existence of the contract, instead of its rescission. The case was remanded for a new trial, and thereupon plaintiff filed an amended complaint in which in effect he based his cause of action upon allegations that the defendant had committed a breach of a material provision of said contract, thereby entitling him to rescind same, which he did, and then tendered for cancellation said contract; and therein he sought a recovery of the purchase money he had paid thereon.

Without making any objection to this amendment to the complaint, the defendant filed an answer and joined issue on the cause of action thus brought. The effect of this amendment was to change the cause of action, and was in effect the institution of a new suit. The defendant, by filing answer thereto without objection, has in effect entered his appearance to that suit, and by joining issue upon the merits has waived any right to raise any objection in this court to the new cause of action thus brought. In his answer the defendant did not plead that the plaintiff, by instituting a suit for damages growing out of the alleged breach of the contract, thus elected to treat the contract in full force, and was estopped thereafter from asking for its rescission. On the contrary, he joined issue on the allegations in the amended complaint seeking the rescission of the contract. *Kansas City Southern Ry. Co.* v. *Tonn,* 102 Ark. 20.

Upon the second trial, the case was submitted to the court sitting as a jury, who made a finding that the defendant had committed a breach of the contract entitling the plaintiff to its rescission, and rendered judgment in favor of plaintiff for the amount of purchase money which he had paid on the contract.

It appears from the testimony that the defendant was the owner of a tract of acreage land which he subdivided into lots and blocks as an addition to the city of Hot Springs. It was known as Central Avenue Park Addition, and consisted of ten or more blocks. In January, 1908, the parties entered into a written contract, whereby defendant agreed to sell to

plaintiff two of these blocks for the price of $6,900, of which the plaintiff then paid in cash $340, and agreed to pay the balance in monthly installments of $170 each, The contract described the two blocks which defendant had agreed to sell to plaintiff, and contained, amongst others, the following provision: "First party (defendant) agrees to surface grade and lay sewer pipe in front of above property and build a four-foot cement sidewalk along the street line of said property, provided, these improvements will be made as fast as 25 per cent. of the moneys received from the sale of the property will pay for the same." Thereupon plaintiff made payment of seven monthly installments as they matured, five of which he paid in cash and two by the execution of a note. After paying the seventh installment, maturing in August, 1908, the plaintiff claimed that defendant had failed and refused to make the improvements mentioned in the above provision upon the two blocks set out in the contract, and thereupon he claimed the right to and did rescind the contract, and tendered back the same for cancellation.

It appears from the testimony adduced upon the part of the defendant that he had received from the plaintiff $1,530 in said moneys and note up to August, 1908, and from other sources sufficient to make a total of $1,655. Of this he had spent $766 for improvements then made upon other property in the addition, but no sidewalks, grading or other improvements were made on the line of or in front of the two blocks mentioned in the contract. The improvements made by defendant consisted of some surface grading, street grading and like improvements made upon portions of the addition at some distance from these two blocks. The defendant claimed that this was a full compliance with the obligation of the above provision of the contract, and for this reason he was not required to and did not make the improvements upon the two blocks described in the contract. His counsel now urges this contention upon the ground that the entire addition had been laid out from acreage property into lots and blocks, which defendant contemplated selling to various purchasers with like terms and like provisions as was contained in the contract made with plaintiff, and by the above provision it was contemplated that the improvements therein named

were to be made in any part of the addition until finally the whole addition would secure all these improvements when all the lots were sold and payments made thereon. In his brief, counsel for defendant suggests that the construction of this provision is in effect the sole question involved in this case upon the determination of which this decision must rest, and in this we think he is correct.

The circuit court made findings of fact in accordance with the above testimony, and declared as a matter of law that, in order to comply with the provision of the contract for the expenditure of 25 per cent. of the moneys received, "the improvements must have been made in surface grading, sewer and sidewalks on the land immediately in front of and abutting the property purchased by the plaintiff," and that it was not a compliance with the terms of said contract to expend 25 per cent. of the moneys so received in making similar improvements on portions of the addition not immediately in front of and abutting the property purchased by the plaintiff. This, we think, is a proper construction of the above provision of the contract.

The contract is a separate one, disconnected with any other sale that the defendant made or will make of any other lot in the addition. The contract makes no reference to any other property in the addition or to other proposed sales thereof, but specifically provides that to the extent of 25 per cent. of the payments made by plaintiff surface grading should be made and sewer pipes laid "in front of" the blocks described in the contract, and that a cement sidewalk should be built along "the street line of said property." The plain meaning of this language of this provision of the contract is that these improvements shall be made in effect upon the property described in the contract out of the purchase money paid thereon. Any other construction thereof would simply alter and vary this plain meaning of this language of the contract. The amount received from plaintiff on the contract up to the time he claimed a rescission amounted to $1,530, 25 per cent. of which was sufficient to pay for the character of improvements named in the above provision upon this property. But defendant not only failed to make any of these improvements upon this property, but refused to do so, claiming and as-

serting the right to expend the moneys thus collected from plaintiff for improvements made upon other property in the addition. This he had no right to do, and by so doing he not only violated the obligation he assumed by the terms of this provision of the contract, but evinced an intention not to comply therewith. This was a breach upon his part of this provision of the contract, which we think is a material part of it. In the contract there were mutual obligations which were assumed by both parties. The promises therein made by one were the consideration for the promises made by the other; and the failure or refusal by one to fulfill his promises justified a rescission of the contract by the other.

The principle is thus formulated in the case of *Missouri Pacific Ry. Co.* v. *Yarnell*, 65 Ark. 320: "The obligations of the contract were mutual; and if the appellee failed to comply with it, he could not hold the appellant to a compliance. This is too plain to require argument or authorities. The failure of one party to a contract to comply with its terms releases the other party from compliance with it." The same principle has been announced or approved in the following cases: *Weigel* v. *Boone*, 64 Ark. 228; *Eastern Arkansas Hedge Fence Co.* v. *Tanner*, 67 Ark. 156; *Harris* v. *Wheeler Lumber Co.*, 88 Ark. 491; *Jno. A. Gauger & Co.* v. *Sawyer & Austin Co.*, 88 Ark. 422; *Berman* v. *Shelby*, 93 Ark. 472.

In the case at bar, the contract was entirely executory, and the plaintiff had never been put in actual possession of the land agreed to be sold. After the breach upon the part of the defendant of this material provision of the contract, he claimed a right to rescind, and subsequently tendered the contract for cancellation and surrendered every right that he might have therein. By such action the parties can be placed *in statu quo*, the defendant retaining all title to the land and the plaintiff receiving the moneys he has paid thereon. Under these circumstances, we are of opinion that the breach by defendant of this material provision of the contract entitled the plaintiff to rescind his purchase and to recover the money paid thereon as for money had and received. *Yeates* v. *Pryor*, 11 Ark. 58; *Bellows* v. *Cheek*, 20 Ark. 424; *Shultz* v. *Redondo Improvement Co.*, 156 Cal. 439; *Gray* v. *Immigration Co.*, 127 Iowa 560.

The lower court rendered a judgment in favor of plaintiff for $1,530, on the ground that this entire sum was paid by plaintiff upon the contract. It appears from the testimony, however, that $340 thereof was paid by a note which was given by the plaintiff. It does not appear whether this note has been negotiated by defendant or is still in his possession. The testimony in the case is that the note is past due and unpaid. If this note is still owned by the defendant, or was still owned by him at the institution of this suit, he has not in his answer asked for an allowance of it as a set-off. The note is a binding obligation, therefore, and is unaffected in its enforcement by the adjudication in this case.

We are of the opinion therefore that the court was right in the amount of the judgment which it rendered, and it is accordingly affirmed.

KIGHTLINGER v. STATE.

Opinion delivered October 28, 1912.

1. INDICTMENT AND INFORMATION—ALLEGATION OF VALUE.—When value is an element in the punishment of an offense, it must be alleged in the indictment. (Page 174.)
2. SELLING MORTGAGED PROPERTY—ALLEGATION OF VALUE.—An indictment for selling mortgaged property, the punishment of which is determined by the value of the property, must allege the value of the same. (Page 174.)
3. INDICTMENT AND INFORMATION—REQUISITES.—Every indictment must set out all the facts which in law may influence the punishment. (Page 174.)

Appeal from Randolph Circuit Court; *John W. Meeks*, Judge; reversed.

S. A. D. Eaton, for appellant.

1. An indictment for the offense of disposing of mortgaged cotton which merely alleges that it was cotton "upon which the said Ball Mercantile Company then and there had a lien by virtue of a certain chattel mortgage," without stating facts from which the court could arrive at a legal conclusion that the company had such valid existing lien on such cotton, is bad for want of sufficient description of the offense charged.

Kirby's Dig., § 2227; 11 O. 282; 26 Ark. 323; 68 Ark. 490.

2. An allegation of the value of the cotton sold was material and necessary to a valid indictment. Kirby's Dig., § § 2011, 2013, 2014.

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

1. The general allegation that a lien existed by virtue of a chattel mortgage was sufficient under our statutes. 68 Ark. 480; 50 Ia. 194.

2. The statute defining the offense (Kirby's Dig., § 2011) says nothing about the value of the security or the value of the property disposed of. They were mere matters of proof, and it became the duty of the jury, under proper instructions as to the law, to convict of a felony or misdemeanor according to the proof as to values. See 43 Ark. 284; 64 Ark. 194; 65 Ark. 80; 43 Ark. 378.

FRAUENTHAL, J. The defendant was indicted for selling certain property upon which a mortgage lien existed. The indictment in apt and comprehensive language charged that the defendant had sold certain property which was therein described, upon which a lien then existed by virtue of a certain chattel mortgage executed by him, and that such sale was made without the consent of the mortgagee; but the indictment did not allege the value of the property which was sold nor the amount of the debt secured by said mortgage. To this indictment the defendant interposed a demurrer, which was overruled; and upon his trial he was convicted of a felony, and his punishment assessed at imprisonment in the penitentiary for a term of six months. The indictment is founded upon section 2011 of Kirby's Digest, which makes it an offense for any person to sell or otherwise dispose of any property upon which certain liens exist, amongst them a lien created by virtue of a mortgage, with intent to defeat the holder thereof in the collection of his debt secured thereby. It is further provided that persons convicted of this offense shall be deemed guilty of a felony where the debt secured by such lien exceeds in amount the sum of $10, and the property so sold or otherwise disposed of exceeds in value the sum of $10; and where the debt secured by such lien does not exceed the

amount of $10, or where the property so sold or otherwise disposed of does not exceed in value the sum of $10, such persons shall be deemed guilty of a misdemeanor. Kirby's Digest, § § 2013, 2014.

Under the provisions of the above statutes, the defendant could be guilty of a felony only where the property disposed of exceeded in value the sum of $10 and the debt secured by the mortgage exceeded in amount the sum of $10. The value of the property disposed of and the amount of the debt secured by the mortgage are therefore, of the very essence of the offense of which defendant was convicted. The offense is a graded crime, and the value of the property and the amount of the debt are elements in the punishment thereof.

When value is an element in the punishment of an offense, it must be alleged in the indictment, and it is immaterial what the crime is. Thus, in cases of larceny, the value of the article stolen must be alleged unless the statute makes the stealing of a particular thing itself a felony. *Houston* v. *State,* 13 Ark. 66; *Ware* v. *State,* 33 Ark. 567; *Walker* v. *State,* 50 Ark. 532; *Sheppard* v. *State,* 42 Ala. 531; *Davis* v. *State,* 40 Ga. 229; Rapalje on Larceny and Kindred Offenses, § 109; 1 Bishop's New Crim. Proc., § § 541, 567; 12 Enc. Pl. & Prac. 996.

Every indictment, for whatever offense, must set out all the facts which in law may influence the punishment for the commission thereof. The principle is thus stated in 2 Bishop's New Crim. Proc., § 48: "If the punishment to be inflicted is greater or less, according to the value of the property, the value must be stated in the indictment, because every indictment for whatever offense must set out every fact which the law makes an element in the punishment thereof." 1 Wharton, Crim. Law, § 1003; Bishop on Stat. Crimes, § 427.

The punishment fixed for the crime of selling mortgaged property is influenced by and dependent upon the value of the property sold and the amount of the debt secured by the mortgage thereon, and these facts must necessarily be set out in the indictment in order to charge an offense under the above statutes.

It follows that the court erred in overruling the demurrer to the above indictment. For this error the judgment is

reversed, and this cause is remanded with directions to sustain the demurrer to said indictment and for further proceedings.

WEST v. STATE.

Opinion delivered October 28, 1912.

1. DISTURBANCE OF SCHOOL—INTENT.—Under Kirby's Digest, § 1927, providing that "any person or persons who shall, by boisterous or other noisy conduct, disturb or annoy any public or private school," shall be guilty of a misdemeanor, etc., any act which is within the terms of the statute, the natural consequence of which is to disturb a school, and which is wilfully done, and which in fact does disturb a school, comes within the statute, though the actor may have had no specific intent to disturb the school. (Page 177.)
2. SAME—INTENT.—One who went to a school house for a lawful purpose, and who was properly demeaning himself, was not guilty of disturbing the school, within the meaning of Kirby's Digest, § 1927, where, on being violently assailed by another, he defended himself, though his acts in his necessary self-defense may have disturbed the school. (Page 178.)

Appeal from Randolph Circuit Court; *John W. Meeks*, Judge; reversed.

STATEMENT BY THE COURT.

B. B. West was convicted of a misdemeanor, charged to have been committed by disturbing a public school in Randolph County, Arkansas.

Gussie Tiner, for the State, testified: "My name is Gussie Tiner. I was at the school house on the 14th day of July, 1911, where Miss Amanda Stevens was teaching when the difficulty occurred between the Wests and Segraves. Mr. West and myself and others were standing in front of the school house looking at some seats that Mr. Simpson had hauled there. Mr. Segraves came along, called Mr. West, saying that he wanted to talk with him. Mr. West replied that he would not do it. A quarrel followed, and again he asked West to come out there. Mrs. West had a club in her hand. West picked up a rock. Segraves said something to West about he would lick him or for him to come off the school grounds. They soon got into a fight, were separated and Mr. Segraves went on home. They fought and rolled over

the ground, and Mrs. West struck Segraves on the head with a stick. I saw a cut or lacrated place on West's head, but I did not see the wound made. Everybody there was excited over the fight. Many of the children ran away during the fight; some of them were crying, and the teacher was crying also. Mr. West came into the school house. Mrs. West still had the club in her hand. Mr. West talked excitedly and, as I thought, in a mad tone of voice to the teacher, Miss Stevens. He told her that his children had come home with their clothes wet and torn, and that it was her place to look after them. Mr. Simpson told all of them he thought they should hush as they had been disturbed enough, and it was time for the school to begin."

Other evidence for the State tended to show that the defendant and Segraves both used loud and boisterous language while engaged in their quarrel just preceding the fight and otherwise corroborated the testimony of Gussie Tiner.

The defendant in his own behalf testified: "There was some dissatisfaction in the school district among the patrons of the school on account of the manner in which the teacher allowed the pupils to act, and complaints had been made to the directors about it. My wife and I went to the school house on the morning of the difficulty at the request of the directors for the purpose of discussing and investigating the matter. I had no thought of trouble with any one when we went to the school house. Soon after we arrived there, R. L. Segraves came along and called to me. He had a personal grievance against me, and talked like he was mad. He called me to come out of the school yard, saying that he had a settlement that he had to make with me. I told him I had no settlement to make, and did not want to have any trouble. He said he would whip me either off of the school ground or on the school ground. I told him to go on and let me alone, that this was no place to have trouble. He then pulled a rock out of his hip pocket, and threw it at me. I dodged the rock, and then run in and clinched him, and we both fell to the ground. He had a knife in his left hand when he come up, and while we were down on the ground he cut me on the side of the head and face with the knife. I held his hand the best I could. The other men there parted us, and Segraves went

on away, and my wife and I and the other men then went in the school house. I talked to the school teacher about the way I thought she should treat my child, and told her I wanted her to make my boy mind. I did not mean to talk in a contemptuous manner, and do not think I did. I did not mean to offend the teacher in any way. Of course, I was excited over the trouble I had just had with Segraves, and perhaps talked a little loud and excited. What I said was in the presence of Mr. Simpson, one of the directors, and I believe if I had said anything out of the way to the teacher he would have called my attention to it. I had no intention at any time of disturbing either the teacher or the school."

The jury returned a verdict of guilty, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

S. A. D. Eaton, for appellant.

1. The indictment states two distinct offenses, and is bad for duplicity. Kirby's Dig., § 1927; 32 Ark. 203; 33 Ark. 176; 36 Ark. 55; 70 S. W. 1034.

2. The court erred in refusing to charge the jury as requested by appellant. One who is attacked by another may lawfully use such force as may be necessary to repel the assailant. 49 Ark. 543; 84 Ark. 121; 133 Ala. 613; 1 Gray 476; 53 Ala. 398; 96 Ala. 33; 11 Tex. App. 318; 108 N. C. 772.

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

1. The indictment states an offense under the statute, and is not bad for duplicity. Kirby's Dig., § 1927.

2. The instruction requested by appellant was properly refused because the effect of it was to tell the jury that appellant would not be guilty *unless he intended to disturb the school* which is not the law. 14 Cyc. 543; 133 Ala. 613; 99 Ala. 207; 8 Lea (Tenn.) 563; 92 Ala. 82; 34 N. Y. 141; 78 N. C. 448; 146 S. W. 862.

HART, J., (after stating the facts). The indictment in this case was drawn under section 1927, Kirby's Digest, which reads as follows:

"Any person or persons who shall, by any boisterous or other noisy conduct, disturb or annoy any public or private

school in this State, or any person not a student who, after being notified to keep off the school grounds during the school hours, by the board of directors or the superintendent or principal teacher in charge of any such school, shall continue to trespass or go upon said grounds, whether at recess or during the session of said school, shall be guilty of a misdemeanor," etc.

The indictment charged.

"The said B. B. West and Mrs. B. B. West, in the county and State aforesaid, on the 14th day of July, 1911, did unlawfully disturb and annoy the public school in School District No. 34, in Randolph County, Arkansas, by boisterous and noisy conduct, by quarrelling, by fighting, by using loud, profane, abusive language, and by trespassing upon the school grounds, during the sessions of said school. Against the peace and dignity," etc.

The section of the Digest in question states two offenses, the first of which is disturbing a school, and the second, trespassing on school grounds. It is contended by counsel for the defendant that the indictment in this case charges both of these offenses, and is therefore bad for duplicity. We do not think so. The indictment was evidently framed under the first part of the section. The indictment under the latter part of the section provides that any person, not a student, who, after being notified to keep off the school grounds during the school hours, shall continue to trespass or go upon said grounds, shall be guilty of a misdemeanor.

The indictment in question does not charge that the defendant trespassed upon the school grounds after being notified to keep off the same. Therefore, we think there was no attempt to charge two offenses, and the clause "and by trespassing upon the school grounds during sessions of said school" should be treated as surplusage.

Counsel for the defendant asked the court to give the following instruction:

"You are instructed that, if you find from the evidence that the defendant, at the time mentioned in the indictment in this cause, had gone to such school house or grounds for a lawful purpose, and was demeaning himself in a lawful manner, and while there and so demeaning himself he was attacked

by one Segraves with a knife and rock, or knife or rock, that he would be justified in defending himself against such assault, and if, in so doing, he disturbed said school without intending so to do, you should acquit him."

The court refused to give the instruction, and in effect charged the jury that, if the defendant while at the schoolhouse became engaged in a difficulty with Segraves and while engaged in such difficulty, by boisterous or other misconduct, disturbed the school, he should be convicted. The court should have given the instruction asked for by the defendant. It is true that an intent to disturb is not a necessary factor in the crime, but, on the contrary, any act which is within the terms of the statute, the natural consequence of which is to disturb, and which is wilfully done, and which in fact does disturb the school, comes under the denunciation of the statute, though the actor may have had no specific intent to disturb the school. See *Walker* v. *State*, 102 Ark. 336.

The testimony of the defendant tends to show that he went to the school house for a lawful purpose, and was conducting himself in a quiet and peaceful manner when he was insultingly approached by Segraves; and the subsequent fight was thrust upon him. Up to the time of Segraves's approach no disturbance had been created. The defendant insists that he tried to avoid a quarrel with Segraves, and did not strike him until after Segraves had assaulted him. From the imminent hostile demonstrations on the part of Segraves, as they appeared to him, the defendant had a right to stand upon his self-defense.

The defendant's testimony shows that whatever disturbance was caused by his act was in his necessary self-defense, and that he did not wilfully do or say anything that would have the effect of disturbing the school.

Therefore, the court should have given the instruction asked for by the defendant, and for the error in refusing so to do the judgment must be reversed, and the cause remanded for a new trial.

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

Opinion delivered October 7, 1912.

1. RAILROADS—DUTY OF TRAVELLER AT CROSSING.—It is the duty of a traveller on a highway, before attempting to cross a railroad track, to look and listen for the approach of trains, and, if he fails to do this, he is guilty of such negligence as will preclude a recovery for an injury resulting from such negligence, but, if the evidence is conflicting as to whether he looked and listened, the question is for the jury. (Page 183.)
2. APPEAL AND ERROR—HARMLESS ERROR.—If it was error, in an action against a railroad company for the negligent killing of a traveller at a highway crossing, to permit plaintiff to introduce a rule of the defendant company requiring trains not to block the highway in question, such error was harmless, since the act of May 10, 1907, imposed a penalty upon railroad companies for remaining standing on any highway for more than ten minutes. (Page 185.)
3. RAILROADS—INJURIES TO TRAVELLER AT CROSSING—EVIDENCE.—In an action against a railroad company for the negligent killing of a traveller at a crossing where at the time of the killing a freight engine blocked the highway and obstructed the vision of an approaching passenger train, evidence of a rule of the railroad company forbidding the blocking of the street in question was relevant. (Page 186.)
4. SAME—INJURY BY OPERATION OF TRAIN—PRESUMPTION.—Under Kirby's Digest, section 6773, in effect making proof of an injury by the operation of a train *prima facie* evidence of negligence, a plaintiff is entitled to an instruction informing the jury of this statutory presumption, even though there was evidence tending to rebut this presumption and to establish contributory negligence on plaintiff's part. (Page 187.)
5. SAME—INJURY TO TRAVELLER AT CROSSING—INSTRUCTION.—It was not error to instruct the jury, in an action against a railroad company for negligently killing a traveller at a highway crossing, that if deceased, before going on the crossing where he was struck, had looked and listened both ways then it can not be said as a matter of law that he failed to look and listen as required; other instructions having told the jury that it was the decedent's duty to continue to look and listen until he was across the defendant's tracks. (Page 188.)
6. SAME—INJURY TO TRAVELLER AT CROSSING—INSTRUCTION.—In an action against a railroad company for negligently killing a traveller at a highway crossing, an instruction that, while the fact that there was a freight train standing on the side track, the engine of which partially obstructed the crossing and was making a loud noise, would impose upon decedent a greater degree of care for his own safety, still, if these conditions existed, and defendant was responsible for them,

this would impose upon defendant a correspondingly greater degree of care, was not erroneous as imposing upon defendant a greater degree of care than ordinary care. (Page 189.)

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

E. B. Kinsworthy, R. E. Wiley and *W. V. Tompkins,* for appellant.

1. It was error to admit Dickson's testimony as to the order by the train master. There is no proof that the company was negligent; but, if there was, the proof is so flimsy that appellant should have had a verdict, but for this error. The jury may well have argued that the company had violated its own orders. 77 N. W. 433; 135 Ala. 450; 79 N. Y. 1043; 71 Minn. 438; 47 Pa. St. 300; 70 Ark. 179; 68 *Id.* 606.

2. The first instruction is erroneous. The railroad had the right-of-way, and the fact that deceased was on the track at the time overcomes the statutory presumption of negligence. 95 Ark. 193; 62 *Id.* 235; 95 *Id.* 193; 3 Elliott on Railroads, § 1165.

3. It was error to give the third instruction. It leaves it to the jury to say what is lawful. It was deceased's duty to stop, look and listen, and the court should declare the law. 46 Cent. Dig., § 467.

4. The sixth instruction is wrong. As a matter of law, if deceased only looked once as he went upon the crossing, he was guilty of contributory negligence. 76 Ark. 224; 60 *Id.* 138; 54 *Id.* 431. The rule that all the instructions must be read together, and that an omission in one may be cured by another does not extend to instructions inherently erroneous and misleading. 74 Ark. 585; 77 *Id.* 201; 75 *Id.* 263; 89 *Id.* 201; 75 *Id.* 263; 89 *Id.* 213; 93 *Id.* 573.

5. The ninth is also erroneous, and the deceased was clearly guilty of contributory negligence. 77 Ark. 164; 94 *Id.* 524; 78 *Id.* 55.

J. C. Ross and *H. B. Means,* for appellee.

1. The train master's order was properly read in evidence. 1 Am. & E. R. Cas. 253; 13 *Id.* 49; Acts 1907, 687; 143 S.W. 1070; 2 Thompson on Negligence, § 1692; 3 Ind.

App. 573; 95 N. C. 602; 63 N. H. 623; 74 Iowa, 188; 104 N. Y. 669; 58 Ark. 129; 58 Ark. 374.

2. Failure to sound the whistle or ring the bell is negligence. Kirby's Digest, § 6595; 92 Ark. 437.

3. The testimony justified a finding of negligence, and this question was for the jury. Elliott on Railroads, § 1160; 96 Ark. 311.

4. Even if the train master's order was inadmissible, a case of negligence was otherwise proved, (1) for violating the statute, (2) for failure to ring the bell or sound the whistle and (3) for running its train across Main Street at a negligent rate of speed. The error was harmless. 68 Ark. 606; 74 Ark. 417; 76 *Id.* 276.

5. There is no error in the court's charge. The *prima facie* presumption of negligence applies even to a trespasser. 95 Ark. 194; 94 *Id.* 246; 69 *Id.* 380; 95 *Id.* 193; 76 *Id.* 227. The degree of care is proportionate to the danger to be avoided. 1 Thompson on Negl., § 25; 38 Ark. 357; 95 *Id.* 359.

6. Deceased was not guilty of contributory negligence. 61 Ark. 549; 76 *Id.* 227; 94 *Id.* 246; 97 *Id.* 405.

FRAUENTHAL, J. This is an action instituted by the administrator of Lee Sullivan to recover from the St. Louis, Iron Mountain & Southern Railway Company damages for the pain and suffering endured by him by reason of being struck by one of defendant's passenger trains, which resulted in his death. Sullivan was struck at a public crossing in the city of Malvern, where defendant's tracks crossed Main Street. The depot was situated on the west side of the tracks, and next it was defendant's main track. Just east of that track, and about nine feet therefrom, was a side track. On the east side of both tracks and a short distance therefrom was a hotel, at which Sullivan had boarded for several months just prior to the injury. On the morning of July 15, 1911, Sullivan left the hotel for the purpose of going to the depot, and to do this it was necessary for him to cross defendant's tracks at Main Street. At this time a freight train was standing on the side track between the hotel and the depot, with its engine about one-half or three-fourths the distance across Main Street. Freight cars were attached to the rear end of the engine and extended southward for a distance of probably

three hundred yards. The freight train was taking water at a standpipe located just south of Main Street, and was emitting large quantities of steam and making a great noise. Sullivan proceeded on foot to the crossing at Main Street and across the side track in front of the freight engine, and then stepped on the end of the ties of the main track, when a fast passenger train coming from the south on the main track approached the crossing, and Sullivan attempted to escape by drawing or stepping back, but he was struck by the pilot on the engine, and was so severely injured that he died several hours later. The trial resulted in a verdict for plaintiff for $1,500 damages. The defendant seeks a reversal of the judgment entered thereon, chiefly upon the grounds (1) that the undisputed evidence shows that Sullivan was guilty of negligence contributing to the injury he received, and (2) that the court erred in admitting certain testimony and in giving certain instructions.

Upon the trial of the case, there was testimony adduced upon the part of the plaintiff tending to prove that the defendant failed to ring the bell or sound the whistle on the passenger train, as required by the statute of this State, when it approached the crossing, and that said train was running at a high rate of speed through the city of Malvern.

While counsel for the defendant do not contend in their brief that there was no testimony sufficient to warrant a finding of negligence on the part of defendant, they chiefly contend that the undisputed evidence shows that the injury which Sullivan received was due to his own contributory negligence. They earnestly argue that if Sullivan had exercised ordinary care in looking or listening after passing the freight engine, and before he stepped upon the ties of the main track, he would have seen the approaching passenger train in the broad daylight, when this injury occurred.

The care that is required by law of a traveller at a public crossing over a railroad track has been repeatedly stated by this court. It has been held that it is the duty of the traveller along the highway attempting to cross a railroad track to look and listen for the approach of trains; and if he fails to do this, he is guilty of such negligence as will preclude a recovery for an injury resulting from the failure to exercise that care.

The traveller must look in both directions, and continue that vigilance until the point of danger is passed; and where the undisputed evidence shows that the injured person had an opportunity to see or hear the approaching train at or before the time of the injury, and that his opportunity was such that he could not have failed to have seen or heard such train in time to have avoided the injury if he had used ordinary care in looking and listening, then the law declares him guilty of negligence barring him of recovery. On the other hand, where the evidence is conflicting, the question as to whether or not a traveller at a public crossing did look and listen for an approaching train before attempting to cross, and whether or not he did continue that vigilance until the point of danger was passed, is ordinarily one of fact for the jury to determine. This is especially so where the moving train is hid from his view by reason of some obstruction. This exception is illustrated by the following cases:

Thus, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hitt,* 76 Ark. 227, a traveller stopped at a railroad crossing and looked and listened, but failed to hear an approaching train, which was making little noise on account of sleet, and he was unable to see its headlight by reason of an obstructing train and the converging rays of an arc light and the headlight of a freight train standing near; and it was under those circumstances held that the question as to whether in attempting to cross the track he was guilty of contributory negligence was properly left to the jury.

In the case of *St. Louis & S. F. Rd. Co.* v. *Wyatt,* 79 Ark. 241, a traveller crossed several tracks at a public crossing and was injured, but there was evidence that he looked and listened before going on the track where he was injured, and on account of obstructions was unable to see the approaching train in time to avoid injury, and was unable to hear it on account of other noises. It was there held that the question as to whether he was guilty of contributory negligence was properly submitted to the jury.

In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Garner,* 90 Ark. 19, a traveller at a public crossing attempted to pass over a railroad track while on foot. A freight train was standing upon a side track, and the traveller passed over this track

in front of the freight engine. As he stepped on to the main track, a fast passenger train struck him and killed him. In that case there was testimony tending to show that the traveller looked and listened for the approaching train, but that he was prevented from discovering it on account of its rapid approach and the fact that his vision was obscured by the escaping steam from the freight engine. In that case this court said: "We are of the opinion that where the evidence shows, as it does in this case, that the deceased was making some effort to discover dangers on the track over which he was attempting to pass, and that the escaping steam brought about a condition which might have prevented his discovering the danger, even though by the exercise of greater care he might have discovered it, it was peculiarly a question for the jury to determine whether under all the circumstances deceased acted as a prudent person, or whether he was guilty of negligence in attempting to cross under those circumstances."

In the case at bar, the freight train had been standing upon the side track for more than ten minutes just before Sullivan was injured, and during that time its engine was standing upon and obstructing the crossing at Main Street for a distance of from one-half to three-fourths the width of the street. The freight cars on the side track were between Sullivan and the main track, and obstructed the view towards the south, the direction from which the passenger train came. The freight engine was emitting great quantities of steam and making a great noise. There was testimony tending to prove that, after passing in front of the freight engine, Sullivan listened and looked to the south, the direction whence the passenger train was approaching; and we are of the opinion that there was some testimony from which the jury were warranted in finding that the escaping steam from the freight engine obscured his view and prevented his discovering the approaching passenger train. Under these circumstances, we think it was fairly a question for the jury to determine whether Sullivan acted as a prudent person, or whether he was guilty of negligence in attempting to cross the main track.

It is urged that the court committed error in permitting the introduction in evidence of one of defendant's rules or orders providing where its employees should stop its trains

to take water in the city of Malvern. It appears that just south of the Main Street crossing there was a standpipe at which engines took water, and there was also a standpipe some distance north of this crossing, which was used for the same purpose. Some days before the injury there was posted at the depot at Malvern the following order: "Train and engine men. In taking water at Malvern by north bound trains, arrange to take water from north standpipe. This in order to keep from partially blocking the street crossing, about which we have received serious complaints from the mayor and marshal of that town." It is argued that this was a private rule of the defendant company, intended simply for the guidance of its employees, and that it did not fix any standard of duty which it owed to any traveller at such crossing.

It has been held by some courts that a violation of the rules prescribed by railroad companies for the management of its trains and the conduct of its employees tends to show negligence, and evidence thereof is admissible for that purpose. 10 Enc. Ev. 570, and cases there cited in footnote. It has also been held by such courts that such evidence is also relevant on the question of contributory negligence, in the event such rules have been published or posted for such a time and so publicly as that they might have come to the knowledge of some injured person and were relied upon by him. Other courts, however, have held that the law itself fixes the degree of care which shall be exercised by a railroad company in the operation of its trains, and that such company could not lessen the degree of care thus exacted of it by law by the adoption of any rule or regulation, and that it would be unreasonable to exact a higher degree of care than that required by law on account of any such rule or regulation. *Railroad Co.* v. *Clark*, 136 Ala. 450; *Isaackson* v. *Duluth R. Co.*, 77 N. W. (Neb.) 433; *Fonda* v. *Railroad Co.*, 71 Minn. 438.

In the present case, however, we do not think it necessary to pass on this question, for the reason that the purpose of this rule or order which was introduced in evidence was to prevent the blocking of street crossings in the city of Malvern, and this same prohibition is prescribed by the statutes of this State. By the act of the Legislature approved May 10, 1907, it is made a penalty for any railroad company to suffer or to

permit its freight trains to remain standing on any public highway or street for more than ten minutes, and for failure to leave a space of sixty feet across such highway or street. (Acts of 1907, p. 687). This is a public act, designed for the protection of the public, standing upon an entirely different footing from the private rules or regulations of the railroad company. The statute fixes the standard of care by which the conduct of the company must be tested; and a failure to observe that degree of care is negligence, fastening upon the company a liability for a consequent injury.

In the present case the testimony tended to prove that the engine of the defendant's freight train stood upon and obstructed Main Street for more than ten minutes. The above statute forbade this, and the private rule made by the defendant for the government of its employees prescribed no greater care, and required of its employees no greater duty, than that which the statute prescribes. The defendant could not therefore be injured in its legal rights by the introduction of this order. It is, however, claimed that the fact that defendant's engine obstructed the street crossing did not cause or contribute to the injury which Sullivan received, and on this account the order was an irrelevant matter misleading the jury. The fact that the engine was standing upon the street tended, we think, to further obstruct at this crossing the view of the train approaching from the south. The engine was between Sullivan and the direction whence this passenger train was coming, and if the street crossing had been clear of any obstruction he could more readily, and probably would, have seen the approaching train before he crossed over the side track. The situation was made more hazardous by the obstructing engine on the street, and this was doubtless one of the reasons for the passage of the above legislative act and the promulgation of the above order. We are therefore of the opinion that this was a matter that was relevant to the question as to whether or not Sullivan was guilty of contributory negligence.

It is urged that the court erred in instructing the jury in effect that, if Sullivan was struck and killed by a train when he was crossing over defendant's track, this was *prima facie* evidence that it was due to defendant's negligence. It is conceded

that, by virtue of our statute making a railroad company responsible for all damages done to persons and property by the running of its trains (Kirby's Digest, § 6773), a *prima facie* case of liability against the company is made by proof of such injury occurring by reason of the operation of its trains. *St. Louis & S. F. Rd. Co.* v. *Carr,* 94 Ark. 246. It is claimed, however, that the fact that plaintiff was not rightfully on the crossing at the time of the injury, or that he acted without due care, overcame this statutory presumption. It is true that this statutory presumption of negligence could be rebutted by proof that the defendant was free from negligence, or that the plaintiff was barred from recovery by reason of proof of contributory negligence on the part of Sullivan. But neither of these principles is inconsistent with or alters the rule that the negligence of the railroad company will be presumed from proof that the injury itself occurred by reason of the running of its trains. Plaintiff was therefore entitled to an instruction to that effect.

Objection is made to instruction No. 6, which was given in behalf of plaintiff, in which it is in part stated that if Sullivan, before going upon the crossing where he was struck and killed, had looked and listened both ways for the approaching train, "then it can not be said as a matter of law that he failed to look and listen as required by law." It is claimed that under this instruction the deceased would have been free from negligence if he looked and listened at a great distance from the crossing, and then failed to look and listen again before he reached the point of danger. We do not think, however, that this instruction is open to this objection, especially when taken in connection with other instructions given by the court on this question. The instruction manifestly refers to the part of the crossing or track on which Sullivan was struck, and not to any other track or place, and it required him to look and listen in going on and crossing over that track, and therefore in effect required him to look and listen until he passed the point of danger. *St. Louis, I. M. & S. Ry. Co.* v. *Prince,* 101 Ark. 315.

In this connection the court gave the following instruction to the jury: "13. You are told that it was not sufficient for the deceased to have looked for the approaching train

before he got on the track in front of the engine; but it was his duty to have continued to be on guard until he was entirely across the main track of the railroad. And if you believe from the evidence that, after he passed the freight train, he could have looked and listened in time to have avoided the injury, then the plaintiff can not recover in this case." In instruction No. 14, given on behalf of the defendant, the court further instructed the jury: "It is not sufficient for him to look once or even several times; but he must continue to look and listen until the danger is passed. In this case it was not sufficient for deceased to look and listen as he approached the freight engine, but it was his duty to look and listen after he passed the freight engine; but if you believe from the evidence that if he had looked immediately after he passed the freight engine he could have seen the approaching passenger train in time to have avoided injury, the plaintiff can not recover in this case."

The instructions given upon the part of the plaintiff and defendant on this issue were not contradictory, but were in harmony with each other, and correctly announced the law relative thereto.

At the request of the plaintiff the court gave the following instruction to the jury: "9. You are instructed that while the fact that there was a freight train standing on the side track, the engine of which partially obstructed the crossing and was making a loud noise, if such were the facts, would impose upon deceased a greater degree of care for his own safety in approaching said crossing, still if these conditions existed, and the defendant was responsible for them, this would impose upon the defendant company a corresponding greater degree of care in so operating its trains that, if deceased was rightfully using the crossing and in the exercise of ordinary care for his own safety, he might not be injured in so doing."

It is urged that by this instruction a greater degree of care than ordinary care was imposed upon the defendant. This contention, however, we do not think is sound. The instruction itself does not state that the defendant was required to exercise more than ordinary care. In effect, it only says that, if the situation and circumstances were more dangerous, then greater care should be exercised to avoid doing

an injury. But this does not mean that the defendant was required to exercise a greater degree of care than ordinary care. Ordinary care is but reasonable care; and the degree and the exercise of care necessary to constitute it depends generally upon the circumstances of each particular case. Ordinary care has been defined by this court to be such care as a reasonably prudent and cautious person would exercise under similar circumstances. *Bizzell* v. *Booker*, 16 Ark. 308; *Hot Springs St. Rd. Co.* v. *Hildreth*, 72 Ark. 572. The degree of care varies with the circumstances of each case, and necessarily depends upon the hazard or danger. It would not be improper to say that a greater degree of care should be exercised when the situation or circumstances is more dangerous or hazardous. Under such circumstances, a reasonably prudent and cautious person would exercise greater care than when the situation involved less or no danger. The exercise of the greater care under more dangerous and hazardous circumstances would therefore only be the exercise of that care which a reasonably prudent and cautious person would exercise under similar circumstances, and would therefore be at last only ordinary care. And this, we think, is but the meaning and effect of the instruction given.

The rulings made by the court relative to other instructions given and rejected are complained of and urged to be prejudicial. We have examined these, and find that the objections thus urged are similar in effect to those made to the instruction above referred to, and we are of the opinion that they were not erroneous, for the same reasons. On an examination of the entire case, we fail to find any error which calls for a reversal of the judgment. It is accordingly affirmed.

Ex parte WINN.

Opinion delivered October 14, 1912.

CONTEMPT—SUFFICIENCY OF EVIDENCE.—A judgment of the police court fining petitioner for contempt of court will be quashed where all the witnesses testified that neither the language nor the demeanor of the petitioner on the occasion in question was disrespectful, and where the police judge stated that he fined petitioner because he had a "snarl" on his face.

Appeal from Pulaski Circuit Court, First Division; *Robt. J. Lea,* Judge; reversed.

Murphy & McHaney and *W. T. Tucker,* for appellant. Petitioner argued the case orally, *pro se.*

1. Direct contempt can only be committed in the presence of the court or so near thereto as to obstruct the administration of justice. Insolent conduct toward the court or judge, to constitute contempt, must occur while the court or judge is engaged in the discharge of a judicial duty. 9 Cyc. 19. Certiorari is the proper remedy to bring into the circuit court for correction void proceedings of inferior courts. Kirby's Dig., § § 1310, 1315 and 1316; 73 Ark. 358; 87 Ark. 47.

Where the judgment fails to set out the facts constituting the contempt, it will be presumed that there was no direct objectionable conduct toward the court or judge. 87 Ark. 47; 73 Ark. 358; 80 Ark. 583.

2. Contempts committed out of the presence of the court may be proceeded against only after an order or statement spread upon the record or by affidavit calling the court's attention to the alleged contempt with notice in either case to the party charged and a reasonable time allowed in which to answer. 89 Ark. 72. One of these methods of procedure is necessary, where the contempt is not committed in the presence of the court, in order to give it jurisdiction, and without jurisdiction the judgment is a nullity. 91 Ark. 527; 93 Ark. 311.

Harry C. Hale, for appellee.

1. A police court is a court of record. Kirby's Dig., § 5626. And as such has power to punish for criminal contempt. *Id.,* § 720. In determining whether or not a contempt has been committed, the court may take into consideration, not only the spoken words, but also the demeanor of the offender, his tone of voice, the emphasis used, his manner and bearing toward the court, the glance of the eye and his facial expression. 7 Q. B. 984; 105 Ind. 513; 3 Minn. 274; 46 Neb. 149; 32 Vt. 253; 51 Ill. 296; 106 Ia. 7; 5 Col. 436.

2. The omission of the findings of fact in the judgment does not invalidate it. 5 Iredell's Law, 149; *Id.* 199; Rapalje

on Contempt, § 128; Oswald on Contempt, p. 217; 6 Fed. 63; 3 Wilson 188; 14 East 1.

McCULLOCH, C. J. The petitioner, Oscar H. Winn, is an attorney at law, licensed to practice in the courts of this State, and resides in the city of Little Rock; and on February 6, 1912, the police court of that city imposed a fine on him for contempt, alleged to have been committed in the presence of the court. The record was carried up to the circuit court by certiorari, and on trial *de novo* the petition for certiorari was by judgment of that court dismissed, from which judgment petitioner has prosecuted an appeal to this court.

No question is raised here by the respondent as to the form in which a review by this court is sought; therefore, we pretermit any discussion of that question, as the case may be treated as being either here on appeal or on writ of certiorari.

The circumstances under which the fine was imposed, as disclosed by the testimony adduced at the trial in the circuit court, were substantially as follows: Prior to the occasion in question, the police judge had announced from the bench, in the absence of petitioner, the latter's suspension from the right to practice his profession in that court. On the morning of February 6, 1912, the petitioner entered the police court room, while the court was in session, and took his seat inside of the rail where space was reserved for attorneys and officers of the court. The judge, observing his presence, directed him to leave, saying "Get out of here; you have been disbarred," or "You will have to get out of here; didn't you know you had been disbarred from this court?" Petitioner immediately arose, and, in a somewhat excited and embarrassed manner and tone of voice, replied, saying something about wanting a hearing. The witnesses do not precisely agree as to his words, but there is very little, if any, difference as to their meaning. One of the witnesses stated that he "said something in regard to wanting a hearing." Another stated that he "asked what for, and asked for a hearing or something of that kind;" another that he replied, "Well, I don't know about this; we will have to have a hearing of that;" others that he merely asked for a trial. Petitioner testified that his reply to the judge was that: "Well, Judge, I want to do what is right, and don't know what this is about, but if

I am charged with anything I would like to have a hearing." The police judge himself testified that when he directed petitioner to leave, the latter replied, "I don't know whether I do or not. I have not been given a trial." The fine was then imposed, and petitioner was at once taken in custody by an officer.

All of the witnesses, except the police judge, stated that they observed nothing disrespectful in petitioner's manner or tone of voice. The judge testified that petitioner had a "snarl" on his face, and that he fined him for his contemptuous look and for disobeying the orders of the court. Now, there is nothing in the testimony whatever, not even that of the judge himself, that petitioner refused to obey the order of the court. The only possible conflict in the testimony is as to the alleged manner of facial expression of petitioner. We conceive it to be our duty to give the same force to the findings of the trial court in this kind of case as in other cases where there is a conflict in the testimony, but it can hardly be said, we think, in this case that there is any substantial conflict in the testimony. We do not doubt that disrespectful manner or tone of voice may constitute such conduct as amounts to contempt of court; but interpretation of the expression on another's face, especially that of one who is surprised, excited or embarrassed, as practically all the witnesses agree was the condition of petitioner at this time, is a matter about which observers may easily be mistaken, and when, as in the present instance, only one out of many witnesses could discern a disrespectful look on the face of the accused, we hesitate about sustaining a punishment hastily inflicted. The differences in the opinions of the witnesses on that point are too inconsequential to be treated as raising a substantial conflict in the testimony. The opinion of the judge must under the circumstances be attributed to a mistake on his part in interpreting the manner of petitioner, since all agree that no contemptuous words were spoken, and no one else discovered anything disrespectful in his manner. It is also undisputed that immediately after the fine was imposed the petitioner expressed himself in a way which amounted to a disclaimer of any intention either to disobey the order of the court or to offer anything disrespectful to the court. Upon the whole, we are convinced that neither the manner nor con-

duct of the petitioner on the occasion named was disrespectful to the court, and that there existed no ground for adjudging him to be in contempt. The judgment of the circuit court is therefore reversed, and the cause is remanded with directions to quash the judgment of the police court.

BELL v. BELL.

Opinion delivered October 28, 1912.

1. DIVORCE—EVIDENCE—SUFFICIENCY.—In an action of divorce general statements of witnesses that defendant was rude or contemptuous towards the plaintiff are not sufficient; the witnesses must state specific facts and conduct upon which their opinion is based, so that the court may be able to determine whether such acts and conduct were of a nature to justify the conclusion or belief reached by the witness. (Page 196.)
2. SAME—CRUELTY AND INDIGNITIES.—Mere want of congeniality and consequent quarrels do not amount to cruelty or indignities to the person constituting grounds for divorce. (Page 196.)

Appeal from Faulkner Chancery Court; *Jeremiah G. Wallace,* Chancellor; affirmed.

R. W. Robins and *F. M. Bruce,* for appellant.

J. C. Clark, for appellee.

FRAUENTHAL, J. This is a suit for divorce brought by the husband upon the ground that the wife was guilty of such cruel treatment and had offered such indignities to him as to render his condition intolerable. A short time after the institution of the suit, the parties entered into a written contract whereby they agreed to settle the wife's property rights. In this contract it is provided that, in consideration of $500 and the support of the minor children, the wife surrendered and released all her right and claim, including that of dower and homestead, in all the husband's property, both real and personal. In payment of said $500, the husband turned over to the wife certain notes, personal property and money. Thereafter, the wife filed an answer and cross complaint in which she denied the allegations made by the husband and sought a divorce upon the ground that the husband had been guilty of cruel treatment toward her, and had offered to her such

indignities as to make her condition in living with him intolerable. She also sought a cancellation of said contract settling her rights in the husband's property upon the ground that it had been obtained by fraud and undue influence.

The chancellor entered a decree denying both the prayers of the complaint and cross complaint seeking a divorce, but granting the prayer of the cross complaint asking a cancellation of said contract. In said decree he also ordered the restitution by defendant of all property delivered or paid to her by virtue of said contract. From this decree the plaintiff alone appeals.

A majority of the court are of the opinion that this decree should be affirmed. It appears from the testimony that the plaintiff and defendant were married in 1879, and lived together as man and wife until shortly before the institution of this suit in June, 1911. At the time of their marriage the plaintiff was a widower and the father of six children, some of them of tender age; and during their wedlock there was born to them twelve children. The evidence adduced upon the part of the plaintiff consisted of the testimony of some of these children, both by his first wife and by the defendant, and also of some neighbors. The defendant introduced no witness save herself. The witnesses upon the part of the plaintiff testified in general terms that about a year prior to the institution of this suit the defendant seemed to lose her love and affection for plaintiff; that she was rude and contemptuous towards him, and that during the winter prior to the bringing of this suit the plaintiff was sick and the defendant did not wait on him, and finally, in May, 1911, that she left him. But none of these witnesses testified to any specific act of rudeness on the part of the wife, or to any specific contemptuous language spoken by her to him. This entire testimony consists of generalities, constituting at most mere opinions or beliefs of the witnesses. It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the anuulment of the marriage bonds. This determination must be based upon facts testified

to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt and indignities complained of. General statements of witnesses that defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts—that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms—so that the court may be able to determine whether those acts and such conduct are of such a nature as to justify the conclusion or belief reached by the witness. The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

The defendant testified that plaintiff had often spoken roughly to her and cursed her, and by his conduct caused her to leave him in May, 1911. While she offered no other witness, and therefore produced no corroboration of this alleged misconduct on the part of plaintiff, and therefore no evidence legally sufficient to warrant a divorce in her favor, nevertheless her testimony is competent to show that the quarrels and unkindly conduct which marked the marital relations of these two were not attributable altogether to one of the parties. The chancellor found that the testimony was not sufficient to justify a divorce at the instance of either of these parties, and we can not say from this character of testimony that his finding is clearly wrong.

The plaintiff is now seventy-two years of age, and the defendant fifty-one. They have lived together for more than thirty years, during which time twelve children have been born to them. The wife assisted in rearing six of the plaintiff's children by a former marriage and these twelve children by the marriage with her. It is not claimed that during all these years she did not minister to the needs and wants of all these children, and did not show them every mark of motherly love and affection. It is true that the witnesses state in general terms that she had become, within the year before the suit was brought, rude to her husband and con-

temptuous of him; but they do not state the circumstances accompanying such rudeness or manifestations of contempt, so that it can be determined whether or not there was just cause for her conduct, and whether they were of such a character as to warrant a divorce. Ordinarily, the findings of a chancellor are persuasive upon this court; and, in view of the character of the evidence adduced in this case, his findings, we think, should be all the more persuasive, and therefore should not be disturbed.

We are also of the opinion that the finding of the chancellor that there were sufficient grounds shown to cancel the contract settling the rights of the wife in the husband's property should not be disturbed.

The decree is accordingly affirmed.

FINN v. CULBERHOUSE.

Opinion delivered October 28, 1912.

1. SALES OF CHATTELS—CONSTRUCTION.—Where a stock of old goods were sold "at the wholesale cost of same," to be determined by an inventory, the term "wholesale cost" is to some extent ambiguous, and should be construed, in view of a local custom to that effect, to mean the original cost of purchasing the goods in the wholesale market and of laying them down in the vendor's store. (Page 200.)
2. SAME—ACCEPTANCE.—Where plaintiff exchanged land for a stock of merchandise under an agreement to the effect that the price of the stock should be its "wholesale cost," including freight and dray charges, and accepted an inventory of the goods which included an estimate of the amount of freight and dray charges, and received the goods and sold a part of them, he can not afterwards complain that the cost of freight and drayage was less than the estimate. (Page 201.)

Appeal from Craighead Chancery Court, Western District; *Charles D. Frierson,* Chancellor; affirmed.

Basil Baker, for appellant.

1. "Wholesale cost" does not mean the wholesale price with 10 per cent. added, but the invoice price at wholesale. 45 Am. St. 230.

2. There was fraud and deceit shown, or at least concealment. 16 L. R. A. (N. S.) 818; 17 *Id.* 284; 128 U. S.

(32 L. Ed.) 383, 439; 90 U. S. 420; 143 *Id.* 79; 135 *Id.* 582, 33 (L. Ed.) 384; 74 Ark. 46; 77 *Id.* 261; 81 *Id.* 234.

3. There was no mutual mistake. 91 Ark. 162; 94 *Id.* 200; 90 *Id.* 24; 89 *Id.* 309; 98 *Id.* 23; 141 S. W. 941.

Hawthorne & Hawthorne, for appellee.

1. "Wholesale cost" includes cost of transportation, and 10 per cent. added is customary and reasonable. No fraud nor deceit was proved, and the court properly reformed the contract to express the true intent of the parties. 73 Ark. 542; 11 *Id.* 58; 38 *Id.* 339; 60 *Id.* 387; 74 *Id.* 46; 46 *Id.* 250; 130 U. S. 643; 125 *Id.* 247.

2. Wholesale price has a fixed and determined meaning. 45 Am. St. 230. The custom of all merchants in that vicinity to add 10 per cent. was properly shown. 45 S. W. 876.

McCULLOCH, C. J. Appellants owned a tract of land, containing 591 acres, situated in Craighead County, and appellee was engaged in the mercantile business in the city of Jonesboro, being the owner of a stock of general merchandise. Negotiations were begun between the parties looking to a sale by appellants of their land to appellee, and a purchase by them from appellee of the latter's stock of merchandise. The negotiations finally resulted in a bargain whereby appellee became the purchaser of the land at the sum of $25 per acre, and appellants purchased the stock of merchandise, the price thereof to be credited on the purchase price of the land. A written memorandum of the contract was made and signed by the parties, in which it was agreed that "the price of the above stock to be the wholesale cost of the same." The parties proceeded jointly to take an inventory of the stock of goods, and it amounted to the sum of $10,233, which was credited on the purchase price of the land, and appellee paid the balance, receiving a conveyance. Appellant took possession of the stock of goods, and put on a special sale, and thereby disposed of a considerable quantity of it. The inventory of the stock was taken according to the marks on the articles, which the evidence shows was at the original price paid and 10 per cent. added for the estimated expense of freight charges, drayage, etc. Appellee had been in business at Jonesboro for about thirty years, and the stock of goods contained accumulations

of several years. Appellants assert that they did not know, when the inventory was taken, that the marked prices on the goods included anything above the actual prices paid in the wholesale market, and that they did not make discovery of that fact until several months after the stock of goods had been delivered to them. They instituted this action at law against appellee, alleging that the latter had, by fraud, deceit and misrepresentation, induced them to accept the stock of goods under the belief that they were getting the same at original first cost without other charges, and they prayed for the recovery of damages in the sum of $930.27, which was the amount of the added 10 per cent. Appellee answered, alleging that the contract actually entered into by the parties was that the goods should be taken at marked cost, and that one of appellants reduced the contract to writing and changed the wording so as not to correctly represent the real agreement. He denied the allegations as to fraud, deceit and misrepresentation, and alleged that the inventory had been taken according to the contract and with full knowledge on the part of appellants of the fact that it was taken according to the marked cost on the goods, including estimated freight charges, etc. Appellee made his answer a cross complaint, and prayed for the reformation of the contract, and on his motion, without objection on the part of appellants, the cause was transferred to the chancery court, where it proceeded to a final hearing, resulting in a decree in appellee's favor.

A considerable amount of testimony was taken, mostly of merchants of the city of Jonesboro, and it appears, by the preponderance of the testimony, to be customary in that city for merchants, in marking the cost price upon their goods, to add a percentage sufficient to cover the estimated expense of transportation and placing upon the shelves ready for sale. The testimony also warrants a finding that upon the class of goods held in stock by appellee 10 per cent. was approximately a correct estimate of such charges. The chancellor found that the contract did not correctly express the real intention of the parties, and that it should be reformed so as to make the marked cost on the packages the basis of the sale. He also found that there was no misrepresentation or bad faith on the part of appellee.

Let it be said in the outset that there is no testimony in the record tending to show any actual bad faith on the part of appellee. The utmost that appellants claim is that the contract, when interpreted according to the language used, meant the original price paid by appellee without any other charges added; that the inventory was taken without any knowledge on their part of the added percentage to cover charges of transportation, etc., and that appellee's conduct in failing to disclose to them that 10 per cent. had been added for such charges amounted in law to fraudulent concealment.

Before proceeding to determine whether the chancellor was right in decreeing a reformation of the contract, it is first necessary that we decide what interpretation should be placed upon that part of the contract which fixes the price at which the goods were to be taken.

The term "wholesale cost" is not free from obscurity, and is to some extent ambiguous, making it necessary to look to the surrounding circumstances to determine what it really means as used by the parties in this contract. It has generally been said, in the adjudged cases, that such terms as "actual cost," "estimated cost," "first cost," "original cost," "prime cost," and "wholesale cost," are indefinite, and that surrounding circumstances must often be looked to in order to arrive at a proper interpretation. *Goodwin* v. *U. S.*, 10 Fed. Cases 625; *Hazleton Tripod Boiler Co.* v. *Citizens Street Ry. Co.*, 72 Fed. 317; *Herst* v. *DeComeau*, 31 N. Y. Superior Court, 590; *McCoy* v. *Hastings*, 92 Iowa 585; *Holloway* v. *Frick*, 149 Pa. St. 178; *Eagan* v. *Clasbey*, 5 Utah 154; *Boaz* v. *Owens*, (Ky.) 45 S. W. 876.

There is a difference between the terms "wholesale price" and "wholesale cost," though they are often used interchangeably, as was done by many of the witnesses in this case. If the former had been made use of in the present case, it would doubtless be construed to mean the present price of the goods in the wholesale market; in other words, the present market value. It is evident, however, that the term "wholesale cost" was not used in that sense, for the subject of the sale was an old stock of goods, and the conduct of the parties in taking an inventory plainly shows that the prices paid by appellee were to be considered, and not present prices or market value.

Now, when it is seen that the parties meant to fix a basis of sale according to the prices which had been paid by appellee, it is evident, when we construe this language in the light of the surrounding circumstances and the almost universal custom which prevailed in the city of Jonesboro, that the term was used in a sense which includes the transportation charges and means the wholesale cost of the goods in appellee's house in the city of Jonesboro. It does not mean the selling price in the wholesale markets, nor the selling price at wholesale in Jonesboro; but it means the original cost of purchasing the goods in the wholesale market and of laying them down in the business house at Jonesboro. We are of the opinion, therefore, that the contract should have been construed to mean that, and that it needed no reformation to conform to the actual intention of the parties. Now, the proof shows, as before stated, that 10 per cent. was an approximately correct estimate of the cost of bringing the goods from the wholesale market and placing them upon the shelves ready for sale, that is to say, a correct estimate of the freight and dray charges. That is only an estimate, and the testimony is not conclusive that it is a correct one; but appellants were present when the inventory was taken and assisted in making it. They are chargeable with knowledge of what the language of the contract really means, even though they may, in good faith, have misconceived its meaning; and if they desired an ascertainment of the actual amount of the freight and drayage charges to be added to the original price, they should have demanded it at the time. Having accepted the inventory and the delivery of the goods and disposed of a considerable portion of them, it is too late now to complain of any discrepancy that might appear between the actual expense of transportation and the estimate marked on the goods. The views of the chancellor led to a correct decree, and the same is therefore affirmed.

MILLER v. MATTISON.

Opinion delivered October 28, 1912.

1. SALES OF LAND—VENDOR'S LIEN.—The vendor of land, though he makes an absolute deed to the purchaser acknowledging receipt of

the purchase money, has an equitable lien for unpaid purchase money as against the vendee and all other except innocent purchasers for value. (Page 204.)

2. MORTGAGES—BONA FIDE PURCHASER.—Where a creditor takes a mortgage merely as security for an antecedent indebtedness, without advancing any new consideration, he is not entitled to protection as a *bona fide* purchaser as against prior liens or equities. (Page 204.)

3. EQUITY—PRIORITY IN TIME.—As between persons having only equitable interests, if their interest in all other respects are equal, priority in time gives a better equity. (Page 204.)

4. PARTIES—CROSS COMPLAINT.—One who was constructively summoned as a defendant in the original suit and who is a necessary party defendant in a cross action must be summoned to answer the cross complaint unless she voluntarily enters her appearance. (Page 205.)

Appeal from Cleburne Chancery Court; *Geo. T. Humphries*, Chancellor; reversed.

Appellants, pro se.

1. A deed will not be reformed unless the evidence of mutual mistake is clear, unequivocal and decisive. 85 Ark. 62; 89 *Id.* 309.

2. Banks & Company were not innocent mortgagees for value. There was no new consideration for their antecedent debt. 27 Ark. 557; 55 *Id.* 542; 35 L. R. A. 1174; 25 S. W. 805; 89 N. Y. 446; 16 A. & E. Enc. L. 831; 49 N. Y. 286.

Bratton & Fraser, for appellees.

A mutual mistake justifies a reformation. There is ample proof of the mistake. Banks & Company were innocent mortgagees for value. 49 Ark. 214; 62 *Id.* 323; 27 Cyc. 1192; 23 A. & E. Enc. L. 493-4.

MCCULLOCH, C. J. C. J. Miller owned three lots in Cleburne County, Arkansas, described as lots 4, 5 and 6 of block 69 of West Addition to the town of Sugar Loaf (now changed to Heber). He mortgaged them to Mattison to secure a debt of $500, and subsequently sold and conveyed lot 6 and the west half of lot 5 to Mrs. Elsie Burt, wife of W. L. Burt, for the sum and price of $1,250, of which $450 was paid in cash at the time of the conveyance, $500 was to be paid to Mattison in discharge of said mortgage debt when the same matured, and the remainder was evidenced by two promissory notes

for $150 each, payable at subsequent dates. It was agreed, according to the uncontroverted testimony, that the deed of conveyance should recite Mrs. Burt's assumption of the Mattison debt as a part of the consideration, and also a reservation of the vendor's lien to secure payment of the two purchase money notes. W. L. Burt is a lawyer, and prepared the deed, Miller relying on him to properly incorporate said recitals as to consideration. But Burt failed to do that, and drew the deed reciting the consideration as being paid in full. Miller executed the deed in that form, relying on Burt's representation that it contained the proper recitals as to the consideration, and had no knowledge of the omission, it appears, until this litigation arose. None of the indebtedness, either the mortgage to Mattison or the balance of the purchase money to Miller, has been paid, except that Burt paid some of the interest to Mattison on his mortgage. Subsequently, W. L. Burt, who represented A. B. Banks & Company in soliciting insurance business, became indebted to the latter in the sum of $1,684.96 on insurance premiums collected, and after the debt was incurred his wife, Mrs. Elsie Burt, executed a mortgage to secure $484.96 on real estate described as "lot 6 and west half of lot 5, in West Addition to the town of Sugar Loaf (Heber), Arkansas," the number of the block being omitted. The mortgage deed described a note for $484.96, but no note for that amount was executed, the only one executed being for the sum of $1,684.96, the full amount of the debt, which was due and payable one year after date.

Mattison instituted this suit to foreclose his mortgage, and made Miller, Mrs. Burt, and Banks & Company parties defendant. Mrs. Burt, being a nonresident of the State, was constructively summoned, but did not appear to defend. Miller filed his answer and a cross complaint, setting forth the facts concerning his alleged lien for purchase money, and prayed for a foreclosure against Mrs. Burt, subject to the mortgage of Mattison. Banks & Company also filed an answer and cross complaint against Miller and Mrs. Burt, denying the allegations of Miller's cross complaint as to his asserted lien, and praying for the reformation and foreclosure of their said mortgage. After the commencement of the suit and the filing of the cross complaints, Mrs. Burt executed a new mort-

gage properly describing lot 6 and west half of lot 5, block 69, and this was introduced in evidence over Miller's objection.

On final hearing of the cause the court rendered a decree, foreclosing Mattison's mortgage; also reforming the mortgage to Banks & Company in accordance with the prayer of their cross complaint so as to properly describe the property, and foreclosing the same subject to the Mattison mortgage; also foreclosing Miller's lien as vendor, subject to the mortgages of Mattison and Banks & Company. Miller appealed to this court.

The controversy here is solely between Miller and Banks & Company as to the priority of their respective liens.

The vendor of real estate, though he makes an absolute deed to the purchaser acknowledging receipt of the purchase money, has an equitable lien for unpaid purchase money as against the vendee and all others except innocent purchasers for value. *Shall* v. *Biscoe*, 18 Ark. 142; *Scott* v. *Orbison*, 21 Ark. 202; *Holman* v. *Patterson*, 29 Ark. 357.

The mortgage to Banks & Company was to secure an antecedent indebtedness, no new consideration passing to the mortgagor. In *Johnson* v. *Graves*, 27 Ark. 557, this court held that, where a creditor takes a mortgage merely as security for antecedent indebtedness, without advancing any new consideration, he is not entitled to the protection accorded.

In the recent case of *Haldiman* v. *Taft*, 102 Ark. 45, we reviewed the line of decisions of this court holding that "one who takes negotiable paper before maturity, in payment of or as security for an antecedent debt, and without notice of any defect, receives it in due course of business, and is a holder for value and free from any equities of the maker or indorser."

The distinction is thus marked between negotiable and nonnegotiable paper with respect to the consideration for an antecedent debt. But in the present case there is no note in existence as described in the mortgage, the debt being a part of the larger sum evidenced by negotiable note of that date.

The mortgage also fails to properly describe the lots sought to be conveyed. Therefore, the mortgage is not enforceable except by resort first to equity in order to reform it. The situation as between the parties claiming liens, both

valid in equity, against the same debtor, calls for the application of the maxim that "between equal equities the first in order of time shall prevail." *Byars* v. *McDonald,* 12 Ark. 285. Another statement of the principle is that, "as between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives a better equity." 16 Cyc. 139. Applications of this principle are found in the following cases: *Phillips* v. *Phillips,* 4 DeGex, F. & J. 208, 45 English Reprint 1164; *Hardin* v. *Harrington,* 11 Bush (Ky.) 367; *Carlisle* v. *Jumper,* 81 Ky. 282; *Wailes* v. *Cooper,* 24 Miss. 208; *Perkins* v. *Swank,* 43 Miss. 349; *Briscoe* v. *Ashby,* 24 Grat. (Va.) 454; *Camden* v. *Harris,* 15 W. Va. 554; *Johnson* v. *Hayward,* 74 Neb. 157, 5 L. R. A. (N. S.) 112.

It follows that the chancellor erred in giving priority to the equitable lien of Banks & Company over that of appellant Miller. The last mortgage from Mrs. Burt to Banks & Company, correcting the description of the lots, was executed during the pendency of this litigation and with full notice of Miller's lien; therefore it can not avail anything.

As the cause must be reversed for further proceedings, we deem it appropriate to call attention to the fact that the cause proceeded to final hearing without service of process on Mrs. Burt, constructively or otherwise, as to the cross complaints. This was error. *Ringo* v. *Woodruff,* 43 Ark. 469; *Pillow* v. *Sentelle,* 49 Ark. 430. She was one of the original defendants in the action, and was constructively summoned as such; but it is essential, in order to give the court jurisdiction over her as to the causes of action of appellant Miller and Banks & Company, that she be summoned to answer the cross complaints unless she voluntarily enters her appearance. The decree is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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

Opinion delivered October 28, 1912.

1. MASTER AND SERVANT—NEGLIGENCE—REPAIR OF DEFECTIVE APPLIANCE.—Evidence that the master subsequently repaired a defective

appliance, after an injury had occurred from its use, is incompetent to show negligence of the master in furnishing it. (Page 209.)

2. APPEAL AND ERROR—PRESUMPTION OF PREJUDICE.—When incompetent evidence is introduced, prejudice is presumed, and the burden is upon the party introducing it to show that no prejudice resulted. (Page 209.)

3. MASTER AND SERVANT—DEFECTIVE APPLIANCE—INSTRUCTION.—An instruction to the effect that plaintiff did not assume a latent risk in an appliance furnished by the master, and that, if the cause of his injury was a latent defect in an appliance, he should not be regarded as having assumed such risk, and that the jury in such case should find for him, was erroneous in ignoring the defense of contributory negligence. (Page 209.)

4. SAME—DUTY OF MASTER AS TO APPLIANCES.—It is error to instruct the jury that it is the duty of a master to furnish safe tools and appliances for its employees to work with; the correct rule being that it is the master's duty to use ordinary care to furnish safe tools and appliances for the use of employees. (Page 210.)

5. DAMAGES—INSTRUCTION.—It is error to instruct the jury in a personal injury suit that if they find for the plaintiff they should find such sum as in their opinion and judgment will compensate him for his bodily pain and suffering; the instruction should have required their finding to be based upon the testimony. (Page 210.)

Appeal from Lawrence Circuit Court; *R. E. Jeffery*, Judge; reversed.

STATEMENT BY THE COURT.

This was a suit by appellee for damages for personal injuries sustained, it was alleged, on account of the negligence of the railway company in furnishing defective appliances with which to perform his work. The answer denied the allegations of the complaint and pleaded appellee's contributory negligence and assumed risk as a bar to the action.

The facts substantially are that T. H. Steed, a man seventy-two years of age, was in the employ of the railway company in its roundhouse at Hoxie, Arkansas, classed as a "wiper," and on April 1 he, with others, was told to clean up the roundhouse and remove the scrap iron therefrom. This they proceeded to do, and, in loading a barrel filled with chips and dust and bits of brass from the lathe, he claims to have been injured. He and two others picked up this barrel, which weighed anywhere from 150 to 700 pounds according to the different witnesses, and carried it about ten feet and set it

on the edge of a push car, intending to roll it out to the yards. They did not push the barrel far enough on to the edge of the car to balance, and one of the men desired to change his hold, and asked Steed if he thought he could hold it until he changed. Steed replied, "Yes," and the other turned loose, and the plank in the edge of the car gave down, throwing the entire weight of the barrel against him, and in lifting and holding it he was ruptured. He was, at the time, earning sixteen cents per hour, and was seventy-two years old. He suffered pain from the injury, which is permanent, and still is unable to work. The push car was about twenty inches high, and had been in use around the roundhouse for some time; had been used by the appellee before, and there was one plank broken, or shivered, rather, not broken entirely in two, where the barrel was placed upon it and two broken at the other end. These broken planks were plainly visible to any one seeing the car.

During the introduction of the testimony, the plaintiff and other witnesses were allowed to state that the car was repaired after the injury, and that it was broken entirely down later by loading a small boiler upon it, and a new top thereafter put on it.

Appellant's counsel objected to all the testimony relating to the subsequent repairing of the car, and moved to exclude it from the jury, stating that it made no difference what was done with the car after the accident, to which appellee's counsel replied: "Mr. Campbell is right, but it relates back to the probable condition of it at the time of the injury, and is a recognition on the part of the company that it needed repairing. I would have a right to show that, to show that it was broken, as my client says it was, at the time of the injury, by the means of which he received the injury. I would be permitted to show that to corroborate my client; but I am offering it to show that it was a defective car that was afterwards broken down in the loading of it."

The court overruled the objection, to which exceptions were saved.

The court instructed the jury, giving instructions numbered, 1, 2 and 4, for plaintiff, as follows:

"No. 1. You are instructed that if you find that plaintiff, T. H. Steed, was engaged in loading the barrel of iron in ques

tion on to the push car, and that he was acting under orders of his foreman in so doing, and that the work was such as was his duty to do when so ordered, and that the loading of the barrel on to the car was done in the usual, natural and customary manner, and that plaintiff, by reason of his position and place with reference to the barrel, the push car and those helping him, he could not see or observe any patent or latent defects in the floor of the said car at the point where the floor broke, if you find it did break, under the weight of the barrel, he should not be regarded as having assumed any danger risk by reason of the defective plank in the flooring of the car, and you should find for him, if he was injured as he claims he was.

"No. 2. It is the duty of the defendant company to furnish safe tools and appliances for its employees to work with, and if you find that the car floor was defective by reason of its being of too thin or weak plank, or otherwise insufficient to sustain the weight placed upon it, or that there were other latent or patent defects in the floor of the car, and that defendant, with reasonable and ordinary care and diligence, could have known of them, or, knowing them, did not apprise plaintiff, and he was injured and damaged thereby, the defendant is liable to plaintiff in damages, unless you should believe from the evidence that the plaintiff also knew of such defects in the floor of the car where it broke under the weight of the barrel, if you find it broke.

"No. 4. If you find for plaintiff, he is entitled to damages for bodily pain and suffering, and upon that point you are authorized to find such sum as, in your opinion and judgment, will compensate him therefor."

And refused defendant's requested instruction numbered 6, as follows:

"No. 6. The defendant was not an insurer of the plaintiff's safety, and there is no duty resting upon it to guaranty that the machinery, tools and instrumentalities furnished by it to the plaintiff to work with may not prove defective. The defendant was only required to use reasonable care to that end."

The following statement of appellant's attorney in argument was also objected to: "It (the push car) had been used for this purpose before, and even subsequently it, perhaps,

did not break at this particular point, but in loading some other heavy stuff on it, which it ought to have been strong enough to hold, it broke in two in the middle entirely. Said one of the witnesses, 'The whole floor gave away.' It was seen out of commission by this, and later on was seen with new beams and new floor and used again."

The jury returned a verdict, and from the judgment thereon this appeal comes.

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

Appellee, pro se.

KIRBY, J., (after stating the facts). The court erred in permitting the introduction of the testimony relative to the repairing of the car after the accident and injury and the argument of counsel complained of thereon. It has often been held that evidence of the subsequent repairing of the defective appliance, after an injury has occurred from its use, is incompetent and not permissible to show negligence of the master in furnishing it. *Prescott & N. W. R. Co.* v. *Smith,* 70 Ark. 179; *St. Louis S. W. Ry. Co.* v. *Plumlee,* 78 Ark. 147; *Fort Smith L. & T. Co.* v. *Soard,* 79 Ark. 388; *Bodcaw Lbr. Co.* v. *Ford,* 82 Ark. 555; *St. Louis, I. M. & S. Ry. Co.* v. *Walker,* 89 Ark. 556. "When incompetent evidence is introduced, prejudice is presumed, and the burden is upon the party introducing it to show that no prejudice resulted." *St. Louis, I. M. & S. Ry. Co.* v. *Courtney,* 77 Ark. 43; *St. Louis, I. M. & S. Ry. Co.* v. *Walker, supra.* It is not shown in this case that no prejudice resulted from the introduction of the incompetent testimony, but the prejudice was rather increased by the argument of counsel in relation to it.

Instruction numbered 1, given by the court for appellee, was erroneous in leaving out entirely the appellant's claim of contributory negligence upon his part, and concluding, after a statement that if they should find certain facts he "should not be regarded as having assumed any danger risk by reason of the defective plank in the flooring of the car, and you should find for him if he was injured as he claims he was."

We do not think this conclusion amounts to directing the jury, as appellant claims, that they should find for appellee

in any event, if he was injured as he claimed to be, but only that, if they found certain facts, then appellee had not assumed the risk and was entitled to recover. It was erroneous, however, in directing them that they could find for appellant, under certain conditions, if he did not assume the risk, without taking into account the defense of contributory negligence. *Helena Hardware Co.* v. *Maynard,* 99 Ark. 377.

The second instruction is confusing and incorrect, as was the suggestion in the latter part of the instruction numbered 1, given on the court's own motion in saying "it is the duty of the defendant to furnish safe tools and appliances for its employees to work with." This was attempted to be remedied later on in the instruction, but ineffectually. The law only requires that the master shall use ordinary or reasonable care to furnish safe tools and appliances for the use of employees. (*St. Louis, I. M. & S. Ry. Co.* v. *Gaines,* 46 Ark. 567; *St. Louis, I. M. & S. Ry. Co.* v. *Rice,* 51 Ark. 479), and instruction numbered 6, as requested by appellant, was a correct statement of the law on this point and amounted to a specific objection to the incorrectness of instruction numbered 2, on that account, and the court erred in refusing to give the one and in giving the other as requested.

Instruction numbered 4 left the jury to their opinion and judgment as to the amount of damages they should award for bodily pain and suffering, instead of limiting their judgment and opinion to being based upon the testimony, which they could not, of course, arbitrarily disregard.

We have not examined the other instructions with a view to approving them.

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

ADCOCK v. COKER.

Opinion delivered November 4, 1912.

1. STATUTE—ENACTING CLAUSE.—Act 181 of Acts 1911, containing the enacting clause, "Be it enacted by the General Assembly of the State of Arkansas," is valid. (Page 212.)

2. INJUNCTION—TEMPORARY ORDER—EFFECT.—A temporary restraining order is not "an injunction to stay proceedings upon a judgment or final order" of the county court, within Kirby's Dig., § 3998, providing that upon the dissolution of a judgment to stay proceedings upon a judgment or final order damages shall be assessed by the court. (Page 212.)
3. EQUITY—LIABILITY OF TREASURER—JURISDICTION OF COUNTY COURT.—Equity has no jurisdiction to fix the liability of a county treasurer for failure to pay over county funds to the county depository, as required by Acts 1911, c. 181; the county court having exclusive original jurisdiction over such matters. (Page 212.)

Appeal from Drew Chancery Court; *Zachariah T. Wood,* Chancellor; modified and affirmed.

STATEMENT BY THE COURT.

The appellant, as treasurer of Drew County, applied to the chancery court for a temporary injunction restraining the county judge of Drew County from establishing a depository for the funds of the county under the provisions of act No. 181, approved April 12, 1911, the enacting clause of which is as follows: "Be it enacted by the General Assembly of the State of Arkansas." The appellant executed a bond and obtained a temporary restraining order. Before the final hearing the prosecuting attorney intervened in the name of the State for the use and benefit of Drew County, and filed a complaint against the appellant, asking that the temporary restraining order be set aside, and that appellant be ordered to present a statement of the daily balances of all funds in his custody as treasurer since the restraining order was issued and the amount of all the funds that he would have delivered to the depository, had not the restraining order been issued, and prayed that judgment be entered against the appellant and his bondsmen on the injunction bond at the rate of 5½ per cent. on the daily balances. The court, on final hearing, dissolved the injunction and entered a decree against the appellant and his bondsmen "for damages in the sum of 5½ per cent. on daily balances in the hands of plaintiff as treasurer from and after October 2, 1911, until paid, and for all other and further damages that may arise by further delay and appeal from this decree until final settlement," etc. From this decree the appellant duly prosecutes this appeal.

Patrick Henry, for appellant.

Williamson & Williamson and *R. W. Wilson*, for appellees.

WOOD, J., (after stating the facts). 1. Act 181 of the General Assembly, approved April 12, 1911, is valid. It was recently held by this court that an enacting clause like the one under consideration does not render an act unconstitutional. *Ferrell* v. *Keel*, 103 Ark. 96. That case rules this.

2. The court erred in rendering judgment against the appellant and his bondsmen.

The temporary restraining order was not "an injunction to stay proceedings upon a judgment or final order" of the county court. Section 3998, Kirby's Digest; *Greer* v. *Stewart*, 48 Ark. 21; *Stanley* v. *Bonham*, 52 Ark. 354.

The complaint on the information of the prosecuting attorney did not state facts sufficient to give the chancery court jurisdiction to render judgment against appellant and his bondsmen on the injunction bond. In the case of the *State* use *Columbia County* v. *Nabors*, 103 Ark. 16, the county brought suit against Nabors, the collector of Columbia County; and his bondsmen, to recover interest on funds of the county which were to be turned into the county depository. In that case the court held that suit could not be maintained against the collector and the sureties on his official bond for the interest that would have been earned until "a determination and adjudication fixing the liability" by the county court. In other words, the court held that the determining of the amount of interest, if any, for which the collector and his bondsmen were liable in that case was within the exclusive jurisdiction of the county court.

It follows from the application of the doctrine of that case to the facts of this record that the chancery court had no jurisdiction to render the judgment herein for damages. To this extent the decree will be modified, and as thus modified it is affirmed.

CLOUSTON v MAINGAULT.

Opinion delivered November 4, 1912.

1. TRIAL—DIRECTING VERDICT.—Where there was a conflict in the evidence as to whether the plaintiffs complied with their contract, it was error to direct a verdict in their favor. (Page 216.)
2. CONTRACT—CONSTRUCTION.—The construction of an unambiguous contract is for the court, and not the jury. (Page 216.)
3. SAME—MEANING OF CONTRACT TO DIG WELL.—A contract to dig a well "to be made in the first good water-bearing white or gray sand" means that the well should be made in the first white or gray sand where there is a good supply of water. (Page 217.)

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

STATEMENT BY THE COURT.

The appellees and the appellant entered into the following contract: "The party of the first part (appellees) agrees to make a deep well on the plantation of the party of the second part (appellant) at Lakeport, Ark. The party of the first part agrees that this well is to be four inches from top to bottom and are to use a thirty-foot, all brass Cook strainer. This well is to be made in the first good water-bearing white or gray sand. The outside casing to be left in. The party of the first part is to furnish all material, tools, machinery and labor in sinking this well. The party of the first part is not to advance any money on the work until the well is completed and water has been produced."

Then follows a provision as to the use of certain machinery and the specification of the consideration.

The appellees sued appellant for the possession of certain machinery, a part of the consideration, and for the balance of the cash consideration alleged to be due under the contract, setting up that they had performed the contract on their part and that appellant had failed to perform the contract on his part by refusing to pay the balance of the cash consideration and by withholding from them the possession of certain machinery belonging to the appellees. They alleged that appellant accepted the well, but failed to pay the consideration agreed upon.

Appellant in his answer admitted the contract, but denied

that appellees had complied with the contract on their part, and denied all other material allegations of the complaint. The case was submitted to a jury.

The appellant contends that the contract called for good water in the first white or gray sand. The appellees contend that the contract only required them to get a bountiful supply of water in the first white or gray sand, and that they had complied with the contract when they obtained a good supply of water in the first white or gray sand, regardless of the quality of the water.

There was testimony on behalf of the appellees tending to show that they had complied with their contract.

On behalf of appellant one witness testified in part as follows:

"Q. Do you know what sort of sand that well is resting in? Ans. I know what color it is.

"Q. What color is it? Ans. Gray sand.

"Q. What color besides gray is mixed in with it? Ans. There is some white and some looks like it is blue.

"Q. Is there anything else in it besides sand? Ans. I don't know, sir.

"Q. How much blue was there in that deposit? Ans. I can not say positively.

"Q. Was it pure sand, or a mixture of sand, clay and mud? Ans. I would call it a mixture.

"Q. Mixture of what? Ans. Mud, sand and gravel."

Another witness testified that he saw the earth that came up from the well where they had sunk it. "It was deep gray sand with black particles in it; it looked like pepper and salt; black like pepper." Witness would "term it a gray sand." "If the black particles had not been in it, it would have been pure white sand. The sand was gray. It was sand mixed with black particles. The particles were gray, and some of them black, but it looked like pepper and salt. Witness was not an expert; but he said "it was a mixture of gray and white sand. It was black and gray particles of sand." In another place witness said "it was gray sand with white and black particles in it."

The appellant testified in part as follows: "The well is 379 feet deep, 179 feet deeper than where they struck the first

white sand. The deposit where the well was left in was fine blue looking sand. Mr. Graham brought me some pretty white sand over to the store and told me they got that where they were down there, and Mr. Maingault told me that Mr. Graham made a mistake in telling me that; that that sand didn't come from there; that they got that out of the pipe from another depth; he said that sand didn't come from there. They had a supply well there between seventy and eighty feet deep, a four-inch well, they used to run the machinery with. The sand that came out of that was as good sand as the well was in now."

The court gave, over the objections of appellant, a peremptory instruction directing the jury to find for the appellees.

The appellant, among others, asked the court to instruct the jury as follows:

"2. The court instructs the jury that the burden of proof in this case is upon the plaintiffs to show that they complied with their contract in all respects."

"3. The court instructs the jury that, unless they believe from the evidence that the well was made in the first good water-bearing white or gray sand, they must find for the defendant."

These, with other prayers numbered respectively from 1 to 9, the court refused. The court rules on these instructions separately, and the appellant duly saved his several exceptions to the ruling of the court in refusing the separate requests as they were presented.

N. B. Scott, for appellant.

Where there is competent evidence tending to establish the issue in favor of the defendant, it is error to direct a verdict for the plaintiff. 89 Ark. 368. The contract in this case should be construed most strongly against the plaintiff, who prepared it. 90 Ark. 88; 90 Ark. 256; *Id.* 522. The expression in the contract, "good water-bearing white or gray sand," is ambiguous as to whether it means wholesome water or a plentiful flow of water.

If the meaning of a contract is ambiguous, the conduct of the parties under it may be considered in explanation of its terms, and its meaning should be left to the jury. 88 Ark.

363; 89 Ark. 368; 94 Ark. 461; 95 Ark. 449; 97 Ark. 522; 98 Ark. 421.

W. Garland Streett and *Carmichael, Brooks & Powers*, for appellees.

Ordinarily, the construction of a contract is a question for the court and not for a jury; and in the construction of a contract the words therein used are to be given their usual, common and ordinary meaning. Anson on Contracts, 330. Under this rule of construction, it is patent that the thing intended by the contract was the production of water, and not the quality of the water. The court was, therefore, right in holding that, if the sand was white or gray and water-bearing, and it was the first good white or gray sand that bore water, the contract had been fulfilled.

The authorities are to the effect that the production of good, pure, wholesome water is not implied in the use of the word "well," and if not implied in the use of that word, it would not be included in the expression "first good, water-bearing white or gray sand." Cyc. "Wells;" Fed. Cas. No. 371; Words and Phrases; 27 Pac. 394.

WOOD, J., (after stating the facts). 1. There was a conflict in the evidence as to whether the appellees complied with their contract by making the well "in the first good water-bearing white or gray sand." The court therefore erred in taking this question from the jury and in directing a peremptory verdict in favor of the appellees. In his prayer No. 3 the appellant asked that this question be submitted to the jury. The prayer was correct, and the court should have granted it. The court also should have given appellant's prayer for instruction No. 2.

2. There was no ambiguity in the contract under consideration, and its construction was for the court and not for the jury.

The intention of the parties must be gathered from the contract as a whole; and, where the contract is unambiguous, no resort can be had to extraneous evidence to determine its meaning. The meaning must be ascertained from the language itself.

Giving the words "first good water-bearing white or gray

sand" their usual and ordinary meaning and construing them according to their arrangement and grammatical construction, we are of the opinion that appellees were required to make the well in the first white or gray sand that was good water-bearing. The adjectives, "first," "water-bearing," "white," "gray," all qualify the noun "sand." The adjective "good" is used in an adverbial sense, and qualifies the adjective "water-bearing" next succeeding it in the sentence, meaning that the sand must be good "water-bearing," that is furnishing a sufficient or bountiful supply of water. Water-bearing is a compound word. If the word "water" were not combined with the word "bearing" then the adjective "good" would qualify "water," and appellant's contention would be correct. But that would change entirely the obvious meaning of the sentence and would give the contract a meaning manifestly against the intention of the parties, as gathered from the language of the entire contract. For in that case the contract would read as follows: "This well is to be made in the first good water bearing white or gray sand." If this were the arrangement of the sentence and the meaning was only to require good water, then it was wholly unnecessary to employ the other words "bearing white or gray sand."

The parties evidently intended, by the plain meaning of the words as used in this contract, that the well should be made in the first white or gray sand where there was a good supply of water. The adjective "good," in other words, referred to quantity rather than to the quality of the water. Such being the plain meaning of the language used in the contract, we must give it this effect. If the parties had intended "good water"—referring to the quality, instead of a good supply of water—referring to the quantity, it would have been easy to have so arranged the sentence and used words that would have expressed that meaning. They have not done so, and the court can neither eliminate nor supply nor rearrange the words and sentences in the unambiguous contract, but must construe it as the parties have made it. The construction given the contract by the trial court was in accord with these views.

It follows that the court did not err in refusing the prayers for instructions in which appellant requested that the con-

struction of the contract be left to the jury and to have the jury determine whether or not his contention was correct.

For the errors indicated *supra* in refusing prayers for instructions, the judgment is reversed and the cause remanded for a new trial.

HART and KIRBY, JJ., concurring.

DOUGLASS v. STATE.

Opinion delivered November 4, 1912.

RAPE—ASSAULT WITH INTENT TO COMMIT—SUFFICIENCY OF EVIDENCE.—Proof that defendant took hold of the hand of a female and that he drew a pistol on her is insufficient to sustain a conviction of assault with intent to commit rape where it does not appear that either act was the beginning a part of the attempted crime with which he was charged.

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

Jackson & Jones, Bradshaw, Rhoton & Helm and *A. M. Fulk*, for appellant.

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

MCCULLOCH, C. J. The defendant, Ensley Douglass, was indicted for the crime of assault with intent to commit rape upon Nina Carroll, a girl about sixteen years of age. The trial jury convicted him of the charge, and he was sentenced to the penitentiary for a term of ten years, and appeals from the judgment of conviction.

The offense is alleged to have been committed in the city of Little Rock on or about June 10, 1912, at night in the bedroom of Nina Carroll and her elder sister, Goldie Carroll, who occupied the room together. Nina Carroll was, as before stated, about sixteen years old, and her sister was about twenty-one years old. They were both well acquainted with the defendant, and he and Goldie Carroll had been on terms of intimacy for several years. She testified that he had promised to get a divorce from his wife and marry her, and that they had frequently had sexual intercourse. It is claimed

that he wrongfully entered the bedroom of these young ladies in the night time and attempted, by force and threats, to have intercourse with the younger of them.

There are several assignments of error, and the one to which we shall address our attention is that the evidence is not sufficient to make out a case of assault with intent to rape; and, as the conclusion we reach on that question is decisive of the case, the other assignments need not be discussed.

Nina Carroll testified that she recognized the defendant as her assailant, and she gave the following testimony concerning the assault: "Q. Who woke you up? A. He was in the room. Q. This defendant? A. Yes, he was down on his knees by the side of my bed, and had hold of my hand and woke me up. He was whispering to me. I think he was saying, 'Girlie.' I asked his business in there. I think he was on his knees. He told me to keep still, to keep quiet, or he would kill me. He talked there for a few minutes, talking to me. I didn't say anything. He told me to keep still, and I did. I pushed my sister with my arm and woke her up. She called him by name, and asked what was the matter. Q. What did she call him? Ensley? A. She called him by name. I didn't say anything to her at all. He said to her 'You over there, you keep still.' He told us what he was there for. Q. What did he say? A. He said, 'You got to do business with me right here. You over there, you are sick. You can't, I know. You can't come across. You are not, and you have to come across.' Q. That's to you. A. Yes, he was still down there talking to me. Q. What did he have with him, when he said he would kill you? A. He had a gun. * * * Q. What did you say to him when he said you had to come across, to do business with him? A. I didn't say anything. I just laid there. She commenced talking to him and begging for me. Q. What did she say? A. She said, 'For God's sake, don't ruin my little sister. She has no mother. For God's sake, don't ruin her!' She said, 'I will take it all on myself to save her. He said, 'You are sick. I don't want you. She's the one I want.' She said, 'For God's sake, I will do anything in the world to save her.' He said, 'Well, since you begged so hard, come on. You get on this side of the bed.' He told me to get over there. I went to

the foot of the bed, and she crawled over the head of the bed, and I went to the head. We were sleeping with our heads to the foot. I got on the other side, and she got on the side I was on. I don't know; I guess he thought I was trying to get out of bed. He thought I was trying to get out for something. He said, 'Being you are getting out somewhere, I will just put my hands on you.' I said something to him. I don't remember just what I said to him. He said, 'Just for that, I will put my hands on you,' and he did. I didn't say anything to him at all. Q. Was he trying to have intercourse with you against your will? Was that against your will? A. Yes. Q. Did he tell you that he would kill you there in the presence of your sister with the gun? A. Yes, if I didn't. She begged him out of it."

This is all the testimony on the subject, and the question is, was it sufficient to constitute an assault with intent to commit rape? The evidence shows that there was a technical assault by touching or taking hold of the hand of the girl by the defendant, and also, after he had desisted from his attempt to induce her to have sexual intercourse with him, by again touching her person, Drawing a gun with intent to use it or to coerce her was also a technical assault. But did these technical assaults constitute a part of the essential element of the crime of rape, namely, the act of sexual intercourse? If not, the crime of assault with intent to commit rape was not complete. Undoubtedly, if he had drawn the pistol for the purpose of inflicting death upon the assaulted girl, the crime of assault with intent to kill would have been complete, even though he desisted from carrying out his intention; and if he had placed his hand upon the girl as a part of the act of having sexual intercourse and with intent to secure carnal intercourse with her, this would have completed the offense of assault to commit rape. But, according to this testimony, his taking hold of the hand of the girl for the purpose of waking her up and the drawing of the pistol on her were merely a part of the preparation for the act, and not an overt attempt to commit the act itself. He did not try to have sexual intercourse with her, but was merely attempting to induce her to yield to his embraces, or, by threats, to coerce her into doing so.

The case is, we think, controlled by the decision of this

court in *Anderson* v. *State*, 77 Ark. 37. There the accused found a ten-year-old girl waiting at a railroad station for the arrival of a train, and on some false pretext induced her to leave the station with him. After they got out of the station and got to the mouth of an alley, he kissed the girl and tried to pull her into the alley. She commenced crying, and he turned her loose, and she ran back to the station. He was indicted and convicted of the crime of assault with intent to rape, and this court reversed the case on the ground that the evidence did not show that the assault with such intent was complete. Judge BATTLE, delivering the opinion of the court, said:

"The statute of this State, requiring the unlawful act to be coupled with the present ability to do the injury, clearly indicates that the unlawful act must be the beginning or part of the act to injure, or the perpetration of the crime, and not of preparation to commit some contemplated crime."

Applying that rule to the facts of the present case, it is clear that the only overt act was committed merely in preparation for the perpetration of the crime, and not in the commission of the crime itself.

Another case which is decisive of this is *Paul* v. *State*, 99 Ark. 558. There the court reiterated the doctrine of the Anderson case upon a somewhat different state of facts, but to which the same principle was applicable.

The Attorney General relies upon the recent case of *Birones* v. *State*, *ante* p. 82, in which we held that, where the accused entered, in the night time, the sleeping apartments of two young ladies, the jury were warranted in drawing the inference that he did so for the purpose of forcibly having sexual intercourse with one of them, and that this was sufficient to sustain a conviction for the crime of burglary. The case here is different. The offense of burglary was complete upon the forcibly entry of the house with intent to commit rape, whether there was an actual assault committed or not; but upon the charge set forth in the indictment in this case there must have been an actual assault made upon the girl with intent to have sexual intercourse before the crime was complete. We are convinced, therefore, that the judgment is not sustained by the evidence and it must, therefore, be reversed. The evidence may be sufficient to justify a con-

viction of a lower degree of assault, and for that reason the cause is remanded for a new trial.

HART, J., dissents.

TEMPLE v. CULP.

Opinion delivered November 4, 1912.

ABATEMENT AND REVIVAL—TIME.—Kirby's Digest, section 6313, requiring an order of revival of an action to be made within one year from the time it could have been first made, applies to cases pending in the Supreme Court on appeal.

Appeal from Bradley Chancery Court; *Zachariah T. Wood*, Chancellor; appeal stricken from the docket.

R. E. Wiley and *J. R. Wilson*, for appellant.

B. L. Herring and *E. E. Williams*, for appellees.

PER CURIAM. Appellant, J. T. Temple, instituted this action in the chancery court of Bradley County against U. J. Culp, Jr., to cancel a tax deed and quiet title to a certain tract of land situated in that county, and on August 29, 1911, final decree was rendered in the cause dismissing the complaint for want of equity. An appeal was granted by the chancery court on the day of the rendition of the decree. The transcript of the record was not filed within the time prescribed by law for perfecting the appeal, but on August 15, 1912, which was within the year allowed for taking an appeal, transcript was lodged and appeal was granted by the clerk of this court. Summons was issued for some—not all—of the heirs of the defendant, and was duly served on them. It appears, by affidavits filed, that U. J. Culp, Jr., died on October 7, 1911, and the cause has not been revived. The heirs at law of U. J. Culp, Jr., now move that the cause be stricken from the docket on the ground that there has been no revivor within the time prescribed by law. Appellant seeks at this time to revive in the name of the heirs, and that motion is resisted.

The statutes bearing upon this question read as follows:

"Sec. 6311. Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived

against his heirs or devisees, or both, and an order therefor may be forthwith made in the manner directed in the preceding sections."

"Sec. 6313. An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made."

"Sec. 6315. When it appears to the court by affidavit that either party to an action has been dead, or where he sues or is sued as a personal representative, that his powers have ceased for a period so long that the action can not be revived in the names of his representatives or successors without the consent of both parties, it shall order the action to be stricken from the docket." Kirby's Digest.

It is insisted that these statutes only apply to causes pending before judgment in the circuit courts of the State. This contention is, however, against the rulings of this court in decisions which hold that the statute applies to cases pending in this court on appeal. *State Fair Assn.* v. *Townsend*, 69 Ark. 215; *Anglin* v. *Cravens*, 76 Ark. 122.

An appeal had been granted when the defendant died, and the time for perfecting the appeal by lodging transcript in the office of the clerk of this court had not expired. The transcript could have been lodged in this court and the order for revivor made upon ten days' notice. Kirby's Digest, § 6307. The final order of revivor could, therefore, have been entered ten days after the death of the defendant, and the motion of appellant to revive was not filed in this court until October 28, 1912, which was more than twelve months after the time the order could first have been entered. The object of the statute is to give twelve months within which to obtain an order of revivor after the earliest moment at which the order could first have been obtained. *Peay* v. *Pulaski County*, 103 Ark. 601. One year having elapsed since the order of revivor could have been first made, the right is barred, and, following the plain mandate of the statute, the court is required to strike the case from the docket. The way was clear for appellant to file his transcript and procure an order of revivor, and it is through his own fault that he has suffered the time to elapse given by law to proceed in that way. The motion

to revive is therefore denied, and the appeal is ordered stricken from the docket.

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

Opinion delivered November 4, 1912.

1. MASTER AND SERVANT—DEFECTIVE APPLIANCE—EFFECT OF PROMISE TO REPAIR.—Where the master or a vice principal of the master promises to repair a defective appliance, a servant has a right to rely upon such promise and does not assume the risk therefrom during the time specified for the repairs to be made. (Page 226.)
2. SAME—DEFECTIVE APPLIANCE—PROMISE TO REPAIR.—The time specified to make repairs of a defective appliance can not be said to have expired, so far as relieving the servant from the assumption of the risk of the danger is concerned, before the servant has an opportunity to know that the repairs have not been made. (Page 227.)

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

STATEMENT BY THE COURT.

This suit was brought by appellee for damages for a personal injury, resulting virtually in the loss of his left eye, it was alleged, by the negligence of the defendant.

It was alleged that the injury resulted on account of the failure to properly screen or shield the glass water gauge or indicator upon the engine. The appellant denied any negligence, and pleaded contributory negligence and assumption of risk of appellee in bar of the action.

The facts are substantially that George C. Swaim, a locomotive fireman, twenty-seven years of age, began work for appellant in that capacity on October 5, 1911, and had worked one day before the injury on the second night. He noticed that the water glass indicator had one of these shields made of bars or strips of metal, and that one of the strips was out. He complained to the engineer that it ought to be fixed, and the engineer said that he would have it attended to. The next time he took the engine to the roundhouse, and put it on the cinder pit, and, returning, told the engineer that the

water glass had not been fixed, and he replied: "I am going to attend to that, and have it fixed in the morning."

Appellee was called at 7 o'clock the next night for same engine, and the roundhouse foreman sent him to relieve the crew in the yards. When he got on the engine, he discovered that the glass had not been shielded or screened, and he told the engineer again that it should be done, and that it wouldn't take two minutes to fix it, saying further: "Now, I have told you about that as much as I am going to tell you, and if you don't have it fixed at 12 o'clock I am not going to work on this engine," to which the engineer replied that he would surely have it fixed. Appellee then went to his supper, and upon his return he was standing up in the engine and struck a match, and the water glass exploded, and the steam blew into his face and eyes. This occurred about 12:50 A. M., and was the first time the appellee had been on the engine since he announced his determination to quit at 12 o'clock if it wasn't fixed, and received the assurance that it would be fixed.

The testimony was conflicting as to the extent of the injury, appellee claiming that the sight of his eye was virtually destroyed by a piece of glass that struck and stuck in it and had to be removed. The surgeon, who he claimed removed the glass, denied that any piece of glass was taken from his eye, and others attributed its condition to a disease that he had had. He was earning about $90 per month at the date of the injury, and had not been able to work much since that time up to the trial, three months later, and his eye was still inflamed at the time of the trial, and he had suffered a great deal of pain on account of the injury, which was probably permanent.

It was the duty of the engineer to remedy the defect complained of, or report it to the master mechanic and have it done. Some of the witnesses also testified that the shields or screens were put upon the water guage for its protection from breakage and not for the protection of employees working upon the engine, while others stated that the glasses frequently exploded, sometimes without any apparent cause, and that the shield or screen was for the protection of the employees, and that a wire screen was much better than a shield with the bars.

The jury returned a verdict for the appellee, and from the judgment the railroad appealed.

Thos. B. Pryor, for appellant.

The decision of this court in *Railway* v. *Wells,* 93 Ark. 153, is conclusive of this case under the facts in evidence, and the court erred in not directing a verdict for the defendant. 93 Ark. 153, 155, and cases cited; 77 Ark. 367.

Trimble, Robinson & Trimble, for appellee.

The facts differentiate this case from the Wells case, in that appellee reported the defect to the engineer in charge, who was the proper party to whom to report, and that the latter promised to repair the defect. Appellee had the right to rely upon that promise without being chargeable with assuming the risk. 98 Ark. 217; 90 Ark. 567; Labatt on Master & Servant, 727; *Id.* 740.

KIRBY, J., (after stating the facts). It is contended that the facts in this case bring it within the decision in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Wells,* 93 Ark. 153, and that the court erred in not directing a verdict for appellant.

In that case the injury resulted from the explosion of the feed glass to the lubricator, which was not protected or guarded by any shield or screen, about which there was no complaint and no promise to repair made, and it was held that the servant had assumed the risk. This case differs materially in this: The water glass had been incased or protected with a shield, from which one of the bars was broken or lost, leaving the glass exposed. Appellee, upon going to work upon this engine, immediately discovered the defective condition of the shield and complained at the time to the engineer that it should be remedied and ought to be protected by a wire screen shield. He was assured that it would be done that day, and continued at work. He later complained again that it had not been done, and received the same assurance that it would be attended to shortly, and on the night of the injury, upon first going to the engine, he discovered that it had not been repaired, immediately complained to the engineer that it had not been, and said if it wasn't fixed at 12 o'clock that night that he would not longer continue to work upon the engine. He was again assured that it would be attended

to, and, upon his returning to the engine after 12 o'clock at night, when he believed, as he said, that it had been repaired, as he was promised it should be, upon striking a match to see how the water was in the boiler, the explosion occurred, injuring his eye permanently, if his claim as to the injury be true, and the jury believed it was.

It is not disputed that the promise to repair was made by the engineer, whose duty it was to either make the repairs or to have them done.

"The effect of a promise to repair by the master, and of the continuance in his service by the servant, in reliance upon the promise, is to create a new stipulation, whereby the master assumes the risks impendent during the time specified for the repairs to be made. Where no definite period is specified in which the given defects are to be remedied, the suspension of the master's right to avail himself of the defense of assumption of the risk by the servant continues for a reasonable time. * * * For it can not be said that the servant has voluntarily assumed the risk of the impending danger of working in an unsafe place, or of the use of obviously defective appliances furnished by the master, where the servant has complained to the master of such defective conditions and agrees to and does continue in his service upon the promise of the master within the time specified, or a reasonable time, if none is specified, to restore the place or appliances to normally safe conditions." *St. Louis, I. M. & S. Ry. Co.* v. *Holman*, 90 Ark. 565.

Appellee had the right to rely upon this promise to repair without assuming the risk for the time specified, and it was not denied that the promise was made, nor that the injury occurred upon his first use of the appliance after the time in which it was agreed to be repaired had expired and before he could have known that the repairs had not been made and just as he had discovered that fact. The time specified for the making of the repairs can not be said to have expired, so far as relieving him from the assumption of the risk of the danger is concerned under the circumstances of this case, before he had an opportunity to know that the repairs had not been made, even though the hour fixed upon had passed. *A. L. Clark Lumber Co.* v. *Johns*, 98 Ark. 218.

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

BAILEY v. STATE.

Opinion delivered November 11, 1912.

TRIAL—EFFECT OF CONFLICTING INSTRUCTIONS—INSANITY.—In an indictment for rape, where the defense of insanity is relied upon, it is prejudicial error to instruct the jury that such defense must be "clearly proved," although the court further instructed the jury that the defense was made out if there was a reasonable doubt of his guilt; the two ideas being contradictory.

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

G. C. Hardin, for appellant.

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

WOOD, J. The appellant was convicted of the crime of carnal abuse under an indictment that charged rape. One of the defenses was insanity. There was proof tending to show that the appellant at the time of the alleged offense was insane. There was also evidence tending to show that he was of sound mind.

The court gave instruction numbered 10, as follows:

"10. The court instructs you that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until evidence is adduced that raises in your mind a reasonable doubt as to his sanity; and to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the defendant was laboring under such a defect of reason from disease of mind as not to know the nature or character of the act he was doing, or, if he did know it, that he did not know he was doing wrong."

The court also gave instructions numbered 13 and 14, as follows:

"13. But it is not necessary, in order for the defendant to be acquitted, that it should be shown by the evidence that at the time of the commission of the act he did not know right

from wrong as to his acts in general, but if you have a reasonable doubt from the evidence as to whether defendant's act was caused by mental disease or unsoundness of mind which dethroned his reason and judgment with respect to that act, which destroyed his power rationally to comprehend the nature and consequences of the act, and which overpowered his will and inevitably forced him to its commission, then he is not in law guilty of any crime.

"14. If the jury have a reasonable doubt arising out of the evidence as to whether or not the defendant, at the time of the commission of the offense charged against him, knew right from wrong as to the act committed, or, if he so knew, you have a reasonable doubt from the evidence as to whether or not, on account of unsoundness of mind then existing, he was mentally incapable at that time of adhering to the right and avoiding the wrong, and incapable by reason of such mental condition of guiding his conduct in accordance with such choice, he would not be guilty."

The instruction numbered 10 puts the burden on the defendant to clearly prove that at the time of the commission of the act he was "laboring under such a defect of reason that he was not capable of knowing the nature or character of the act he was doing." In this respect the instruction was inherently erroneous and highly prejudicial. Appellant was entitled to his defense of insanity if the evidence adduced in his behalf or the evidence in the whole case raised a reasonable doubt in the minds of the jury as to his sanity. The court so told the jury in the first part of the instruction numbered 10, but in the concluding part just quoted the court announced the contrary rule. It is contended that, when this instruction is considered in connection with instructions numbered 13 and 14, the jury could not have been misled, but we are of the opinion that the instructions were in hopeless conflict. *Cogburn* v. *State,* 76 Ark. 110.

The jury had no correct guide. In one part of the charge, considering it as a whole, they were told that the appellant's insanity must be clearly proved. In another part they were told that it was sufficient if the evidence raised a reasonable doubt as to his sanity. These ideas are contradictory.

The defendant is not required to clearly prove his insanity

before he can avail himself of that defense, yet the jury may have concluded from this language that it was his duty to make absolute proof of that fact before he could get the benefit of his defense. Raising in the minds of the jury a reasonable doubt as to his sanity is equivalent to saying that he is not required to make positive or clear proof of that fact. Both rules are given to the jury to guide them in their deliberation. How would they know which was correct, and which one they must obey? To clearly prove is to prove beyond a reasonable doubt or to the exclusion of any reasonable doubt, and that is not required of the defendant on any criminal charge. It is sufficient, as we have stated, if the evidence on his behalf or the evidence in behalf of the State raises a reasonable doubt in the minds of the jury of his insanity, where that is set up as a defense.

In instruction numbered 3 the court told the jury "that actual penetration was necessary, but no particular depth is required, and the hymen need not be ruptured nor the body be torn." The instruction was not happily worded in stating facts that it was unnecessary to prove, but the physical condition of the private parts of the prosecutrix as the result of the alleged violence of appellant upon her was disclosed by the evidence, and it was undisputed. We are of the opinion that no prejudicial effect was produced by the instruction.

The other errors complained of will not likely arise on another trial, and it is unnecessary to now pass upon them. For the error indicated in the giving of instruction numbered 10, the judgment is reversed, and the cause remanded for a new trial.

KIRBY, J., dissenting.

FLETCHER v. FREEMAN-SMITH LUMBER COMPANY.

Opinion delivered November 11, 1912.

1. MASTER AND SERVANT—NEGLIGENCE.—In an action by a brakeman for the negligence of the engineer in failing to catch his signal to stop the engine in time to prevent injuring him, the burden is on the plaintiff to show that he gave the signal in such a manner that it could be seen by the engineer. (Page 232.)

2. SAME—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—Testimony of an expert engineer that a skilled engineer, even without getting a signal, could see the bulk of the car which plaintiff was endeavoring to couple to the tender, and that he ought to have been able to discover when the end of the "reach" of the tender, about thirty-six inches long, passed the drawhead of the car, and that the engine could have been stopped in a distance of eight inches when the brake was applied, is insufficient to support a charge of negligence on the engineer's part. (Page 232.)

3. APPEAL AND ERROR—EXCLUSION OF EVIDENCE—PREJUDICE.—Refusal to permit appellant to propound certain questions to a witness was not prejudicial error where it does not appear what appellant expected to prove by him. (Page 233.)

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

J. S. McKnight and *C. Hamilton Moses*, for appellant.

Where there is any evidence tending to prove the issues in favor of either party to a suit, even though it be conflicting, or if the evidence is such that reasonable minds might draw different conclusions therefrom, it is the province of the jury to pass upon such evidence. 89 Ark. 522; 97 Ark. 347; *Id.* 353.

This court has held that where there is *no* evidence upon which a verdict could be found by the jury, the trial court may then direct a verdict. 57 Ark. 461-6; 35 Ark. 155; *Id.* 499.

Gaughan & Sifford, for appellee.

MCCULLOCH, C. J. This cause was formerly here on plaintiff's appeal, and was reversed on account of the trial court's error in giving a certain instruction. *Fletcher* v. *Freeman-Smith Lbr. Co.*, 98 Ark. 202, 135 S. W. 827.

The second trial resulted in another verdict in favor of defendant, the court giving a peremptory instruction, and the plaintiff again appealed.

There is a slight difference in the testimony given in the two trials, and it therefore becomes necessary to restate the facts. Plaintiff was brakeman on a log train operated by defendant in the course of its business, and one of his duties was to couple cars. He was injured while attempting to couple to the end of the tender a car loaded with logs as the engine and tender backed on a spur track on which the log car was situated. He went in between the rails, and, after

adjusting the coupling pin on the log car, took hold of the iron bar or "reach" as it is called, which serves as the connection, but, as it came in contact with the drawhead of the car, he saw that it was too low to connect, and then attempted to signal the engineer to stop. Before the engine was stopped, he was caught between the ends of the tender and the car, and his leg was mashed. He charges in his complaint that the engineer was guilty of negligence in failing either to get the signal or to stop the engine after the signal was given. Does the evidence, viewing it in the strongest light, sustain that charge? The evidence is uncontradicted that the engineer was at his place in the cab of the engine, where he could have seen the signal if it was properly given. He testified that he was looking for a signal, and would have seen it if given. Plaintiff testified that he was between the rails, and gave a signal with his hand, but could not remember whether he gave it by throwing his hand upward or outward—that it could have been seen from the engine cab if he gave it by an outward movement of his hand, but not if given by an upward movement. At least, he stated that he did not know that it could have been seen if given by an upward movement with the hand. The burden was on plaintiff to show that he gave the signal in such a manner that it could be seen by the engineer in the cab while in proper position to receive it. This he did not do, and has therefore failed to make out his case.

He attempted in another way to make out a charge of negligence against the engineer in failing to stop the engine in time to prevent injuring him. He introduced another witness who testified as an expert on the subject of operating that kind of an engine, that a skilled engineer, even without getting a signal, could see the bulk of the car from his seat in the cab, and could gauge the distance so as to discover the failure of the coupling to make successfully at the proper time. He stated that the engineer ought to have been able to discover when the end of the reach passed the drawhead of the car, and that the engine could have been stopped in a distance of eight inches while going at the rate of speed it should have traveled while approaching to make a coupling. We understand from this that the engine could have been stopped in eight inches when the brake was applied. The bar or reach is shown to be from thirty to thirty-

six inches long; therefore the engine only had to travel that distance after the end of the reach passed the drawhead of the car before the end of the drawhead collided with the tender. Now, it can not be assumed from the testimony of the expert that the engineer, without being able to see more than the bulk of the car, and not the drawhead itself, could gauge with mathematical exactness just when the end of the reach would pass the drawhead without coupling successfully. Yet, in order to convict him of an act of culpable negligence, it must be based on a failure, during the time the engine traveled a distance of thirty of thirty-six inches, to realize that the reach had passed the drawhead and then stop the engine, which required a distance of eight inches after he applied the brake. In other words, he is charged with negligence because he failed, in that short a distance, to discover that the coupling had failed to make and to apply the brake so as to stop the car before the collision occured. We think that is too narrow a margin of time and distance, under the circumstances of this case, on which to successfully predicate a charge of negligence. Moreover, the expert witness testified that when the reach passed the drawhead the car must have hit the engine before plaintiff could give the signal. If that be true, how can the engineer be guilty of negligence in not stopping the engine in that short distance? We are of the opinion, therefore, that the plaintiff failed to make out a case, and that the court properly withdrew it from the jury.

The plaintiff also assigns error of the court in refusing to permit him to propound certain questions to a witness. The record does not disclose what plaintiff expected to prove by the witness; therefore, we are unable to determine whether any prejudice resulted from the ruling.

Judgment affirmed.

KEOPPLE v. DELIGHT LUMBER COMPANY.

Opinion delivered November 11, 1912.

1. CONTRACT—BREACH—NONPERFORMANCE.—Under the rule that he who commits the first substantial breach of a contract can not maintain an action against the other contracting party for a subsequent failure

on his part to perform, a vendor of certain timber can not insist upon a forfeiture of a sum placed in a bank by the vendees as a guaranty that they will carry out the terms of their contract, where the vendor, prior to the alleged breach, was negotiating with a third party for the sale of the same timber. (Page 238.)

2. SAME—PERFORMANCE—WAIVER.—A literal compliance with the terms of a contract may be waived by the parties thereto. (Page 239.)

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

STATEMENT BY THE COURT.

The appellants, Keopple and McIntosh, and the appellee lumber company entered into a contract whereby the lumber company agreed to sell to the appellants "all the white oak and hickory timber owned by them on nine forties of land" in Pike County, of certain kinds and dimensions specified in the contract. The contract, among other things, provides as follows:

"The purchasers agree to keep a man in the woods to pass on all logs as they are being cut and to accept all logs which are offered by the company that will meet the specifications and to reject any logs that may be offered which will not meet the above specifications, and said inspection shall be final. The company agrees to cut and deliver all of said timber as above described f. o. b. cars of the St. Louis, Iron Mountain & Southern Railway Company at Delight, Ark. The purchasers agree to pay $20 per thousand feet for all white oak and hickory timber. Said purchasers agree to pay for all logs delivered at Delight, f. o. b. the cars by the company on Monday morning of each week, for all logs delivered in the past week, and to keep on deposit with the Bank of Delight $1,000 as a guaranty that they will carry out the terms of this contract, said $1,000 to be turned over to the company upon the failure of the purchasers to comply with the terms of this contract, otherwise to be subject to the orders of the purchasers.

"The said company agrees to begin the execution of this contract within thirty days from this date, and to continue as rapidly as is consistent without interfering with the regular operation of their sawmill. All timber as herein agreed upon shall be delivered within twelve months from this date. Logs to be scaled with Doyle's scale stick."

The contract was executed on the 29th day of March,

1910. The appellants deposited $1,000 in the Bank of Delight in pursuance of the contract, and the parties entered upon its performance.

This suit was instituted by the appellants against the appellees in the chancery court of Pike County to recover the $1,000 that had been deposited by the appellants with the Bank of Delight. The appellants in their complaint set up the contract, and alleged that the same had been complied with by the parties to it until September 19, 1910; that on that day the appellee lumber company notified the appellants that it considered the contract void, and therefore would refuse to comply with or perform the contract on its part. The appellants set up that the lumber company had declared the sum of $1,000 forfeited, and had demanded payment of the same; that appellants had made demand on the Bank of Delight for the $1,000, which it had refused to pay, and they prayed that the sum be adjudged to be a special deposit to guaranty the performance of the contract by appellants, that the same be declared a penalty, and that the receiver of the bank be instructed to pay the same to them.

The lumber company, in its answer, set up that the notice given to appellants on the 19th day of September, 1910, that it would consider the contract void was sent out long after appellants had violated the contract "by refusing to inspect and receive logs in the woods" and by refusing at various times "to pay for logs loaded on cars at Delight," and by notifying the lumber company that it could not accept logs until such time as the appellants might be in position to handle same. The lumber company also denied that the appellants had complied with the conditions of the contract in any manner. The lumber company also denied that the deposit of $1,000 was a penalty, and alleged that it was intended by the parties as liquidated damages in case of breach of the contract on the part of appellant, and the lumber company therefore prayed that the receiver of the bank be directed to pay the $1,000 to it.

The court found that the lumber company "in all things complied with its part of the said contract; that the plaintiffs failed and refused to comply with the terms of the said contract by their failure and refusal to receive logs after they had

been notified and requested by the defendant Delight Lumber Company to do so," and further found "that the said $1,000 was intended by the parties, at the time they entered into the said contract, to be liquidated damages in case the contract was breached by the plaintiff."

Carmichael, Brooks & Powers, for appellants.

1. If it be conceded that the evidence raises a doubt as to the purpose for which the sum named in the contract was deposited, and whether it was intended as a penalty or as liquidated damages, then the presumption of law would apply that the sum named was intended as a penalty, the tendency and preference of the law being to treat a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages. Note 39, Am. St. Rep. 636; 13 Cyc. 95; 19 Am. & Eng. Enc. of L. 397; Joyce on Damages, § 1298; 7 Am. Dig., Ch. 4, § 76 p. 79; *Id.* Ch. 4, § 76 (n); *Id.* Ch. 4, § 76 (e); *Id.* Ch. 4, § 76 (d).

The burden of showing whether the sum named is liquidated damages or a penalty is on the one claiming that it is liquidated damages. 19 Am. & Eng. Enc. of L. 397. Where a contract calls for the performance of several or a number of conditions, the sum named as security for the performance of the contract is always treated as a penalty. 1 Pomeroy on Equity, 736, § 443; 13 Cyc. 101; *Id.* 96; Joyce on Damages, § 1305; *Id.* § 1307; 108 Am St. Rep. 56, and cases cited; 47 N. C. 15; 7 Am Dig. 89, § 718 (7); 15 Am. Dig., Century Ed., § 163; 37 Fla. 147, 20 So. 249; 38 N. J. Law, 230. Where the different acts to be performed are of unequal degree of importance, the doctrine that the sum stipulated to be paid upon breach of a contract for the performance of several conditions is a penalty especially applies. 19 Am. & Eng. Enc. of L. 406.

Where a sum had been named as liquidated damages, and would be so treated upon a total breach, yet, upon a partial performance, the sum is treated as a penalty, and only damages actually proved could be recovered. Sutherland on Damages, § 296; 13 Cyc. 103; 63 Tex. 175; 7 Dec. Dig., § 86, p. 99; 19 Am. & Eng. Enc. of L. 408, 409; 9 Mont. 154; 40 Wis. 503. As conclusive against appellee's contention herein, see 14 Ark. 329, 333; 55 Ark. 376; 73 Ark. 432.

2. If the sum deposited was intended as liquidated damages, there was no such breach of the contract by appellants as would forfeit the money to appellee Delight Lumber Company. One who commits the first substantial breach of a contract can not maintain an action against the other party for a subsequent failure on his part to perform. 79 Ark. 528, and cases cited. If there were any breaches of the contract by the appellants, they were clearly waived.

Sam T. Poe and *Geo. A. McConnell,* for appellee.

1. The question "who breached the contract" is settled by the finding of the chancellor, which will be sustained unless clearly contrary to the preponderance of the evidence.

2. The amount deposited in the bank is liquidated damages. 14 Ark. 315; Anson on Contracts 255, 335; 57 Ark. 168; 73 Ark. 432; 56 Ark. 405; 83 Ark. 144; 83 Ark. 364; 87 Ark. 52; *Id.* 545.

WOOD, J., (after stating the facts). The appellee lumber company is not in a position to insist on a forfeiture to it of the $1,000 in controversy for the reason that a clear preponderance of the evidence shows that it committed the first substantial breach of the contract. The contract required the lumber company to sell to appellants all hickory owned by them ten inches in diameter and up on the land mentioned in the contract. The appellants both testified that, after the lumber company had cut a car and a half of hickory, they positively refused to cut any more. Bowers, the agent representing the lumber company, in charge of the woods where the cutting was done, and "whose authority was recognized in all working departments," told appellants that he never intended to deliver the balance of the hickory logs under the contract. Appellants stated that they thought there must have been some 250,000 feet left standing on the ground after the delivery of the car and a half that had been cut, containing about 7,300 feet. This testimony of appellants was corroborated by another witness, who testified that he heard a conversation between Keopple and Bowers concerning the hickory as follows: "They asked me how many feet I had, and I told them a little bit over 7,300 feet, and Bowers said, 'Is that all?' and I told him it was, and he said:

'We can't get out any more at that price.'" Bowers, in his testimony, denied this, but the preponderance of the evidence on this issue was in favor of appellants.

This conversation, according to the undisputed testimony, took place some time early in May, 1910. The testimony shows that the lumber company never shipped any more hickory after that time. At the time this breach of the contract occurred there was no complaint on the part of the lumber company that appellants were not complying with the contract on their part. On the contrary, the president and general manager of the lumber company testified that appellants carried out their contract "fairly well for a period of something over four months."

The testimony shows that the first car load of logs under the contract was shipped on April 16. Four months from that day would be August 16. Therefore according to the testimony of the president and general manager of the lumber company, appellants were performing their contract fairly well up until after August 16. Yet as early as August 5 the lumber company was conducting negotiations with Nickey & Sons Company, at Memphis, Tenn., for the sale of the timber which it had already contracted to appellants. On the above date, August 5, 1910, the lumber company wrote Nickey & Sons Company as follows: "We have 500,000 feet or more of extra fine white oak timber. We would like to sell you this," etc.

Again on August 9: "We stated that we had 500,000 feet or more of fine white oak. We have possibly a great deal more than this. Please let us hear from you with reference to smaller sizes by return mail" etc.

The manager of the lumber company testified that the logs referred to in the above letters were the same timber that was included in the contract with the appellants.

The above testimony shows at least an attempt on the part of the lumber company to avoid its contract with appellants at a time when it is conceded by the lumber company that appellants were satisfactorily discharging the contract on their part. The law is well settled that "he who commits the first substantial breach of a contract can not maintain an action against the other contracting party for a subsequent

failure on his part to perform." *National Surety Co.* v. *Long*, 60 C. C. A. 623, and cases there cited; *National Surety Co.* v. *Long*, 79 Ark. 528.

The appellees claim that the appellants had breached the contract by failing "to keep a man in the woods to pass on all logs as they were being cut and to accept all logs," etc., and by "failing to pay on Monday morning of each week for all logs delivered in the past week."

These provisions of the contract were for the benefit of the appellee lumber company, and the testimony shows that whatever technical breaches there may have been in these particulars they were waived by the appellee lumber company. Bowers, the agent of the lumber company to make the inspection, testified concerning this as follows: "After the first week Mr. Keopple and myself had a talk, and we agreed that I knew about what he wanted, and it was not necessary for him to stay there. He didn't have anything else there to do, and I thought I could get the logs out to suit him. We agreed that he would take up the logs once a week. He agreed to come and take the logs up as often as we needed to get them out of the way. He didn't always do that; failed two or three times."

Concerning the subject of payment under the contract, the president testified that "it was satisfactory to the Delight Lumber Company for these invoices to be rendered to the firm of Keopple & McIntosh as the logs were loaded out, and for them to mail a check on receipt of these invoices for the amount thereof." And again: "It was understood that they were to mail us checks for them as soon as the invoices and bills of lading were received. That was perfectly satisfactory when they did that."

The above testimony shows that a literal compliance with the provisions of the contract as to the inspection and as to the manner of payment was not insisted on by the lumber company, but that a different arrangement from that stated in the contract was made and pursued with the lumber company's express consent.

On the 12th of September, 1910, the appellants received from the Delight Lumber Company the following telegram: "Mr. Keopple did not come to take logs today as promised.

If you fail to come or send a man to arrive here tomorrow to take logs, also pay for those shipped last week, we will consider contract void and make no further shipment of logs. Shipped two cars today.'' Yet, after sending this telegram, the testimony shows that the lumber company shipped out logs under the contract on September 14 and 15, as shown by the invoices in evidence which the Delight Lumber Company rendered to the appellants.

There is an agreement in evidence to the effect that the appellants were not indebted to the lumber company for logs shipped under the contract. Therefore, the lumber company must have received payment for the logs as shown by the invoices of the 14th and 15th of September.

As late then as the above dates, and after the lumber company had telegraphed the appellants that it would consider the contract void, we find it acting under and recognizing the existence of the contract. The testimony on behalf of the appellants tended to show that as early as possible after receiving the telegram one of the appellants went to Delight to make the inspection and take up the logs. Witness says: "When I got that telegram, I was at home; my family was sick. I went down there the next day."

All the conduct of the lumber company, as revealed by the testimony, shows that there was a waiver of any breach of the contract that might have been upon the part of the appellants. After the lumber company gave notice by the telegram that it would consider the contract void, it continued to recognize it as binding by making shipments of timber under it and accepting the payments for these shipments.

On the 19th of September, 1910, the lumber company wrote to appellants as follows: "This is to again notify you that, owing to your persistent and continued failures to come and receive our logs, as per terms of contract, as well as violations of the contract by you in other respects, we are compelled to hereafter treat the contract as void, and govern our actions accordingly." But, before the lumber company gave the appellants this notice of a final intention on their part to treat the contract as rescinded for alleged breaches thereof on the part of the appellants, it had already breached the contract on its part and abandoned same by selling the timber

included in the contract to Nickey & Sons Company of Memphis Tenn., as evidenced by correspondence of the lumber company with Nickey & Sons Company in the record which it is unnecessary to here set forth.

We are therefore of the opinion that the court erred in its finding of fact and in declaring a forfeiture. The conclusion we have reached makes it unnecessary to determine whether the provision in the contract for the deposit of $1,000 was in the nature of a penalty or for liquidated damages. The judgment is therefore reversed, and judgment will be entered here in favor of appellants for $1,000.

MOORE v. OLLSON.

Opinion delivered November 11, 1912.

1. MORTGAGES—EFFECT OF FAILURE TO ACKNOWLEDGE.—An unacknowledged mortgage is not entitled to record, and its record is of no validity, (Page 242.)
2. SAME—RECORD OF UNACKNOWLEDGED MORTGAGE.—The record of an unacknowledged mortgage is invalid as against a subsequent purchaser who takes with full knowledge that such purchase is defeating the prior lien. (Page 242.)

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; affirmed.

Marsh & Flenniken, for appellants.

The mortgage was good under the Louisiana law. But the mortgage was properly acknowledged under our Arkansas statutes. 33 Ark. 600. Ollson only sold his equity. 33 Ark. 63 does not apply.

Patterson & Green, for appellees.

1. The mortgage was not recorded and not notice. Kirby's Dig., § 746, 748; 20 Ark. 190; 35 *Id.* 365; 33 *Id.* 600; 40 *Id.* 536; 32 *Id.* 458, 602.

2. The evidence fails to sustain the contention that the shingle company bought only the equity of Ollson. 41 Ark. 186; 56 *Id.* 82.

SMITH, J. Appellants, who were plaintiffs below, alleged in their complaint, and offered evidence to show, that appellee M. Ollson executed to them a mortgage upon a certain sixty-

acre tract of land, which he owned and which was situated in Union County, Arkansas; that the conveyance was executed for the purpose of securing the payment of a certain note payable to the order of appellants for $458.16. This instrument was dated July 27, 1908, and was filed for record in that county on July 31, 1908. It was contended, and the chancellor held, that the mortgage was an unrecorded instrument. On August 22, 1908, the said M. Ollson executed and delivered to the appellee Loutre Shingle Company a warranty deed, purporting to convey the same land described in the mortgage for the recited consideration of $100. Appellants insist that the shingle company not only knew of the mortgage to them, and that the indebtedness there mentioned had not been satisfied, but they also contend that the assumption of the payment of this indebtedness was a part of the consideration for which Ollson conveyed the land. It will not be necessary to set out here the recitals of this mortgage. There was no certificate of acknowledgment whatever; and, while the parties did appear before a notary public, there was no attempt to acknowledge this instrument substantially as required by the laws of this State.

But appellants do not rely wholly on the contention that the mortgage to them had been recorded and was entitled to record, as they strongly urge the facts to be that the shingle company bought only the equity of Ollson and assumed the payment of this mortgage indebtedness. The officers of the shingle company do not deny having actual knowledge of the existence of the mortgage and that the indebtedness secured by it had not been paid, and they admit reading it in the office of the recorder of Union County. But this knowledge does not make the deed to the shingle company subject to the lien of this mortgage. Only acknowledged instruments conveying land can be admitted to record, and this was an unacknowledged instrument (section 752, Kirby's Digest); and it was said by Judge EAKIN in the case of *Martin* v. *Ogden*, 41 Ark. 191: "an unrecorded mortgage, however honestly made, is wholly invalid against attaching creditors or persons obtaining a specific lien, or even subsequent purchasers, who take with full knowledge that they are defeating another's lien, and who intended to do so."

The question as to whether the shingle company assumed the payment of this mortgage indebtedness was one of fact, and it will serve no useful purpose here to review the evidence upon which the chancellor found that the shingle company had not assumed this indebtedness and agreed to pay it. It is sufficient to say that in our opinion this finding was not against a preponderance of the evidence.

Affirmed.

GEORGE KNAPP & COMPANY *v.* WILKS.

Opinion delivered November 11, 1912.

1. GUARANTY—EFFECT OF ALTERING CONTRACT.—Insertion of the place and date of execution in a contract of guaranty after it was signed by the guarantors was not such a material alteration as would discharge them. (Page 245.)
2. SAME—AUTHORITY TO FILL UP BLANKS.—If the guarantors in an instrument intrust it to the principal for use with blanks not filled, such instrument so delivered carries on its face an implied authority to fill up the blanks necessary to perfect same, and the principal must be deemed the agent of the guarantors for that purpose. (Page 246.)
3. SAME—EFFECT OF PRINCIPAL'S FRAUD.—Guarantors upon an instrument are not relieved by false representations of the principal made to induce them to sign the instrument if the obligee therein was not a party to such fraud. (Page 247.)

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

STATEMENT BY THE COURT.

One Walter R. Isbell entered into a written contract with appellant, dated Fort Smith, Ark., April 30, 1910, whereby he agreed to buy one hundred copies per day of the St. Louis Republic at a certain price named in the contract. The papers were to be delivered in St. Louis, Mo. To guaranty the performance of the contract, the appellees executed to appellant the following instrument:

"We, the undersigned, hereby become sureties, individually and collectively, for W. R. Isbell, and hold ourselves responsible to you for the prompt payment by him for all copies of the St. Louis Republic furnished him by you. We

further guaranty that such payment shall be made at your office in St. Louis, Mo., and that whenever there shall be default in such payment we guaranty to pay the amount due on demand."

Appellant sued appellees on account for papers furnished Isbell, and for which he had not paid, amounting to the sum of $178.17. The appellees answered, setting up the following: First, fraud in securing the execution of the contract sued on; second, that the contract sued on had been materially altered in this, that the words "Fort Smith, Arkansas, April 30, 1910," and the words "one hundred" had been inserted in contract with Isbell after the contract of guaranty was signed by appellees, and the contract of guaranty was therefore void; third, that the agreed place of performance was at Bentonville, when the contract designated Fort Smith."

The testimony of the appellees tended to show that at the time they executed the contract of guaranty the words "Fort Smith, Arkansas, April 30, 1910," and the words "one hundred" were not in the contract; that the places where these words now occur were blank spaces. The appellees lived at Bentonville, Arkansas. Isbell had been selling papers there. He brought the contract of guaranty to appellees, and told them that he was going to continue to sell papers in Bentonville, and upon that representation appellees executed the contract. They would not have executed the contract, as they stated, if they had known that Isbell was going to sell the papers at Fort Smith, instead of at Bentonville. He was a one-legged boy, and they were willing to sign the bond, thinking that he was going to continue the sale of papers in Bentonville. They never had any correspondence with the appellant before signing the guaranty.

The court refused to direct a verdict in favor of the plaintiff for the amount in suit, and the jury returned a verdict in favor of appellees, and from this judgment in their favor this appeal is duly prosecuted.

Dick Rice, for appellant.

1. A writing is not avoided by an immaterial alteration therein. 21 Pac. 479; 47 S. W. 409; 35 N. E. 999; 35 N. E. 1120; 10 Am. Rep. 161; 33 Mich. 505; 2 Am. & Eng. Enc. of L.

(2 ed.), 222; *Id.* 225; 54 Wis. 425; 11 N. W. 795; 5 Mass. 538; 97 N. E. 130. An alteration is immaterial where neither the rights, duties, interest nor obligations of the parties are affected or changed. 5 Mass. 538; 97 N. E. 130.

2. The burden of establishing an alteration is upon the party alleging it, if the instrument is fair on its face. 6 S. W. 460; 33 Pac. 470; 5 N. E. 338; 12 N. E. 315; 4 N. W. 193. See also 49 S. W. 285; 60 Pac. 270; 113 S. W. 251; 98 S. W. 229.

3. Appellees are estopped from setting up the defense of alteration. When they signed the instrument with blanks in it, they by implication conferred authority on appellant to complete the instrument with reasonable terms. 2 Cyc. 159; 24 Ark. 511; 27 Ark. 108; 53 Me. 89, 87 Am. Dec. 539. See also 9 Wall. (U. S.) 544; 35 Ark. 146; 122 S. W. 756; 76 S. W. 1064.

4. If there was fraud on the part of Isbell towards appellees in this transaction, that would not relieve them as against appellants, unless the latter participated in the fraud. 66 N. Y. 326; 28 N. E. 402; 41 N. E. 130; 20 Cyc. 1419; 16 N. E. 196; 31 N. Y. 294.

No brief filed for appellees.

WOOD, J., (after stating the facts). Conceding that the blank spaces in the contract were filled in by inserting in the blank for the date the words "Fort Smith, Arkansas, April 30, 1910," and in the blank space left for the number of copies of the paper the words "one hundred," and that these insertions were made by Isbell after the contract of guaranty was executed by the appellees, still we are of the opinion that these were immaterial alterations that did not affect the liability of appellees under their contract of guaranty.

Under the undisputed evidence, the only object of inserting the date in the contract between Isbell and the appellant was to fix a time when the liability of Isbell and the appellees for the papers furnished should begin. The contract between Isbell and appellant contained this provision: "This contract will be in effect when duly approved."

It was immaterial, under the provisions of the contract, what date the contract bore; for the liability of the appellees would commence, under the provision above quoted,

from the time of its approval. The contract, under its terms, took effect from that date. The contract between Isbell and appellant does not show on its face the date when it was approved, nor is there any evidence *aliunde* as to when it was approved, but the approval of course could not have been before the contract was executed, and in the absence of proof it must be assumed that the contract was approved on the day of its execution.

The contract of guaranty was dated April 22, 1910, eight days prior to the date of the contract between Isbell and appellant. Therefore, the liability of appellees is not increased by the insertion of the date in the contract between Isbell and appellant subsequent to the date of the contract of guaranty upon which they are sued. The appellees, under their contract of guaranty, became responsible to the appellant "for the prompt payment by him for all copies of the St. Louis Republic furnished him."

So far as the contract is concerned, the number of papers was not specified, and there is no evidence to show that the number was agreed upon. On the contrary, a blank space was left in the contract between Isbell and appellant to be filled in, according to the undisputed evidence. Therefore, the filling in of the number of copies of the paper to be furnished Isbell by appellant was not an alteration which appellant was not authorized to make. "If a party to an instrument intrusts it to another for use with blanks not filled, such instrument so delivered carried on its face an implied authority to fill up the blanks necessary to perfect the same, and the person to whom the instrument is so intrusted must be deemed the agent of the party who committed the instrument to his custody." 12 Cyc. 59. See *White-Wilson-Drew Co.* v. *Egelhoff*, 96 Ark. 105.

Here the appellees executed the bond in suit, agreeing to be liable to appellant for all the papers it furnished Isbell, and this bond was delivered to the obligee. This was authority for the appellant to insert the number of papers furnished in the contract between it and Isbell. See *Inhabitants of South Berwick* v. *Huntress*, 53 Me. 89, 87 Am. Dec. 539.

The uncontradicted evidence showed that appellees knew when they executed the bond in suit that there were blanks

in the contract between Isbell and appellant to be filled by the appellant. The filling in of these blanks therefore did not relieve the appellees of liability on their contract.

If Isbell, by making false representations to appellees, perpetrated a fraud upon them which induced them to sign the instrument in suit, the appellant was in no manner responsible for that fraud, for there is nothing to show that appellant at the time it entered into the contract with Isbell to furnish the papers had knowledge of the facts which appellees claim constituted a fraud upon them. Appellant was innocent in the transaction, and it approved the contract of guaranty in suit and acted upon it in good faith. The appellees, by signing the instrument of guaranty, enabled Isbell to procure the papers from appellant under his contract. The appellees therefore are not in a position to defeat appellant's claim by a charge of fraud. They are estopped from setting up any charge as against the claim of appellant.

"It is no defense to an action upon a bond that the sureties were ignorant as to the extent of the obligation assumed or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud." *Western N. Y. Life Ins. Co.* v. *Clinton*, 66 N. Y. 326; *Powers* v. *Clarke*, 28 N. E. 402; 20 Cyc. 1419; *Bascom* v. *Smith*, 41 N. E. 130; *Lucas* v. *Owens*, 16 N. E. 196; *McWilliams* v. *Mason*, 31 N. Y. 294, cited in appellant's brief.

The court should have directed a verdict in favor of the appellant. For the error in refusing to do so, the judgment is reversed, and judgment will be entered here in favor of appellant for $178.17, the amount of its claim, with interest at 6 per cent. per annum from April 25, 1911, the date of the filing of suit.

RIVER, RAIL & HARBOR CONSTRUCTION COMPANY *v.* GOODWIN.

Opinion delivered November 11, 1912.

1. EVIDENCE—RES GESTAE.—In an action against a master for personal injuries alleged to have been caused by the master's negligence, proof that immediately after the injuries were received a fellow-servant came to plaintiff and in effect stated that plaintiff's injuries were due

to his (the servant's) negligence was inadmissible, as such statement was not so connected with the transaction as to be a part of it, but was a narrative of a past occurrence. (Page 251.)

2. SAME—ADMISSIBILITY OF DECLARATIONS OF SERVANT.—The declarations of an employee as to who was responsible for plaintiff's injuries, or as to the manner in which they were received, were incompetent, as against the master, 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 performed his duty. (Page 252.)

3. MASTER AND SERVANT—DUTY OF MASTER TO WARN SERVANT.—It is the duty of a master to warn an inexperienced servant of risks, either patent or latent, of which, by reason of inexperience, he does not realize and appreciate the danger. (Page 253.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee instituted this action against appellant to recover damages for personal injuries received by him while working for appellant. Appellant was engaged in the work of preventing banks of rivers from caving. It used the Gabion system. The system is patented, and is so arranged that it changes the current of the river where it is washing. As a part of the system, poles of wood bent in the form of a half circle and fastened together are used. They are called hoops. The hoops are made in the following manner: Two stobs of wood three or four feet long are driven in the ground about twelve or fourteen inches. They are placed far enough apart to put between them one end of the poles which it is desired to bend. Men then take hold of the other end of the pole and pull it around and place it between other stobs similarly driven in the ground so that the pole forms a half circle. The men are required to pull instead of push the end of the pole around because it is less dangerous. For instance, if the men were at work on the outside pushing the pole around, and it should break or slip from between the stobs, they would be more likely to be injured than if they stayed on the inside and pulled the pole around. For this reason those engaged in making the hoops were required to work on the inside.

On the day appellee was injured other servants of appellant were engaged in making hoops in the manner above

described. Appellee and another servant of appellant were engaged in carrying poles from a boat tied to the river bank to a place in front of the hoops. He was injured by one of the poles flying out of its fastening and striking him on the leg just as he was passing along there with one end of a pole on his shoulder.

Appellee details the circumstances attending his injury as follows: "I was a farmer, and had never been engaged in any other occupation. I am forty-five years of age. I did not want to work for appellant because the business was new to me, and I was afraid I would get hurt. They first engaged me to dig holes in the ground and bury logs in them for the purpose of securing the gabions thereto. After I had worked on this for a few days, I was told to assist in carrying poles and placing them in front of the hoops which were being made by other servants of the company. We had only carried three or four poles at the time I was injured. The pole we were carrying at the time I was injured was five or six inches thick at the butt and about eighteen or twenty feet long. We had carried it from the boat, and were travelling along a beaten path to place it in position at the side of and somewhat in front of the hoop that was being made. Just as we came opposite the stobs they had driven in the ground, and started to make the turn, one of the stobs pulled out of the ground. This released the pole which was being bent into the hoop, and the end flew around and struck me on the leg, breaking it. I did not know it was dangerous to go in front of the hoops when they were making them. I thought the stakes were put in the ground deep enough to hold them. I saw the men at work making the hoops, and saw that they were staying inside the hoops while making them, but supposed they did so because they could pull more on the inside than they could push if they were on the outside. It did not occur to me that standing on the inside and pulling was safer than standing on the other side and pushing. I was in about four or five feet of the stob when it pulled out of the ground. At the time I got hurt, they had not fastened the pole. They had just got it to the stake and were fastening it down when the stob pulled out. I was not warned of the danger of working around the hoops'.'

Other evidence was adduced by appellee tending to corrob-

orate his testimony and to show the character and extent of his injuries.

Appellant adduced evidence tending to show that appellee in carrying the poles out at one time stepped over the hoops in the performance of his task, and had been warned not to do that any more, because it was dangerous. Other evidence for appellant tends to show that the stob did not pull out, but that the pole slipped from between the stobs and flew back and struck appellee breaking his leg.

Other evidence will be referred to in the opinion.

The jury returned a verdict for appellee, and the case is here on appeal.

Coleman & Lewis, for appellant.

1. The declaration of Taylor, alleged to have been made right after the accident, was a mere narrative of a past event, not an explanation accompanying and explanatory of an act, and was improperly admitted. 97 Ark. 422; Jones on Evidence, § 357; 58 Ark. 168; 66 Ark. 494; 78 Ark. 381.

The foregoing error is emphasized by the court's refusal to exclude from the jury the statement of appellee's attorney in his argument to the effect that the nonproduction of Taylor as a witness raised the presumption that his testimony, if he were produced, would be against appellant, whereas there was no evidence that he was working for appellant or was under its control, or in the jurisdiction of the court, at the time of the trial. This was prejudicial error. Jones on Evidence, § 21; 16 Cyc. 1062; 32 Ark. 346.

2. In case of a servant of mature years who is not deficient in understanding nor lacking in the ordinary experience of men in his station of life, the master is not required to point out dangers which are obvious, nor to ascertain whether the servant knows and appreciates such dangers. 1 Labatt on Master & Servant, § 238; *Id.* § 239; 132 N. W. (Wis.) 889; 76 Ark. 73; 97 Ark. 488; 96 Ark. 387; *Id.* 206; 93 Ark. 153; 82 Ark. 537; 73 Ark. 49; 58 Ark. 228.

James A. Gray and *George A. McConnell*, for appellee.

1. The statement of Taylor was admissible because (1) he was the agent of appellant and his statements bound

it, and (2) his statement was a part of the *res gestae.* 85 Ark. 479.

2. In determining whether or not a servant assumes the risks ordinarily incident to the service in which he engages, the inquiry is whether on account of youth *or* inexperience he does not know or appreciate the dangers of the service. Inexperience brings a servant within the rule as effectively as youthfulness or physical infirmity. 53 Ark. 128; 90 Ark. 407; 84 Ark. 74-79; 81 Ark. 598; 91 Ark. 102.

HART, J., (after stating the facts). Appellee testified that Mr. Taylor was a servant engaged in the making of hoops, and was standing about ten for twelve feet away when he was injured. Appellee said that Taylor came to him at once when he was injured; and, when asked, "What did he say?" answered, "He said if he had been doing his duty and making them like he should have made them, it wouldn't have happened, and he wouldn't have had it happened for a hundred dollars, and I was in so much pain I didn't pay any attention."

This testimony was permitted to go to the jury over the objections of the appellant, and the action of the court in this respect is now assigned as error. We think the assignment is well taken.

Counsel for appellee seek to uphold the ruling of the court by the decision in the case of *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479. There the excited declarations of a child to his father while plaintiff was lying injured at the bottom of the elevator shaft, and before he had been discovered, that a man pushed the elevator door open and walked in, were held to be admissible on the issue of whether the door was left open or not. The remark of Taylor was not competent. It did not illustrate or explain how or what caused the accident. His statement was not so connected with the transaction as to characterize and be a part of it. What Taylor said could give character to nothing that happened. It could neither qualify nor explain it. It was a mere narrative of a past occurrence depending for its force and effect solely on the credit of Taylor unconnected with the act done and receiving no credit or significance from the accompanying circumstances. It was not therefore competent as original evidence in the matter of *res gestae. Fort Smith Oil Co.* v.

Slover, 58 Ark. 168; *Little Rock Traction & Electric Co.* v. *Nelson*, 66 Ark. 494; *Stecher Cooperage Works* v. *Steadman*, 78 Ark. 381; *St. Louis, I. M. & S. Ry. Co.* v. *Pape*, 100 Ark. 269; *Caldwell* v. *Nichol*, 97 Ark. 422.

The declaration was not made by an officer of appellant company, having the right to speak for it and bind it by declarations of that kind. It follows from the authorities that we have already cited that the declaration was improperly admitted, and was prejudicial to the appellant. In Jones on Evidence, § 357, the rule is stated as follows:

"The declaration 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 narrative of a past occurrence."

It is next contended by counsel for appellant that the evidence did not warrant the verdict. In the case of *Arkansas Midland Ry. Co.* v. *Worden*, 90 Ark. 407, the court said: "When an employee takes service with his employer, he impliedly agrees to assume all the obvious risks of the business, including the risks of injury from the kind of machinery then openly used, as well as the method of operating the business then openly observed. * * * This is the rule which applies to an employee of mature years and experience in the particular work or business, for there is no duty on the part of the master to warn an experienced servant of obvious dangers, as they are among the ordinary incidents of the service, and he is bound to take notice of these, and must be presumed to have realized and appreciated such dangers * * * But the rule is different as to a servant who, by reason of youth or inexperience in the particular work, does not fully realize and appreciate the danger. In that case it is the duty of the master to give proper instructions and to warn the inexperienced servant of patent as well as latent dangers.

* * * And, before the inexperienced servant can be presumed to have realized the danger and assumed the risk, it must be shown that he was instructed and warned of it."

Appellee was forty-five years of age, and was in possession of all of his faculties. He had lived in the country all his life, and was a farmer. The danger from a pole breaking as it was being pulled around in order to fashion it into a hoop was patent and obvious to any one. It may also be said that the danger arising from one end of the pole slipping out from between the stobs while the pole was being bent was an obvious and patent danger. The rule is that the master is not required to explain patent dangers which are ordinarily incident to the services, and which it may be reasonably expected under all the circumstances the servant can see and appreciate. But we do not think that the danger arising from one of the stobs pulling up was an obvious and patent one under the evidence detailed by appellee. He says that he had never seen any work of that kind done, and was wholly without experience as to the method of doing it; that he informed appellant of his ignorance and inexperience before he commenced to work for it. That appellant put him to work carrying poles and placing them in front of and a little to one side of the hoops. The stob in question which pulled up had only been driven down that afternoon and was pulled up while the first hoop was being made. Under these circumstances, the jury might have found that it was the duty of appellant to have informed appellee of the way he should travel to place the poles in the position where he was directed to put them, and to have instructed and to have cautioned him sufficiently to have enabled him to comprehend the danger of the stob pulling out. If the circumstances were such that the appellant owed it as the duty to appellee to instruct him, and it failed to do so, and appellee was injured on account of its failure to do so, appellant was liable in damages for the injury. On the other hand, a witness for appellant testifies that on one trip in carrying a pole appellee walked over the hoop, and that he was warned of the danger of so doing. Whether appellee knew or ought to have known what caution was necessary for him to use while walking along the path in the performance of his work of carrying the poles in order to avoid

the injury that he received, or appreciated the danger of the failure to use such caution, or had received the necessary instruction and warning before the injury, was properly a question for the jury.

Other assignments of error are pressed upon as for a reversal, but the views we have already expressed render it unnecessary to discuss them. The assignment in regard to the arguments of appellee's counsel before the jury is not likely to arise on a retrial of the case, and the principles of law that we have already announced will be a sufficient guide for the court in instructing the jury.

For the error in admitting the declaration of Taylor, the judgment will be reversed, and the cause remanded for a new trial.

SKAGGS v. JOHNSON.

Opinion delivered November 11, 1912.

1. LIBEL AND SLANDER—MEANING OF WORDS.—In ascertaining the meaning of words written to determine whether or not they are libelous, the entire article must be construed. (Page 257.)
2. SAME—MEANING OF WORDS.—Words alleged to be libelous are to be taken in their plain and natural meaning, and to be understood by courts and juries in their ordinary acceptation and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them. (Page 257.)
3. SAME—WHEN WORDS NOT LIBELOUS PER SE.—Where defendant charged plaintiff with having violated the law by taking the school census six weeks too early, and quoted plaintiff's reasons for so doing, and then added: "Without any insinuation but as an illustration; a man's motive is no excuse for his stealing," the words quoted are not libelous *per se*, and it was a question for the jury whether the article was libelous. (Page 257.)

Appeal from Clay Circuit Court, Eastern District; *W. J. Driver*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought suit against appellant for damages for the publication of an alleged libel, as follows:

"*But Mr. Johnson's memory is very bad in some respects.*

"W. H. Johnson, in his communication published in

The Soliphone, denies that he told certain parties that he was taking the census in May in order to get the names of those who were moving away. Whenever it is legally necessary, we will prove that Mr. Johnson's memory on this point is poor; that, when asked why he was taking the census so early, he said these words, or something very similar: 'Why, there are people moving away from here every day.' There is more than one person in Paragould who heard Mr. Johnson make this very statement or one exactly of the same import.

"Mr. Johnson, as he nears the end of his article, refreshes his memory and says: 'I did make this statement to some parties who were talking to me—that there were a few families moved away from Paragould after I took the census, but I did not know they were going away at the time, neither did the board.' He says he thinks 'that there were as many families moved in as moved out. So the district is about even.' This is a great explanation.

"But we are grateful for his acknowledgment made in his attempt to explain. If Mr. Johnson and the school board intended to do the fair thing, or violate the law as little as possible, why didn't he ask, or why didn't the directors require Mr. Johnson to ascertain, what families were intending to move away before the first day of July?

"For this violation of the law by taking the school census six weeks too soon Mr. Johnson says he had two reasons: he did not have anything else to do, and he needed the money to go to the reunion.

"Without any insinuation, but as an illustration: a man's motive is no excuse for his stealing."

It was alleged that defendant maliciously intended to injure plaintiff in his good name, and to cause it to be believed that he had committed the crime of larceny by such publication, and thereby to charge him with being guilty of the crime of larceny and cause it to be believed that he had stolen and would steal. It was also alleged that he was the publisher of the paper in which the article appeared, which was of general circulation in certain counties of the State, in which appellee was well known.

The publication of the article was admitted, but it was denied that it was done maliciously or with the intent to injure

plaintiff in his good name, or to cause it to be believed that he had committed the crime of larceny. It was also averred that the only accusation made by appellant in the article, and the only one he intended to make, was that appellee took the school enumeration of the Paragould Special School District at a time not authorized by law, and that the charge was preferred without malice on appellant's part and the truth of it pleaded in bar of the actiom.

The court instructed the jury, giving, among others, over appellant's objection, instruction numbered 3, as follows: "I charge you that the article published by the defendant and set out in the complaint of plaintiff is libelous *per se,* and that it was not privileged, and that plaintiff is entitled to recover in this action."

The jury returned a verdict against appellant, and from the judgment thereon he appealed.

R. P. Taylor, M. P. Huddleston and *R. H. Dudley,* for appellant.

The truthfulness of the accusations in the article complained of has been conclusively established, unless it can be said that one of the accusations consists in preferring the charge of theft. The facts, the face of the article itself, make it clear that appellant made no accusation of theft. As to the word steal—its meaning—see 65 Ark. 82; 8 Okla. 28; 56 Pac. 708. It is used in the article complained of in a figurative sense only, but if it had been used in a literal sense and applied directly to appellee, there could be no recovery. It is necessary that an offense be larceny in order for the use of the word "steal" in connection therewith to be actionable. 25 Am. Dec. 513; 30 Am. Dec. 573; 22 Am. Rep. 548; 59 Mo. 144; 40 O. St. 99; Newell on Slander and Libel, (2 ed.), 292 *et seq.*; 72 N. Y. 419; 151 Fed. 114; 47 So. 774; 51 N. W. 559; 27 N. W. 13; 60 N. W. 476; 95 N. W. 955; 48 Md. 494; 30 Am. Rep. 481; 24 L. R. A. (N. S.) 891; 104 Pac. 956; 113 Ill. App. 447.

S. R. Simpson and *L. Hunter,* for appellee.

If the language used is libelous *per se,* that is, if it means to charge appellee with larceny or impute to him any dishonest conduct, when construed in the plain and ordinary sense in

which the public naturally understood it, then instruction No. 3 was correct. 92 Ark. 488; 90 Ark. 120. See also 96 Ark. 356; 86 Ark. 50; 25 Cyc. 275; *Id.* 360, 361, 364; *Id.* 250, 253; 84 Ark. 489; 4 Ark. 110; Kirby's Dig., § 1850.

KIRBY, J., (after stating the facts). It is no longer questioned that, in ascertaining the meaning of words written to determine whether or not they are libelous, the entire article must be construed. *Miller* v. *State*, 81 Ark. 363. It is also true, the rule now is that the words used are to be taken in their plain and natural meaning and understood by courts and juries in their ordinary acceptation as other people would understand them and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them. *Jackson* v. *Williams*, 92 Ark. 489.

If the words, "A man's motive is no excuse for his stealling," had been spoken alone or used in such connection as to show or indicate that appellee was guilty of larceny, there is no question but that it would be libelous *per se*. *Murray* v. *Galbraith*, 86 Ark. 55; *Greer* v. *Whi e*, 90 Ark. 119. This sentence, however, does not appear alone, but as a conclusion to an article criticising appellant for taking the school census at a time not authorized by law and his reasons for so doing, and expressly states that it was used by way of illustration.

It is not disputed that the census was taken at a time not authorized by law, nor that appellant made statements relative thereto and the reasons in explanation thereof, as stated in the published article. If the sentence complained of as charging the commission of a crime was used by way of illustration only, as the article expressly says, it would not have amounted to a charge of larceny against appellee, who was only charged in the article in which it appeared with taking the census earlier than the law warranted, because, as he said, he had the time and needed the money. It but only accentuated the criticism that no good motives warranted the taking of the school census earlier than the law required, nor rendered one so taken valid. It could not have amounted to charging appellant with stealing, in the sense of committing the crime of larceny, and is not libelous *per se*, and the court erred in declaring it so. It was a question for the jury to say,

under proper instructions, whether the article was libelous within the meaning of the statute defining libel, and said instruction withdrew it from them.

We do not set out the other instructions with a view to approving them for the reason that on the next trial the case will be submitted to jury on the issue as to whether or not defendant meant to impute moral turpitude in an actionable manner.

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

KENYON PRINTING & MANUFACTURING COMPANY *v.* CROSBY.

Opinion delivered October 21, 1912.

SALES—MAPS—DEFECTS.—Where plaintiff sold defendant, a hotel keeper, certain State maps for advertising purposes, and the name of the town where defendant's hotel was located was incorrectly stated to be Heber, instead of Heber Springs, and the population of the town was incorrectly given on the back of the maps, but the plaintiff was not to blame for the mistake, it was error to instruct the jury that, if there was a misstatement of the population of the town, and by reason thereof the maps were rendered useless to defendant as an advertising medium, the jury should find for defendant; the mistakes being immaterial and insufficient to avoid the contract.

Appeal from Cleburne Circuit Court; *George W. Reed,* Judge; reversed.

M. E. Vinson, for appellant.

Mitchell & Thompson, for appellee.

HART, J. The Kenyon Printing & Manufacturing Company commenced this suit before a justice of the peace to recover the sum of $97.65, alleged to be due it by the defendant, C. F. Crosby, doing business as Hotel Adrian. There was a verdict and judgment in favor of the plaintiff. Upon appeal in the circuit court there was a verdict in favor of the defendant, and from the judgment rendered the plaintiff has appealed to this court. The material facts are as follows:

The plaintiff is a corporation engaged in manufacturing State and county maps, and through its representative sold

to the defendant, Crosby, five hundred Arkansas State Map hangers to be used for advertising his hotel at Heber Springs, Arkansas. Crosby signed a written order for the maps, and in it was a clause which provided that the order, being contract work, was not subject to cancellation. The contract bore date of June 1, 1911, and the maps were delivered according to contract. A sample map was exhibited to Crosby, and it was agreed that in one blank space a cut of the Arkansas State Capitol building should appear and in another a cut of the Adrian hotel. In one of the blank spaces appeared the name of the makers of the map and also the following: "Map of Arkansas, with population and location of principal towns and cities. For 1910 statistics see back of map." When the maps were received, the face of the maps was correct, and printed statistics appeared on the back. The defendant distributed a few of the maps, and then discovered that the name of the town of Heber Springs was not printed on the back of the map. It was printed there as Heber, and its population was given as 667. In reality the town of Heber Springs contains a population of something over eleven hundred. The mistake occurred in this way: The plaintiff obtained the statistics printed on the back of the maps from the United States census reports, and these reports did not contain the name of Heber Springs at all. The name of Heber Springs was formerly Sugar Loaf, and so appeared in the census report. The name was changed to Heber Springs on April 4, 1910, and this fact was not known to the plaintiff, and, not finding the name of Heber Springs in the census reports, it gave the name of the town and the population thereof as given by Dun's and Bradstreet's Commercial Guides.

When the plaintiff was informed of the mistake on October 7, 1911, it wrote to the defendant the facts about the matter and offered to make a rubber stamp containing the name of the town and the population thereof in any form desired by the plaintiff, and to send it with a black ink pad to the defendant so that he might make the correction on the back of the maps. Subsequently it offered the plaintiff a reduction of $15 in the price if he would do this, and wrote him that if this was not satisfactory to return the maps by freight, and that it would reprint them and return them freight prepaid at once.

The defendant declined both propositions, and offered to compromise the matter by paying one-half of the amount of the contract price. The plaintiff refused to accept his proposition of compromise, and brought this suit to obtain the full contract price.

The census of the town was taken in April, 1910, and the census reports show the town to contain a population of 1,126, but at the time the maps were printed the census reports did not show the changing of the name of the town from Sugar Loaf to Heber Springs, and, as above stated, this was the cause of the mistake on the part of the plaintiff.

The defendant testified that he bought the maps to advertise his hotel, and that because of the mistake in question the maps were of no service to him as advertising matter; that he expressly desired to distribute the maps in Northern and Eastern cities for his winter trade, and that when he found out the town was not there under its proper name and did not contain the correct population he concluded the maps were useless to him for advertising purposes. That plaintiff's representative told him that the names and population of the towns of the State, as printed on the back of the maps, would represent the census of 1910.

Among other instructions, the court told the jury that, if it should find there was a misstatement of the population of the town printed on the back of the map, and by reason of that misstatement it was rendered useless to the defendant as an advertising medium, it should find for the defendant. This instruction was wrong. The undisputed evidence shows that the plaintiff was in nowise to blame for the mistake that occurred in printing the name of the town and the population thereof on the back of the maps. It was understood between the parties that the data should be taken from the 1910 census reports. The census reports available at the time the maps were printed by the plaintiff showed the name of the town to be Sugar Loaf. It is true the name of the town was changed from Sugar Loaf to Heber Springs on April 4, 1910, but that fact was not known to the plaintiff, and was not shown in the census bulletins issued at the time the maps were printed.

Plaintiff then went to the reports of Dun and of Bradstreet's, and found the name of the town as Heber, and so printed

it on the maps, together with the population given by these commercial reports. Thus it will be seen that the plaintiff made every available effort to comply with its contract, and under the undisputed evidence in the case was not in default.

Moreover, we are of the opinion that that part of the statistics printed on the back showing the name of the town and its population was not material. The defendant was running a hotel, and the object of the map was to advertise his hotel. The maps contained a cut of the defendant's hotel on their face, and in every respect were according to the contract. The maps were intended to be hung up, and the face of the maps would be the part ordinarily seen by persons examining them. The only mistake being in the printing of the name of the town and the population thereof in the statistics compiled on the back of the maps, we deem this to be immaterial, and think that it should not avoid the contract.

For the error indicated, the judgment will be reversed. The policy of the law is to end litigation. The case has been fully developed, and the undisputed evidence shows that the plaintiff has fully complied with its contract, and is entitled to recover the contract price. Therefore, judgment will be entered here for the sum of $97.65, being the amount designated in the contract.

MILLER v. HENRY.

Opinion delivered October 28, 1912.

1. JUDICIAL SALE—VACATING SALE—CONCLUSIVENESS.—Even if a decree adjudicating lands to be subject to a lien for levee taxes is conclusive, and could not be reopened as ground for refusing confirmation of the sale, a decree refusing confirmation and vacating the sale is a final decree, which is open to attack only by such methods as may be available to set aside other decrees. (Page 264.)
2. SAME—SUFFICIENCY OF CONFIRMATION.—While a formal order of confirmation of a judicial sale is unnecessary, anything being sufficient which expresses unqualifiedly the approbation of the court, the mere fact that the judge made an indorsement on the deed of his approval thereof does not constitute an approval where it was a clerical misprision. (Page 264.)

3. SAME—STATUS OF PURCHASER.—A purchaser at judicial sale becomes a party to the proceedings and subject to the orders of the court. (Page 265.)

4. SAME—WHEN COMPLETE.—A judicial sale is not complete until confirmed by the court; the theory being that the court is the vendor and may confirm or reject as law and justice may require. (Page 265.)

5. BILL OF REVIEW—LACHES.—Negligence of a party in failing to discover matter which he asserts as ground for review bars him from that remedy. (Page 266.)

6. LEVEES—TAX SALES—NECESSITY OF CONFIRMATION.—Under Acts 1895, p. 88, authorizing the St. Francis Levee District to foreclose its lien for taxes, and providing that such suits "shall be conducted in accordance with the practice and proceedings of chancery courts in this State except as herein otherwise provided," a sale of land for levee taxes must be confirmed. (Page 266.)

7. QUIETING TITLE—LACHES.—The owner of land is not guilty of laches in failing to assert his title to the land until there has been an interference with his possession or until an incumbrance is placed upon his land which he is called upon to discharge. (Page 267.)

8. LEVEES—SALE OF LAND FOR TAXES—LACHES.—The fact that lands were improperly assessed for levee taxes, and the taxes were from year to year paid to the collector by another did not estop the levee district, which owned the land, nor its successor, from asserting title. (Page 268.)

Appeal from Crittenden Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

Allen Hughes, for appellant.

1. The levee board and its grantee are estopped. 82 Ark. 531; 81 *Id.* 244; 93 *Id.* 490; Kleber, Judicial Sales, § 392.

2. No formal order of confirmation is necessary. 17 A. & E. Enc. L. 991; 72 Ark. 339; 76 *Id.* 146; Kirby's Dig., § 6321. The fairness of the sale and its regularity were settled by the confirmation. 77 Ark. 216; 66 *Id.* 490; 124 Fed. 133. There was no appeal nor bill for review. 97 Ark. 314; 72 *Id.* 67.

3. Confirmation of a levee tax sale is unnecessary. Acts 1895, p. 91. A bidder at a foreclosure sale is a party to the suit and bound by it. 136 U. S. 89, 95. But he may be heard in the trial court or by appeal if not concluded by the decree. He is entitled to notice. 34 Cal. 658; 58 Ill. 239; 21 Ia. 238; 7 Tex. 598.

4. Laches is not imputable to a sovereign, but the rule does not apply to *quasi* public corporations. 91 U. S. 398; 56 Ark. 491; 63 *Id.* 56; 139 U. S. 693; 99 Ark. 45.

A. B. Shafer, for appellee.

1. Confirmation was necessary. Acts 1895, p. 88; 70 Ark. 409; 66 *Id.* 490. The sale was expressly set aside, and the order was valid. 16 Wall. 196; 60 Ark. 453; 50 *Id.* 45-8; 16 Cyc. 521.

2. There is no estoppel. 11 A. & E. Enc. L. (2 ed.) 439; 93 Ark. 490-5.

3. Nor was there laches. 99 Ark. 455.

McCULLOCH, C. J. This is an action instituted by appellee against appellant in the chancery court of Crittenden County to cancel a recorded deed purporting to convey a certain tract of land in that county. Both parties trace their title back to separate sales made by commissioners of the chancery court in actions instituted by the Board of Directors of St. Francis Levee District to enforce payment of delinquent levee taxes. Appellee claims under a sale made in the year 1898 pursuant to decree of the chancery court for the taxes of prior years; and appellant asserts title under a sale made in the year 1899 for the levee taxes of 1898. The levee district itself was the purchaser at the sale made in 1898, and, the sale being confirmed, a conveyance was made pursuant thereto. On December 7, 1898, the board of directors commenced another suit to enforce payment of delinquent levee taxes for the year 1898, and this tract was included in the suit, and a decree was entered condemning it for sale to satisfy the lien for delinquent levee taxes. The commissioner on March 27, 1899, made sale of the lands embraced in the decree, and appellant was the successful bidder for the tract in controversy, and received from the commissioner a certificate of his purchase. The commissioner made his report in writing to the court, and, the same coming on for hearing March, 1, 1900, the court made an order refusing to confirm the sale of this tract to appellant and vacating the sale. The sales of the other tracts of land embraced in the report were, with one or two exceptions, confirmed, and the commissioner was ordered to make deeds to the respective purchasers. On the same day the commis-

sioner presented to the court separate deeds to the purchasers at that sale, and included a deed to appellant for the land in controversy, which was, together with the other conveyances presented, examined by the court and approved, and indorsement to that effect was made by the chancellor upon each instrument. Appellant was not present in court on the day these proceedings were had, but was a nonresident of the State, and the deed so executed to him by the commissioner was forwarded by mail. Appellee purchased the land from the levee board on October 19, 1910, and received a quitclaim deed purporting to convey the same to him. He commenced this suit against appellant on December 16, 1910. The final hearing of the cause resulted in a decree in appellee's favor, quieting his title and cancelling appellant's deed, and an appeal has been duly prosecuted to this court.

The chancery court refused to confirm the sale made to appellant, and cancelled the same on the grounds that the lands were at the time of the decree the property of the levee board; that the same were not subject to taxation at that time; and the court was without jurisdiction to render a decree condemning the same for sale.

Conceding that the facts of the case bring it within the decision of this court in *Robinson* v. *Cross*, 98 Ark. 110, and that the decree adjudicating the lands to be subject to lien for levee taxes was a conclusive bar to further adjudication of that question, and that it could not be reopened as ground for refusing confirmation of the sale under said decree (*Terry* v. *Logue*, 97 Ark. 314), the fact remains that the court rendered its decree refusing to confirm the sale and vacating it. That was a final decree of the court which is open to attack only by such methods as may be available to set aside other decrees. *State National Bank* v. *Neel*, 53 Ark. 110.

The condition of the record, as indicated in the above statement of facts, does not fairly admit of a construction that the court made an order confirming the sale. It is true, as contended by learned counsel for appellant, that no formal order of confirmation is necessary, anything being sufficient which expresses unqualifiedly the approbation of the court. *Ousler* v. *Robinson*, 72 Ark. 339; *Cowling* v. *Nelson*, 76 Ark. 146; *Jacks* v. *Kelley Trust Co.*, 90 Ark. 548. The fact that

the chancellor made an indorsement upon the deed of his approval thereof is *prima facie* evidence of a confirmation of the sale and, ordinarily, would be the equivalent of an express order of court confirming the same; but such a presumption can not be indulged, in the face of an order of the court entered on the same day refusing to confirm the sale and setting it aside. Taking the whole record together, it is patent that the presentation of the deed by the commissioner to the court was a clerical misprision, and the action of the chancellor in indorsing his approval under those circumstances can not be treated as tantamount to a confirmation of the sale.

It is next insisted that the order vacating the sale is void for the reason that it was made in the absence of appellant as purchaser and no notice was given him of the proceedings.

A purchaser at judicial sale becomes a party to the proceedings and subject to the orders of the court. *Porter* v. *Hanson*, 36 Ark. 591.

In *Requa* v. *Rea*, 2 Paige (N. Y. Chancery) 339, Chancellor Walworth said:

"Where a person becomes a purchaser under a decree, he submits himself to the jurisdiction of the court in that suit as to all matters connected with such sale or relating to him in the character of purchaser."

The sale is not complete until confirmed by the court, the theory being that the court is the vendor, and "will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require." *Sessions* v. *Peay*, 23 Ark. 39; *Thomason* v. *Craighead*, 32 Ark. 391; *Wells* v. *Rice*, 34 Ark. 346; *State National Bank* v. *Neel*, 53 Ark. 110: *Phillips* v. *Benson*, 82 Ala. 500.

The purchaser having become a party to the suit "as to all matters connected with such sale or relating to him in the character of purchaser," it is difficult to perceive why he is entitled to notice when the court is about to reject the sale. He must take notice of all proceedings with reference to the report of sale and confirmation or rejection thereof. We are aware that there are a few cases holding to the contrary; but the question seems to be confused with that of vacating a sale after it has been confirmed, and, of course, under those

circumstances notice to the purchaser must be given, as the sale has become complete upon confirmation. It is, we think, a contradiction of terms to say that one who is a party to the proceedings, and therefore required to take notice of all steps, is entitled to have actual notice given to him.

Our conclusion is, that it was within the jurisdiction of the court, without actual notice to the purchaser, to refuse confirmation of and set aside the sale, and that this is conclusive unless other grounds are shown which warrant the court, in the subsequent proceedings, in setting aside that order.

Appellant makes his answer a cross complaint in the nature of a bill of review seeking to set aside the former order of the court disaffirming the sale. The basis of his contention in that respect is that he was not present in court when the order was made; that he had no notice thereof; and that he was misled by the fact that the clerk executed to him a deed which was duly approved by the court and delivered to him.

A sufficient answer to this is that, as he was a party to the suit, it was his duty to be present and take notice of all steps in the proceedings. It does not appear from the allegations of the complaint, nor from the agreed statement of facts upon which the case was tried, that the deed was delivered to him at a time which misled him to his disadvantage and prevented him from appearing in court before it adjourned in order to resist the disaffirmance. In other words, his failure to take notice of the order of the court refusing to confirm his sale was brought about by his own neglect in failing to attend the sittings of the court, either in person or by his attorney. Negligence in failing to discover the matter which he asserts as ground for review bars him from that remedy. *Bartlett* v. *Gregory*, 60 Ark. 453.

Another contention of learned counsel for appellant is that no confirmation of the sale by the court's commissioner was necessary, and that the title completely vested upon the execution of the deed.

The statute authorizing foreclosures by the St. Francis Levee District provides that such suits "shall be conducted in accordance with the practice and proceedings of chancery courts in this State except as herein otherwise provided." Acts 1895, p. 88.

This question has never been expressly decided by this court and, so far as the writer knows, has never been raised in this court. In several instances the necessity for confirmation of a sale for levee taxes has, however, been distinctly recognized. In *Banks* v. *Levee District,* 66 Ark. 490, in discussing the right of the owner to redeem from the sale, the court said:

"The time for making the deed or deeds is after confirmation of sale; for, until the sale is confirmed, it can never be known what changes there may be made in the report of sale in order to its confirmation. In this respect the sale may be said to be incomplete until confirmation."

In *Robertson* v. *McClintock,* 86 Ark. 255, we had under consideration the statute which authorized redemption within one year from the date of sale of lands under foreclosure proceedings for nonpayment of levee taxes, and the particular question raised was, whether the period of redemption ran from the date of the sale by the commissioner, or from the date of confirmation. In the opinion the court clearly recognized the legal necessity for a confirmation.

The statute itself which regulates this proceeding clearly contemplates that all the proceedings shall be "in accordance with the practice and proceedings of chancery courts;" and that necessarily implies a requirement that a sale pursuant to a decree of a court is not complete until it receives the court's confirmation.

We are of the opinion that confirmation is essential as in all other judicial sales.

The only remaining question is upon appellant's plea that appellee's right of action is barred by his own laches.

The deed to appellant was executed March 1, 1900, and was in due time placed of record.

Appellee purchased the land from the levee board October 19, 1910, and began this suit about two months thereafter.

It is shown that appellant continuously paid the levee taxes on the land since the date of his purchase except for the year 1904, and for that year it was again sold for taxes but redeemed by appellant in due time. He also paid the State and county taxes for the years 1899 to 1904, inclusive, and for the years 1908 and 1909, before the commencement of this

suit. The land was sold for State and county taxes for the years 1905, 1906 and 1907, but appellant redeemed from each sale in due time.

It is also shown that the land at the time of appellant's purchase was worth $5.00 an acre, and at the time of the institution of this suit its market value was about $15.00 per acre. The land is wild and unoccupied.

By many decisions of this court it has been held that, where the owner of land abandons it for a period of seven years, or longer, permitting another to bear the burden of paying the taxes, and the land in the meantime becomes greatly enhanced in value, he is barred by his own laches from asserting purely equitable rights.

It is equally well settled that the owner should not be deemed to have abandoned his land until there has been a valid lien for taxes which he has failed to discharge. In other words, he is not called upon to assert his rights, either legal or equitable, until there has been an interference with his possession, or until an incumbrance is placed upon his land which he is called upon to discharge. It is then only that his act in allowing another to bear the burden can be deemed to be an abandonment of his rights. *Penrose* v. *Doherty*, 70 Ark. 256; *Chancellor* v. *Banks*, 92 Ark. 497; *Herget* v. *McLeod*, 102 Ark. 60.

These lands, being the property of the levee district, were not subject to taxation during the period of delinquency, claimed by appellant to exist; therefore the district was not called upon to pay and was not in default in discharging the void assessment. Laches is not imputable to the levee district, nor to appellee, for he brought suit within a few months after he became the purchaser.

The fact that the lands were improperly assessed for levee taxes were from year to year paid to the collector did not estop the levee district to assert title to the lands. *Board of Directors St. Francis Levee District* v. *Fleming*, 93 Ark. 490.

Our conclusion is that the decision of the chancellor upon all the questions involved in the case was correct, and the decree is therefore affirmed.

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

Opinion delivered October 28, 1912.

1. CARRIERS—INJURY TO PASSENGER—COMPLAINT.—A complaint against a railroad company for injury to a passenger should state with as much definiteness as possible the time, the kind of train on which she was riding, and the particular place where the injury occurred. (Page 272.)
2. CONTINUANCE—SURPRISE—WAIVER.—Defendant waived his right to a continuance on account of surprise because plaintiff was permitted to amend his complaint so as to change the issue where he amended his answer to meet the changed issue and went to trial without asking for a continuance. (Page 272.)
3. SAME—DISCRETION OF COURT.—Applications for continuance are addressed to the sound discretion of the trial courts. (Page 273.)
4. CARRIERS—INJURY TO PASSENGER—QUESTION FOR JURY.—Where there was evidence tending to prove that a passenger was injured by the train being negligently started before she had time to reach a seat, it was not error to refuse to direct a verdict for the railway company. (Page 273.)
5. SAME—INJURY TO PASSENGER—INSTRUCTIONS.—In an action against a carrier for injury to a passenger, instructions that it was the duty of defendant to stop its train long enough to allow passengers reasonable time to board said train and reach a seat, that a reasonable time is such time as one of ordinary prudence should be allowed to take, that the carrier should consider any special condition peculiar to the passenger and give reasonable time under the circumstances, and that if defendant did not give plaintiff a reasonable opportunity to board the train and reach a seat it was liable, were not objectionable as requiring defendant to stop its train long enough for plaintiff to board same and reach a seat. (Page 274.)
6. SAME—DUTY TO ALLOW PASSENGER TIME FOR BOARDING TRAIN.—A passenger is entitled to a reasonable time to get aboard a train after he is given an opportunity to do so; and if, without allowing such reasonable time, the train is started, and the passenger is injured, the railway company is liable. (Page 274.)
7. INSTRUCTION—ASSUMPTION OF FACTS.—An instruction, in a personal injury suit, that the jury should consider, among other elements of damages, such pain "as she will necessarily endure in the future resulting from her injury, if any," was not erroneous as assuming that she would suffer pain in the future. (Page 275.)
8. CARRIERS—INJURY TO PASSENGERS—INSTRUCTIONS.—In an action for injury to a passenger on a mixed train, an instruction that, while plaintiff assumed the risk of necessary jars of the train, defendant was

not relieved from using the same high degree of care in handling its train to avoid injuring plaintiff as if it were a regular passenger train, etc., was not inconsistent with another instruction that a passenger on a mixed train assumes the ordinary risks incident to travel on such trains, but that the railway company owes to such passenger the duty to exercise the highest degree of care, consistent with the practicable operation of such train, to protect the passenger from injury. (Page 275.)

9. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—In an action for personal injuries an award of $1,550 was not excessive where plaintiff suffered great pain for a year, where her injured shoulder was an inch and a half shorter over the shoulder blade than over the other shoulder blade, and where her injuries were probably permanent. Page 277.)

Appeal from Pike Circuit Court; *Wm. P. Feazel,* Special Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellant to recover damages for injuries received by her while embarking on one of appellant's trains. The material facts are as follows:

On the 5th day of May, 1911, appellee purchased a ticket for herself and children from Amity to Glenwood, both being stations on appellant's line of railroad. She intended to go on what was called the log train, which was a mixed passenger and freight train. When the train pulled up to the station at Amity the conductor called out, "All aboard," and appellee immediately proceeded to get on the train. The conductor helped her on the platform with her children, and she started into the car as fast as she could go. She had her baby in her arms, and her little boy and two little girls preceded her into the car. She was back of them, urging them along as fast as possible, and just as they got in the door of the car the train started with a sudden jerk which threw appellee down. When she fell, the right side of her head and shoulder hit the upper part of the first seat in the car. She held her baby in her left arm when she fell. The seat that she struck was about ten feet from where she was when the jerk came. She had not gotten inside the car when the jerk came, but was just in the doorway. Her older little girl, who was ahead, had gotten far enough in the car to catch hold of the first seat on the left and keep herself and sister from falling. The jerk of the

train knocked her little boy over as fast as he could get up. Appellee told the conductor about the injury she received. She proceeded on her journey, and as soon as she got home she examined herself and found that she had a long black bruise about four inches long on her shoulder and a bruise on her head. She testified that her shoulder looked blue for a long time afterwards, and that she has never had the use of her right arm since, and that she can not lift a bucket of water with that arm; that she had always been a stout woman, and never had had any trouble with her arm before the accident; that in November or December, 1911, after the accident, her shoulder got so bad she had to send for a doctor; that it is no better now, and gives her a great deal of pain; that up to the time she sent for the doctor she treated her arm herself with liniment; that she has suffered a great deal of pain and still suffers pain; that the pains are mostly in her shoulder, head and through her chest.

Doctor J. E. Baker, for the plaintiff, testified: "I examined appellee's arm and shoulder three or four months after she said she received the injury. I found at that time a place of discoloration between her shoulder blades. She seemed to be suffering considerable pain. I did not take any measurements at that time, but the injured shoulder blade was considerably to one side and flattened. It seemed that one edge was knocked down. I prescribed rubbing, massaging and liniment. Later on I took two measurements, and found that the injured shoulder was an inch and a half shorter over the shoulder blade than it is over the other shoulder blade. I think that a blow similar to the one appellee sustained would have a tendency to produce the condition she is in. I believe she is liable not to have good use of her arm. She can't bear to have it raised above a level. Such an injury would have a tendency to produce pain, which might last an indefinite time. Any severe lick on the point of the shoulder could produce a case similar to this, and it might knock the shoulder blade loose from the muscles and flatten the shoulder blade. I think that nothing but a blow of some kind could produce a similar result unless it might be possible for some kind of rheumatism to do it. I think there is an indication that her injury might be permanent."

Other facts will be stated in the opinion. The jury returned a verdict for appellee in the sum of $1,550, and the case is here on appeal.

E. B. Kinsworthy, W. V. Tompkins, R. E. Wiley and *W. G. Riddick*, for appellant.

George A. McConnell, for appellee.

HART, J., (after stating the facts). 1. Counsel for appellant contend that the court erred in refusing to grant appellant's motion for continuance. The original complaint alleges that appellee received her injuries on April 5, 1911. When the case was called for trial on March 21, 1912, appellee asked the court to amend her complaint by alleging that she received her injuries on May 5, 1911. This was granted, and thereupon the appellant was given permission to change its answer to meet the amendment of the complaint. Then both parties announced ready for trial, and a jury was impanneled to try the cause. While counsel for appellee was stating her case to the jury, appellant asked leave of the court to file a motion for continuance. The motion alleged that appellant was taken by surprise when appellee amended her complaint so as to change the date on which the injury occurred from April 5, 1911, to May 5, 1911, and that it was not prepared to meet this change in the date.

The complaint should state with as much definiteness and certainty as possible the time and kind of train and the particular point where the injury occurred. This should be done in order that the railroad company might be enabled to prepare for its defense and avoid the necessity of subpoenaing an unnecessary number of witnesses and therefore possibly decrease the efficiency of the service of its trains and also to avoid unnecessary expense. So, if the motion for a continuance had been made at the time appellee was given permission to amend her complaint, the motion should have been granted. In the instant case, however, appellant did not do this. It amended its answer to meet the changed issue and elected to go to trial without asking for a continuance. As far as the record discloses, it knew as much then as it did subsequently about the necessity of having new witnesses to meet the changed condition of the pleadings. The injury occurred on a branch

line of appellant's line of railway where, presumably, appellant had but few trains and train crews. The general rule is that the granting or refusing a continuance is intrusted to the judicial discretion of the trial court, and it is an abuse of that discretion only that is a ground for reversal. Having elected to go to trial under the changed condition of the pleadings and not having shown any additional grounds than that before appellant elected to go to trial, the court did not abuse its discretion in refusing to grant the continuance.

2. It is insisted by counsel for appellant that the court erred in refusing to direct a verdict for it. This was a suit by appellee to recover damages for injuries received while getting on one of appellant's trains, which carried both freight and passengers. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hartung*, 95 Ark. 220, the court in discussing the duty of carriers to passengers getting on mixed trains, said:

"The carrier of passengers on mixed trains is required, like carriers on regular passenger trains, to furnish reasonably safe means of entering the car and to hold the car in a reasonably safe manner for a reasonable time to permit those who wish to enter to do so with safety. If, therefore, while the passenger is getting on the car, the train is negligently started, or so negligently handled by permitting other cars to be thrown against it with such violence that the passenger is injured, the carrier will be liable. The time that is allowed a passenger to enter a train depends to a great extent on the particular circumstances of each case and of the passenger, the physical ability of the passenger, his incumbrance with baggage and his being accompanied by those who are dependent upon him for attention may all be taken into consideration in determining whether a reasonable time has been afforded the passenger in getting on board the train."

Tested by this rule, the court did not err in refusing to direct a verdict for appellant. The testimony of appellee shows that, as soon as the conductor announced that the train was ready to receive passengers, appellee and her children started to get on the train and proceeded with as much dispatch as possible to board the train and to get to their seats. The accident occurred just as appellee reached the door of the train and before she had time to walk to a seat.

3. The court at the request of appellee, among others, gave the following instructions:

"No. 3. You are instructed that it was the duty of the defendant, as a carrier of passengers, to stop its train long enough to allow the plaintiff and other passengers a reasonable time to board said train and reach their seats."

"No. 5. You are instructed that the reasonable time which the defendant was required to hold its train for passengers to get on and off is such time as a person of ordinary care and prudence should be allowed to take, and in determining this reasonable time it is the duty of the carrier to take into consideration any special condition peculiar to the passenger, and to give a reasonable time under the existing circumstances, as they are known, or should be known, by its servants, for passengers to get on and off its train."

"No. 6. If you find that the defendant did not stop its train a reasonable time, giving the plaintiff a reasonable opportunity to board said train and reach her seat, then the defendant has failed in its duty to the plaintiff."

Counsel for appellant assign as errors the action of the court in giving the fourth and sixth of these instructions. Counsel insist that the effect of these instructions was to tell the jury that appellant should have stopped its train long enough for appellee to board the same and reach her seat. We do not think so. The instructions should be read together, and, when that is done, they fall fairly within the rule laid down in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hartung,* above copied.

A passenger is entitled to a reasonable time in which to get aboard a train after he is given an opportunity to do so, and if, without allowing such reasonable time, the train is started, and the passenger is injured, the railway company is liable. The instructions referred to, when considered together, properly submit this question to the jury.

4. Counsel for appellant also assign as error the action of the court in giving the following instruction:

"No. 3. If you find for the plaintiff, in assessing her damages you will take into consideration her age and condition in life, the injuries sustained by her and the physical and mental pain and anguish endured by her on account of the injury,

if any, together with such as she will necessarily endure in the future, resulting from her injury, if any, together with all other facts and circumstances in the case, and assess her damages at such sum as you believe from the evidence will fully compensate her for the injuries."

They insist that the instruction assumes that future suffering would result to appellee from the injury and also insist that it is not supported by the evidence. We can not agree with appellant in this contention. The evidence on the part of the appellee tends to show that she suffered pain from the time she received the injury on May 5, 1911, to the time of the trial on March 21, 1912. She said she still suffered greatly from her injuries. The physician who attended her also stated that she appeared to suffer great pain, and that it was likely that her injuries would be permanent. Under the testimony, as set out in the statement of facts, the jury might have well found that appellee would continue to suffer pain in the future and that her injuries were permanent. We do not think that the instruction assumes that she would suffer pain in the future, but that fact was left for the jury to determine under the evidence.

5. Counsel for appellant also contend that the court erred in giving instructions numbered 7 and 8 to the jury, which read as follows:

"No. 7. You are told that while the plaintiff in taking passage upon a mixed train assumed the risk of necessary and usual jolts and jars, this did not relieve the railroad company from exercising the same high degree of care in the handling of its trains as if she was riding on a regular passenger train, to avoid injuring her. The risk of usual jolts and jars assumed by plaintiff is the risk incident to the mode of conveyance, and it does not relax the rule as to the high degree of care to be exercised by the servants of the defendant to avoid injuring passengers. So in this case, if you believe that the plaintiff was without fault and would not have been injured if the defendant's servants had exercised such high degree of care, your verdict should be for the plaintiff."

"No. 8. When a passenger takes passage on a mixed train, which carries both freight and passengers, such passenger assumes the ordinary risks and inconveniences that are

incident to the travel on such trains. But the railway company owes to such passenger the duty to exercise the highest degree of care consistent with the practicable operation of such train to protect the passenger from injury."

Counsel for appellant insist that the instructions are inconsistent and conflicting, and that both should not have been given. In the case of *Arkansas Southwestern Railroad Company* v. *Wingfield*, 94 Ark. 75, the court quoted with approval the following:

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

An instruction in precisely the same language as that contained in instruction numbered 7 was given by the court in that case, and in commenting upon the instruction the court held that it was in accord with the statement of the law above made and was not fairly susceptible of the meaning now sought to be given it by counsel for appellant. The same contention in regard to the instruction was made in that case as is made in the present one, and the court held that it was not prejudicial error to give the instruction. The instruction is not happily framed, but when it was considered by the jury in connection with instruction numbered 8, which immediately followed it, and which is conceded by counsel for appellant to be correct, we are of the opinion that the jury could not have been confused or misled by it. The correct rule applicable to such cases is laid down in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Purifoy*, 99 Ark. 366, which is as follows:

"Railroad companies are bound to the most exact care and diligence, not only in the management of trains and cars, but also in the structure and care of the track and in all the

subsidiary arrangements necessary to the safety of the passengers. While the law demands the utmost care for the safety of the passenger, it does not require railroad companies to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible peril. They are not required, for the purpose of making their roads perfectly safe, to incur such expenses as would make their business wholly impracticable, and drive prudent men from it. They are, however, independently of their pecuniary ability to do so, required to provide all things necessary to the security of the passenger reasonably consistent with their business and appropriate to the means of conveyance employed by them, and to adopt the highest degree of practicable care, diligence and skill that is consistent with the operating of their roads and that will not render their use impracticable or inefficient for the intended purposes of the same."

Tested by this rule, and, when considered together, we think the instructions contained a correct guide to the jury in determining the issues submitted to them.

6. Finally, it is contended by counsel for appellant that the verdict is excessive. The verdict was for $1,550. It is true the appellee did not seek the service of a physician until four or five months after she received her injuries, but she testified that during all of that time she suffered great pain and attempted to alleviate her suffering by the use of liniments and other home remedies. The trial occurred almost one year after she received her injuries, and she states that she was still suffering great pain at that time. Her physician stated that her injuries were severe at the time he visited her; that her injured shoulder was an inch and a half shorter over the shoulder blade than it is over the other shoulder blade. He stated it was his opinion that the injuries would be permanent. Appellee testified that at the time of the trial she could not lift her baby or a bucket of water with her injured arm and could not milk a cow with that hand. She stated that she suffered at that time great pain from her injuries. Under these circumstances, we do not think the verdict was excessive.

Therefore the judgment is affirmed.

JOHNSTON v. PENNINGTON.

Opinion delivered November 4, 1912.

1. TROVER AND CONVERSION—SUFFICIENCY OF EVIDENCE.—In an action against the chief of police of a city for unlawfully converting plaintiff's animals to his own use, proof that the animals in question were impounded by another, without defendant's knowledge, is insufficient to show a conversion by defendant. (Page 280.)
2. SAME—JUSTIFICATION UNDER IMPOUNDING ORDINANCES—BURDEN OF PROOF.—One who would justify the taking and conversion of another's animals under an ordinance for the impounding of animals has the burden of proving that the ordinance has been strictly complied with. (Page 280.)
3. TRIAL—ABSTRACT INSTRUCTION.—An instruction not based upon evidence is prejudicial error where it is calculated to confuse and mislead the jury. (Page 280.)

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

STATEMENT BY THE COURT.

J. I. Pennington brought this suit in the circuit court against Sid Johnston and John B. Williams for the conversion of two horses of the value of $125.

The plaintiff in his own behalf testified as follows: "I am the owner of the two horses involved in this controversy. On the 4th day of February, 1910, they strayed from my place at Greenwood, Sebastian County, Arkansas. About the 16th day of February I called up over the telephone the defendant Sid Johnston, who was chief of police of the city of Fort Smith, Arkansas, and a person answered the 'phone, and said his name was Sid Johnston. I described the horses to him, and asked him if they were in the pound at Fort Smith, and he answered no, and said no such horses had been there. He said they did not have any horses up then. Some time about the first of May I was in Fort Smith, and asked the defendant Williams if he had seen my horses and described them to him. He replied that he had not. I soon found my roan horse, and on talking to Williams again he stated that the horses had been impounded and had been sold. Williams was employed by the city to keep horses that had been impounded."

Cross Examination: "When I talked to Sid Johnston over the telephone, I did not know his voice, but when I was in Fort Smith in May I asked him if he remembered talking to me about the 16th day of February in regard to some horses, and he replied that he remembered it, said that he remembered having a conversation about that time with a man who said his name was Pennington."

Other evidence was introduced by the plaintiff tending to corroborate his testimony. The ordinance of the city of Fort Smith in regard to impounding animals running at large was read in evidence, and testimony was introduced tending to show that the horses in question were impounded and sold by an order of the police judge of the city of Fort Smith, and that the sale was made by the day captain of police. Sid Johnston, the chief of police, was usually on duty in the night time, and was not present when the horses were sold under orders of the police court.

The jury returned a verdict for the plaintiff in the sum of $75, and from the judgment rendered the defendants have appealed.

Pryor & Miles, for appellant.

1. The court should have directed a verdict in favor of both Johnston and Williams at the conclusion of the evidence. 34 Ark. 431; 10 Ark. 223.

2. The court's instruction, placing the burden upon appellants to show that the ordinance under which they acted was complied with, was erroneous, and especially so as to Johnston because the evidence fails to connect him in any manner with the sale.

3. There was no testimony, either as to Johnston or Williams, upon which to base instruction 4 holding appellants liable if they or either of them purposely or knowingly misled appellee as to the horses being in the pound, etc.

HART, J., (after stating the facts). The ordinance in regard to the impounding of animals in the city of Fort Smith provides that it shall be the duty of the chief of police to sell them under the orders of the police court. The testimony in this case shows that the sale was conducted by the day captain of police, and that the chief of police was not present

at the sale, and, for aught that appears from the record, the chief of police did not know that the sale was to take place or that it did take place. The chief of police being the person designated to conduct the sale, the sale could be made only by him, or at least must be made under his immediate direction and supervision; that is to say, if he were present, he might employ an auctioneer or other person to cry the sale. It follows that there is no testimony tending to show that the defendant Johnston converted the horses to his own use.

It is contended by the defendants that the court erred in instructing the jury that the burden of proof was upon them to show that the ordinance in regard to the impounding of animals had been strictly complied with to justify an action brought against them by the owner of the horses, but their contention in this respect has been determined against them by the principles announced in the case of the city of *Fort Smith* v. *Dodson*, 51 Ark. 447.

It is finally insisted by the defendants that the court erred in giving the following instruction:

"If the defendants, or either of them, purposely or knowingly misled plaintiff as to the horses being in the pound, such defendant so purposely or knowingly misleading him would be liable, notwithstanding the ordinances were complied with in the impounding and sale of the horses."

We agree with the defendants in this contention. As we have already seen, there is no testimony in the record upon which to base a verdict against the defendant Johnston. In regard to the defendant Williams, it may be said that there is no testimony tending to show that he made any statement whatever to the plaintiff in regard to the horses prior to the sale. What he said to the plaintiff was said after the sale had been made and after Williams had disposed of the horses. Hence there was no testimony in the record upon which to predicate such an instruction against him. The necessary effect of the instruction was to confuse and mislead the jury, and the instruction is therefore prejudicial.

For the errors indicated, the judgment must be reversed, and the cause remanded for a new trial.

LITTLE v. ARKANSAS NATIONAL BANK.

Opinion delivered November 4, 1912.

1. INSURANCE—WAGERING CONTRACT.—A policy of life insurance issued to one who had no insurable interest in the life of the person insured, but who pays the premiums for the chance of collecting the policy at the death of such person, is invalid as a wagering contract and against public policy. (Page 283.)
2. SAME—WAGERING CONTRACT—VALIDITY OF PREMIUM NOTE.—A promissory note given for the premium on a wagering contract of insurance is without valid consideration and therefore unenforceable; and such defense is available against an assignee of such note with notice of the facts concerning the consideration, but not against an innocent purchaser for value before maturity. (Page 283.)
3. EVIDENCE—WRITTEN CONTRACT—ORAL EVIDENCE.—No rule of evidence is violated by admitting oral proof of the consideration of a promissory note for the purpose of showing want or failure or illegality of consideration. (Page 283.)

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

Dick Rice, for appellants.

1. The court erred in sustaining appellee's motion to strike out parts of appellant's answer. If the allegations so stricken out are true, they constitute a defense to the note sued on. 127 S. W. (Ark.) 968; 25 Cyc. 706; *Id.* 758; 29 Cyc. 117; 22 L. R. A. 291; 135 S. W. 807. The introduction of parol testimony proving such allegations would be no violation of the rule that parol testimony can not be introduced to vary or contradict a written instrument, since this principle does not apply so as to preclude the admission of evidence to show that the consideration was vicious or illegal. 17 Cyc. 660; 8 Cyc. 45; *Id.* 252-254; Joyce, Defenses to Commercial Paper, § 288; 88 Pac. 708; 62 S. W. 445; 38 N. E. 644; 100 S. W. 796; 36 N. Y. 531; 23 Ark. 390; 25 Ark. 238; 25 Ark. 209; 26 Ark. 450; 32 Ark. 758; 35 Ark. 279; 66 Ark. 534; 41 Ark. 242.

2. The plea of want of consideration is a defense to the notes. 60 Ark. 606; 31 S. W. 567; 6 Ark. 412; Joyce, Defense to Commercial Paper, § 322; Norton on Bills & Notes 275; Tiedeman on Commercial Paper, § 154; Kirby's Dig., § 3690.

B. R. Davidson, for appellee.

1. The third paragraph of the answer was a palpable

effort by the appellants to substitute by parol a contract with the district for an individual contract of their own, ignoring the fact that they had given promissory notes over their own signatures to be negotiated in due course. This can not be done either in law or in equity. 36 Ark. 293; 49 Ark. 285-7; 66 Ark. 445; 67 Ark. 62; 78 Ark. 574-577; 87 Ark. 93.

It is alleged in this paragraph that the notes were illegal and void and contrary to public policy because the district had no insurable interest in the lives of the parties. If proof of this character were admitted to defeat a promissory note, then commercial paper would have no value. 71 Ark. 185-188; 83 Ark. 163-171; 35 Ark. 555-559; 72 Ark. 514.

2. Even if proof were admissible that this was accommodation paper signed by the parties for the school district, it is no defense. 65 Ark. 543; 65 Ark. 204; 88 Ark. 97.

3. The defense that this is a transaction of a corporation and that it is void as such could only be made by the corporation itself. It is not a party, and, even though the contract itself was *ultra vires*, appellants could not take advantage of it in this case. 89 Ark. 435-443.

McCULLOCH, C. J. Appellants executed to one J. O. Gunter two negotiable promissory notes, each for the sum of $837.10, due and payable three and six months, respectively, after date, and Gunter assigned the notes to appellee, a banking corporation doing business in the city of Fayetteville, Arkansas. Appellee instituted this action to recover of appellants the amount of the two notes with interest. Appellants, for defense to the action, pleaded want of valid consideration for the execution of the notes sued on, alleging that Gunter was the soliciting agent for a certain life insurance company; that the notes were executed to him for the first annual premium on life insurance policies issued by said company on the lives of eighteen young men, the amount of the several policies of insurance to be payable on the death of the young men to Special School District of Rogers, Benton County, Arkansas; that neither the school district, nor any of these appellants, had an insurable interest in the lives of the men mentioned in the policies, and that said insurance contracts were void, and, consequently, the said notes given for premiums were without legal consideration. It is further alleged that appellee

had full notice of the above stated facts when it purchased the notes from Gunter, and was therefore not an innocent purchaser for value.

The court, on motion of appellee, struck out the allegations concerning the consideration for the notes, leaving in the answer only the allegation of payment of the notes by the school district, and on that issue evidence was introduced, upon which there was a finding in favor of appellee.

The question presented for our consideration on this appeal is whether or not the allegations of the answer, concerning the consideration for the notes, set forth facts sufficient to constitute a defense to the action. It is settled by a decision of this court, supported by the great weight of authority, that a policy of life insurance issued to one who had no insurable interest in the life of the person named, but who pays the premiums for the chance of collecting the policy at the death of such person, "is invalid because it is a wagering contract and against sound public policy." *McRae* v. *Warmack,* 98 Ark. 52.

It necessarily follows that a written obligation to pay the premium on such a policy is without valid consideration, and therefore unenforceable. The defense is available against an assignee of a note who purchased with notice of the facts concerning the consideration, but not against an innocent purchaser for value before maturity of a negotiable note. *German Bank* v. *DeShon,* 41 Ark. 331; Joyce on Defenses to Commercial Paper, § 288.

No rule of evidence is violated by admitting oral proof of the consideration for a promissory note for the purpose of showing want or failure of consideration, or illegality of consideration. *Martin* v. *Tucker,* 35 Ark. 279; *Taylor* v. *Purcell,* 60 Ark. 606; *Hencke* v. *Standiford,* 66 Ark. 535; Joyce on Defenses to Commercial Paper, § 322; 2 Parsons on Bills & Notes, p. 501; 8 Cyc. pp. 252 *et seq.*

The answer stated facts sufficient to show that the consideration for the notes was illegal, and that appellant was not an innocent purchaser. It was error, therefore, for the court to require those allegations to be stricken from the answer.

Reversed and remanded for a new trial.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. NEWMAN.

Opinion delivered November 11, 1912.

1. RAILROADS—NEGLIGENCE—DISCOVERED PERIL.—Evidence tending to prove that employees in charge of defendant's train discovered the perilous situation of plaintiff's decedent in time to avoid killing him, but failed to exercise ordinary care to that end, will sustain a finding of negligence on defendant's part. (Page 285.)
2. SAME—DISCOVERED PERIL—INSTRUCTION.—Where there was evidence tending to prove that plaintiff's decedent was killed by a train on defendant's track at a time when he appeared to be insensible of his danger, an instruction that if the trainmen had reason from the appearance of the decedent to believe that he was suffering from drunkenness or other cause, and thereby was insensible to the danger, it was the duty of the trainmen to use proper care to avoid injuring him, was not prejudicial because there was no proof that decedent was drunk, if there was proof that he was in a place of danger which he failed to appreciate. (Page 288.)

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

W. F. Evans and *W. J. Orr*, for appellant.

1. The objection to, and error in, the court's modification of instruction 2, requested by appellant, is that there is no evidence that deceased was "insensible of his danger or unable to avoid it." In the absence of proof to the contrary, the legal presumption is that the man was not mentally nor physically incapacitated. 49 Ark. 257. There is no proof whatever in the record to support the allegation in the complaint that deceased was drunk. He was in good health when last seen prior to the time of the accident. The presumption is that he remained so. 142 S. W. (Ark.) 1122; 131 S. W. (Ark.) 958; 82 Ark. 522.

2. Instruction 4 given by the court but emphasizes the error in instruction 2 as modified, and gives a wider range for conjecture. The facts in the Wilkerson case, 46 Ark. 513, from which this instruction was taken, show that the deceased when he was seen *"was staggering and had the appearance of being very drunk,"* whereas here there is no such proof. The law fixes the duty of trainmen toward trespassers on a railway track, and, such being the case, the jury should not be allowed to substitute their own ideas as to that duty. 64 Ark. 336.

A. B. Shafer, for appellee.

The evidence shows the distance from the north end of the trestle to where Nass was struck; that he was plainly seen upon the trestle, and that the engineer and fireman saw his perilous position more than a quarter of a mile from where he was struck.

The court correctly stated the law of the case in the modification of instruction 2 and in instruction 4. 46 Ark. 520; 138 S. W. 995; 90 Ark. 398, and cases cited.

McCULLOCH, C. J. The plaintiff's intestate, Hans Nass, was run over and instantly killed by a freight train on a trestle of defendant's railroad near Tyronza, a station in Poinsett County, Arkansas, and this action was instituted to recover damages for the benefit of the widow and next of kin.

Nass was a trespasser on the track, and the question in the case is, whether or not the train operatives failed to exercise care, after making discovery of the perilous situation of deceased, to prevent injuring him. The case was tried upon this theory, and the trial resulted in a verdict in favor of the plaintiff assessing damages.

The chief ground urged for reversal is that the evidence is not sufficient to sustain the verdict. Nass was a stranger in those parts, and had only been living at Tyronza for a short time. He was accustomed to using, on the railroad, a speeder which belonged to a timber inspector, but did so without permission of the railroad company. On the day that he was killed, he took the speeder and rode it to Deckerville, another station south of Tyronza, and was returning about sundown, when he was run over by the train. There is evidence tending to show that he went to Deckerville for the purpose of getting some whisky at a saloon located there. Only one person witnessed the occurrence, except the trainmen themselves. This was a man named Leonard, who was a farmer, living a short distance from Tyronza, and who was starting from his field towards his house when it occurred. He walked up on the track, started towards home, when a freight train came from the north, and he stepped off the track to allow the train to pass. As he did so, he noticed a man riding a speeder on the trestle. He testified that the man appeared to have stopped.

He afterwards measured the distance and found that he was about 2,220 feet from the north end of the trestle when the train passed him. He states that shortly after the train passed, and obscured his view of the man on the trestle, the alarm signal was given by blowing the whistle, and was continued until the train reached the trestle and stopped. His measurement showed that the engine was 1,192 feet from the north end of the trestle when the alarm was first sounded. He did not go down to the trestle to see whether injury had been inflicted, as he supposed, so he states, that the train had been stopped in time to prevent injuring the man; but, after he learned that the man had been killed, he examined the place and saw the evidences of the speeder being knocked from the trestle ninety-four feet from the end of the trestle. Another witness, who lived at Tyronza, testified that as soon as he heard of the accident he went down to the scene and found the broken speeder lying in the water near the trestle, fifty or seventy-five yards from the north end. The trestle was 635 feet long and about thirty feet high, spanning a shallow body of water called Dead Timber lake. The evidence justified the jury in concluding that Nass, when struck by the train, was sitting on his speeder on the trestle from ninety to 150 feet from the end, and that the trainmen could see that he had stopped. The evidence warranted the conclusion that the trainmen did see him from the fact that they began to give the alarm 1,192 feet from the north end of the bridge, which placed them at that time at a distance of about 1,300 feet from deceased's position on the trestle. There was also evidence to the effect that the train could have been stopped in a distance of from 100 to 200 yards, according to the favorable or unfavorable conditions with reference to the working of the air and the amount of tonnage in the train. In that state of the proof, it is our opinion that the jury was warranted in finding that the trainmen, that is to say, the engineer or fireman, discovered the perilous situation of this man in time to have avoided the injury. They could see him on the trestle, where he appeared to have stopped, and as they approached him should have known that he was in a position of peril of which he was insensible or from which it was impossible for him to extricate himself. He was facing north, and one

who discovered his presence could see that he was unable to make his escape from the trestle. The fact that the alarm was continued down to the point where the train stopped shows that the trainmen were aware of his peril all during that time, and their failure to stop the train at an earlier moment is sufficient to sustain the charge of negligence. The evidence shows that the engine ran by him some distance before the train was stopped. None of the trainmen testified in the case; therefore, it is not shown just how far the engine went by before it was stopped, and the jury was left to draw inferences only from the situation as described by the witness Leonard and the other witness who testified with reference to the place where the broken speeder was found. The defendant did not attempt to account in any way for the happening of the injury or to introduce evidence explaining how it occurred. We are of the opinion that the situation described by the witness warranted the inference that the engineer or fireman saw the man on the trestle and was aware of his perilous situation, but failed to exercise ordinary care to prevent injuring him. The verdict is therefore sustained by the evidence.

The court instructed the jury, upon defendant's request, that if the employees in charge of the train saw Nass on the trestle at a distance ahead sufficient to enable him to get out of the way before the train reached him, "and they were not aware that he was deaf or insane or from some other cause insensible of danger or unable to get out of the way, they had the right to rely on human experience and presume that he would act upon the principles of common sense and the motives of self-preservation common to mankind in general, and get out of the way, and they had the right to go on without checking the speed of the train until they did see, if they did, that he was not likely to get out of the way," etc.

The court, over the defendant's objection, modified the instruction by adding the following:

"If, however, Nass was seen upon the track and was known to be, or from his appearance gave the operatives of the train good reason for the belief that he was, insensible of his danger or unable to avoid it, then they would have had no right to presume that he would have gotten out of the way,

but should have acted on the hypothesis that he might not or would not, and then should have used the proper degree of care to avoid injuring him. Failing in this, the railroad company would be responsible in damages if by the use of such care they might have avoided injuring him, if they did injure him. There is no presumption that Nass was insensible of his danger, but that is a fact that would have to be established by the plaintiff by the greater weight of evidence."

The court also gave the following instruction, to which the defendant objected and saved its exception:

"4. The court instructs you further that if from the evidence in this case it has been shown that the decedent, Hans Nass, was upon a railroad bridge near Tyronza station on the date mentioned, and if it be further shown that the employees of the railroad company operating its railroad train saw him on the track far enough ahead of the train to get out of the way, if you believe from the evidence that they were not aware that he was deaf, or insane, or from some other cause insensible to the imminent danger of his position, or unable to get out of the way, then the agents and servants of the railway company had a right to presume that he would do so, and to go on without checking the speed of the train until they saw he would not do so it became their duty to give extra alarm by bell or whistle, and if the agents or servants of the railroad company then saw that that was not heeded it became their duty to stop the train, if possible, in time to avoid the injury to him. However, if you believe from the evidence in this cause that the servants and agents of the railroad company had reason, from the appearance of the decedent, to believe that he was suffering from drunkenness or other cause, and thereby was insensible to the imminent danger, or was in such a situation as to be unable to avoid it, then the servants and agents of the railroad company must presume that he might or would not get out of the way, and it became their duty to use proper care to avoid injuring him, and, unless they did use proper care to avoid injuring him the railroad company would be liable, and your verdict should be for the plaintiff."

The particular part of this instruction to which objection is made is that which submits the question of the appearance

of the deceased as to his insensibility of danger on account of drunkenness or other cause. It is argued that the evidence fails to show that he was in any state of intoxication, and therefore it was erroneous to submit that question. The instruction is abstractly correct. *St. Louis, I. M. & S. Ry. Co.* v. *Wilkerson,* 46 Ark. 513. It can scarcely be said that there is any testimony in the record that deceased was intoxicated at the time; but the point of the case for submission to the jury is whether or not he was in a position of danger which he failed to appreciate, or whether his position was such that he could not extricate himself from it. The evidence shows that he had stopped on the trestle, and this was sufficient to warrant the finding that he was not aware of his danger, and was making no effort to extricate himself. The question was, whether or not he was insensible of his danger, and not the cause of his insensibility. The question was submitted to the jury, and we fail to see how there could have been any prejudice from including drunkenness as the cause. Whatever the cause may have been, the jury necessarily found by their verdict under those instructions either that deceased was insensible of his danger and was making no effort to extricate himself from it, and that defendant's servants were aware of this, or that he was in a position where he could not extricate himself from the danger, even if he knew of it, and the trainmen were aware of that, and failed to exercise ordinary care to prevent injuring him. In either event, defendant was liable, and there could not therefore have been any prejudice in submitting the question whether drunkenness was the cause of decedent's insensibility to danger if such was his condition.

Our conclusion is that the case went to the jury upon instructions which fairly submitted the issues, and which were in no wise prejudicial to defendant. The judgment is therefore affirmed.

Mr. Justice SMITH did not participate.

BURNETT v. TURNER.

Opinion delivered November 18, 1912.

1. APPEAL AND ERROR—MISJOINDER OF CAUSES—WAIVER.—Where no objection was saved to a misjoinder of two separate causes of action, it will not be considered on appeal. (Page 291.)
2. LIMITATION OF ACTIONS—ORAL PROMISE.—Under Kirby's Digest, § 5079, providing that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on contract whereby to take any case out of the operation of this act or to deprive the party of the benefits thereof," *held* that to suspend the statute in such case by promise or acknowledgment such promise or acknowledgment must be in writing and signed by the party to be charged. (Page 292.)
3. SAME—ORAL WAIVER.—An oral waiver of the statute of limitations or a parol promise not to plead it does not fall within Kirby's Digest, § 5079, and need not be in writing. (Page 293.)
4. SAME—PROMISE NOT TO PLEAD STATUTE—SUFFICIENCY.—The suspension of the statute of limitations by a promise not to plead it is based on the doctrine of estoppel; and such promise, to be effectual, must be an express promise not to plead the statute, or its language must clearly evince an intention not to do so, upon which the creditor has a right to rely. (Page 293.)
5. SAME—NEW PROMISE ON ADDITIONAL CONSIDERATION.—A new oral promise, based upon an additional consideration, to pay at a future date constitutes an original undertaking, and does not fall within the terms of Kirby's Digest, § 5079, and an agreement to extend the time of payment to a future date or to the happening of an event which might carry it beyond the period of the statute of limitation is a sufficient consideration upon which to base a new promise. (Page 293.)
6. SAME—NEW PROMISE—CONSIDERATION.—A promise by a debtor that as soon as he could get his father out of the penitentiary he would pay an account, upon which the creditor, without agreeing to do so, forebore from suing, was without consideration. (Page 294.)

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

Appellant, pro se.

1. To suspend our statute by a promise, whether before or after the bar applies, the promise or acknowledgment must be in writing. Kirby's Dig,. § 5079; 25 Cyc. 1351; 26 Ark. 541; 66 *Id.* 464; 77 *Id.* 228. There must be an express written promise to pay. 10 Ark. 134; 9 *Id.* 455; 12 *Id.* 595;

42 N. Y. 443; 45 W. Rep. 446; 93 *Id.* 220; 25 Cyc. 1351; 72 Ga. 74.

2. When the statute is pleaded, the burden is on plaintiff to show the action is not barred. 69 Ark. 311; 64 *Id.* 26; 10 *Id.* 598.

J. T. Coston, for appellees.

The forbearance to sue was sufficient consideration to bind defendant. No one can set up his own breach of faith or fraud to the injury of the person deceived. 15 Wend. 313; 60 Mo. 630; 80 Ky. 312. A parol promise to pay, if based on sufficient consideration, is valid, the statute of frauds notwithstanding. The statute does not apply to cases like this. 34 S. W. 558; 21 N. J. Eq. 101; 1 Atl. 205.

McCULLOCH, C. J. Appellees are practicing physicians, and instituted this action before a justice of the peace against appellant to recover an account for professional services rendered. The account which forms the basis of the action seems to embrace items alleged to be due the two physicians separately, that is to say, $101.50 to Doctor Turner and $50.00 to Doctor Dunavant; but no question is raised as to the improper joinder of the two causes of action. The suit was first instituted by Doctor Turner, and afterwards Doctor Dunavant was allowed to join as a party plaintiff. But no objection is made to this, and both of these questions pass out of the case.

Appellant does not dispute the items of the account, but relies entirely upon his plea of the statute of limitations. It is conceded that the action was not instituted until more than three years after the services were performed; but appellees seek to take the case out of the operation of the statute on account of a special promise on the part of appellant to pay at a future date or rather to pay in the future on the happening of a certain event. The facts of the case are very simple, and there is but slight conflict in the testimony. In October, 1906, appellant was wounded by a gun or pistol shot, and Doctor Turner was called to attend him. He did so, and gave appellant continuous attention for something like a month, when the condition of the wound rendered a surgical operation necessary. In this emergency Doctor Dunavant was

called, and performed the operation, charging a fee of $50.00 therefor. Doctor Turner's bill was $101.50 for his entire services. Nothing has ever been paid on the account, and more than three years elapsed before the institution of this action. Doctor Dunavant testified that he frequently requested appellant to pay the bill, and on one occasion—the particular time not mentioned—appellant promised to pay the bill when his (appellant's) father should be released from the penitentiary in the State of Missouri, where he was then incarcerated. Doctor Dunavant states the transaction in the following language: "I never put the man's name on my books at all. I told Doctor Turner what I would charge him, and he looked after the collecting. I just left it with him to collect. In the meantime I had asked Doctor Turner about it, and he told me that Mr. Burnett was slow, and I saw him and got after him myself, and he says, 'My papa is in trouble up in Missouri, and as soon as I can get him out of it I will pay it all,' and under that kind of a promise I held off."

In other parts of the testimony it is disclosed that appellant's father was in the penitentiary, and that he was released therefrom within three years from the commencement of this action. Was this promise sufficient to take the case out of the operation of the statute? It is observed that the testimony nowhere discloses any express promise not to plead the statute of limitations, nor does it show any agreement to postpone the date of payment to any future day. Doctor Dunavant merely states that appellant promised to pay when his father got out of trouble, and that upon that promise he did not sue until after the occurrence of that event. He states further in his testimony that he frequently thereafter demanded payment of appellant. Appellant denied that he ever made this promise to Doctor Dunavant, but says that when payment was repeatedly demanded he merely promised that he would pay as soon as he got able.

The statutes of this State provide that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on contract whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof." Kirby's Digest, § 5079.

In the absence of a forbidding statute, an oral promise

or acknowledgment will interrupt the statute of limitations; but it is seen from the above that we have a statute on that subject in this State, and, in order "to suspend the statute by promise or acknowledgment, such promise or acknowledgment must be in writing and signed by the party to be charged." The correct rule is thus stated, and is sustained by the weight of authority. See 25 Cyc. 1351, and numerous authorities there cited.

It is equally well settled by the authorities that an oral waiver of the statute of limitations, or promise not to plead it, does not fall within the statute above quoted, and need not be in writing. 19 Am. & Eng. Ency. of Law, p. 322; *Bridges* v. *Stevens*, 132 Mo. 524; *Jordan* v. *Jordan*, 85 Tenn. 561; 1 Wood on Limitations, p. 76.

The suspension of the statute by reason of a promise not to plead it is based on the doctrine of estoppel, and, in order for it to be effective, the promise must be an express one not to plead the statute, or the language of the promise must be such as clearly evinces an intention not to do so upon which the creditor has a right to rely. Otherwise it could not be said that he was estopped by the conduct of his debtor, and the rule does not apply. 19 Am. & Eng. Ency. of Law, pp. 286-7; *Hill* v. *Hilliard*, 103 N. C. 34; *Bank of Tennessee* v. *Hill*, 10 Humphreys (Tenn.) 176; *Parks* v. *Satterthwaite*, 132 Ind. 111.

A new promise, based upon an additional consideration, to pay at a future date, constitutes an original undertaking, and does not fall within the terms of the above-quoted statute requiring a promise or acknowledgment of a debt to be in writing (*Sloan* v. *Sloan*, 11 Ark. 29), and an agreement to extend the time of payment to a future date or to the happening of an event which might carry it beyond the period of the statute of limitations is sufficient consideration upon which to base a new promise. In order, however, to constitute a new promise based upon sufficient consideration, there must be an agreement on the one part to pay and an agreement on the other part to forbear. The evidence in this case wholly fails to show facts which would suspend the operation of the statute of limitations. It shows neither an express promise on the part of the debtor not to plead the statute of limita-

tions, nor an agreement on the part of the creditor not to sue. The most that the evidence shows is a bare promise on the part of the debtor to pay in the future on the happening of a certain event, and that the creditor did forbear suit until after the happening of that event. There was, therefore, no additional consideration so as to make the new promise constitute an original agreement, nor was there an express promise not to plead the statute of limitations so as to work an estoppel. According to the undisputed evidence the verdict should have been in favor of appellant; and, as the case has been fully developed, no useful purpose would be served by remanding it for a new trial. The judgment is therefore reversed, and the cause is dismissed.

SMITH, J., not participating.

CENTRAL RAILWAY COMPANY OF ARKANSAS *v.* LINDLEY.

Opinion delivered November 18, 1912.

1. RAILROADS—DUTY TO KEEP LOOKOUT—TRAIN.—A motor car run by a railroad company for the purpose of carrying passengers over its line of railroad is a train within the meaning of the lookout statute, making it the duty of all persons running trains in this State to keep a constant lookout for persons and property on the track. (Page 297.)
2. SAME—DUTY TO KEEP LOOKOUT—BURDEN OF PROOF.—Under the lookout statute (Acts 1911, page 275), when the plaintiff has proved facts and circumstances from which the jury might infer that his property has been injured on account of the operation of the train, and that the danger might have been discovered and the injury avoided if a lookout had been kept, then he had made out a *prima facie* case, and the burden is on the defendant to show that a lookout was kept as required by the statute. (Page 298.)
3. SAME—KILLING OF STOCK—EVIDENCE OF NEGLIGENCE.—Evidence tending to prove that the person in charge of defendant's motor car was not keeping the lookout required by the statute, and that plaintiff's horses were frightened and chased some distance until they reached a trestle where they received injuries, and that if the motorman had stopped in time they might have stopped before reaching the trestle, justifies a finding against the defendant. (Page 299.)

Appeal from Yell Circuit Court, Dardanelle District; *Hugh Basham*, Judge; affirmed.

STATEMENT BY THE COURT.

P. C. Lindley sued the Central Railway Company of Arkansas in the circuit court, for $750, alleging that on the 15th of October, 1911, the defendant's servants engaged in running a motor car and train from Ola to Plainview, so negligently ran and operated the car and train as to cause two mares to be killed and one to be injured. The answer denied negligence. The facts are substantially as follows:

The railway company operated a motor car from Plainview to Ola for the purpose of carrying passengers. It was built with a deck with springs, and its capacity is six or eight passengers. The engine is a small type motor, slow speed, and is on the deck of the car. One man runs the car. On the 15th day of October, 1911, A. T. Reed, one of the servants of the company, ran the car from Plainview to Ola and came back with a passenger. He arrived at Ola about 5 o'clock in the afternoon and started back about 7 o'clock P. M. He had one passenger, who was also an employee of the railway company. On his return, when within about 150 yards of bridge number 9, he discovered three horses on the bridge. The bridge or trestle was about ninety feet long, and the horses were on the end next to the approaching car. Reed was not able to extricate the animals from the bridge, and abandoned his car and walked on to Plainview which was about two miles distance.

P. C. Lindley, the plaintiff, testified:

The next morning after the horses had become entangled in the bridge, I learned of the occurrence and went to the scene of the accident. Two of the horses were found dead near the bridge, and I recognized them as my horses. Another one was found on the right-of-way near by. Its feet and belly were badly scarred. It was also my horse. I examined the railroad track and found my horses' tracks on the railroad for about 300 or 400 yards back from the bridge. The tracks of my horses were going towards the bridge, and when I got in about 150 or 200 feet of the bridge it looked as if the tracks were plainer. The tracks appeared as if the horses were running faster, or at least that they had struck the ties and in some places had torn pieces or splinters off of

them. I have often had occasion to notice the tracks of horses going at a rapid rate of speed and tracks of horses walking along. The tracks as they got nearer to the bridge indicated that the horses were running faster. The ties on the railroad track where the horses went on the bridge were scarred and torn up, as if the horses were running. The ties were torn up for about thirty or thirty-five feet. The plaintiff also testified as to the value of the horses that were killed and the amount of damage to the one that was injured.

Another witness for the plaintiff testified that he lived about one mile from Ola and at a distance of about 250 feet from the railroad track; that he heard the car pass on its return to Plainview and heard some persons on the car hallooing. He does not think the motor car was going faster than it usually did, and said that its usual speed was fourteen or fifteen miles per hour. On cross examination, he stated that he heard the hallooing about two miles from the bridge where the mares were killed and injured, and does not think it was loud enough to alarm the horses at the bridge.

Another witness testified that he lived about 200 yards from the railroad and something over a quarter of a mile from the bridge where the mares were killed and injured. He heard the motor car go to Ola and back. On the return trip he heard some people on the car talking and laughing.

A. T. Reed, for the defendant, testified that he ran the motor car on the day in question. He says he was keeping a sharp lookout for persons and objects on the track, and did not discover the animals until they were on the bridge; that he was going at the rate of eight miles per hour when he discovered the horses; that he had no light on the car, but from the starlight he could see about 150 yards in front of the car; that he was looking straight ahead, keeping a close lookout for anything that might be in front, and that he was about 150 yards from the bridge when he saw the animals on it; that he shut off his power and let his car drift within 150 feet of the bridge; that he found it was impossible to do anything towards extricating the animals.

There was a verdict for the plaintiff in the sum of $300, and from the judgment rendered the defendant has appealed to this court.

Hill, Brizzolara & Fitzhugh, for appellant.

1. There was no proof that the horses were injured by appellant's motor car. 42 Ark. 123; 56 *Id.* 549; 60 *Id.* 187; 85 *Id.* 53.

2. There was no negligence of the trainmen. 36 Ark. 607; 37 *Id.* 593. The statutory presumption of negligence was overcome by testimony uncontradicted. 78 Ark. 234; 67 *Id.* 514.

3. A motor car is not a *train.* Kirby's Dig., § 6607; 91 Ia. 81; 153 Mass. 112; 173 *Id.* 177; 163 *Id.* 523; 156 *Id.* 13.

Sellers & Sellers, for appellee.

1. A motor car is a "train." Kirby's Dig., § 6707; 28 A. & E. Enc. Law, 444, note 4; 65 Ark. 235; 57 *Id.* 140; 96 *Id.* 243.

2. This suit is brought under Acts 1911, p. 275, for failure to keep a lookout. The railroad is liable for all damages from neglect to keep a proper lookout. The verdict is sustained by ample evidence, and there is no error in the court's charge.

HART, J., (after stating the facts). Counsel for the defendant say this action is based on the lookout statute, making it the duty of all persons running trains in this State to keep a constant lookout for persons and property on the track, and contends that a motor car is not a train within the meaning of the statute. In the case of *Little Rock & Fort Smith Ry. Co.* v. *Blewitt,* 65 Ark. 235, the court held that an engine is a train within the meaning of the statute. See also *Railway Co.* v. *Taylor,* 57 Ark. 136. The motor car in question was run by the defendant company for the purpose of carrying passengers over its line of railroad, and, we think, was a train within the meaning of the statute.

2. It is next contended that the court erred in refusing to give instruction numbered "A," asked by the defendant. It is as follows:

"A. The court instructs the jury that if they find from the evidence that the horses, whose death and injury are sued for, were found dead or injured so near the roadbed of the defendant company as to indicate that they were thrown there by a passing train of the defendant company, then the

presumption is that the killing or wounding was done by the defendant's train, and that it resulted from want of care, and the defendant would be liable unless this presumption is rebutted by evidence overcoming it; but this presumption does not attach if the evidence shows that the horses were not killed or wounded by contact with a train of defendant company. The jury is instructed that if they find that the horses whose death and injury is sued for herein were killed or injured on a bridge from falling therein and were not killed or injured by the coming in contact with a train of the defendant, then there is no presumption of negligence on part of the defendant, and the plaintiff can not recover unless he shows, by a preponderance of the evidence, negligence on part of defendant's employees causing the death or wounding of the horses sued for."

It was not charged or attempted to be proved that the horses were killed and injured by a train striking them. The action was not brought under section 6776, Kirby's Digest, and that section has no application to the facts of this case. The suit was brought under the act of May 26, 1911, which is as follows:

"It shall be the duty of all persons running trains in this State upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads; and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning or operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout. Notwithstanding the contributory negligence of the person injured, where, if such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time to have prevented the injury, by the exercise of reasonable care after the discovery of such peril, and the burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed." Acts 1911, p. 275.

Under this section, that part of the instruction which tells the jury in effect that there is no presumption of negligence on the part of the defendant where the horses were

not killed or injured by coming in contact with a train is too broad, and is not the law. The statute make the railroad company liable for all damages resulting from neglect to keep a lookout for property upon its track, and imposes upon the railroad company the burden of proving that it has kept such lookout. The statutory policy of imposing the burden of proof in this respect upon the railroad company doubtless had its origin in the fact that the company's employees would know whether they kept a lookout or not, and the owner of the property would not know whether they had performed their duty in this respect or not. In other words, the statute makes it the duty of railroad companies to keep a lookout for property upon its tracks, and make it liable for all injuries that occur by reason of its failure to perform this duty.

Under the lookout statute, when the plaintiff has proved facts and circumstances from which the jury might infer that his property had been injured on account of the operation of the train, and that the danger might have been discovered and the injury avoided if a lookout had been kept, then he has made out a *prima facie* case, and the burden is on the defendant to show that a lookout was kept as required by the statute.

For the reasons here given instructions numbered "B" and "2," asked by the defendant, were properly refused by the court.

It is finally insisted by counsel for the defendant that the court should have directed a verdict for it under the facts. While we do not agree with counsel in this contention, it must be admitted that the question is a very close one. It is true that the motorman and also the other occupant of the car testified that the motorman kept a sharp lookout, and was looking straight ahead all the time, and that the horses were not seen until they were found on the bridge or trestle, but it can not be said that their testimony in this respect was reasonable and consistent and was uncontradicted by any other facts or circumstances adduced in evidence. It will be remembered that the motorman testified that he could see objects on the track 150 yards ahead, and was looking straight ahead all the time. The testimony of the plaintiff

shows that the horses came upon the track 300 or 400 yards from the bridge, and the impressions of their tracks made on the roadbed showed that soon after getting on the track they commenced running and continued to run faster as they approached the bridge. Then, too, testimony was introduced by the plaintiff tending to show that the persons in the car were heard hallooing and loudly talking and laughing. This testimony was not introduced, as counsel for the defendant seem to think, for the purpose of showing that the loud talking and laughing was calculated to frighten the horses, but was no doubt introduced for the purpose of showing that the motorman, being engaged in an animated conversation with the other occupant of the car, was not keeping the lookout required by the statute, and the testimony was competent for that purpose. It will be remembered that there were only two persons in the car, and the motorman would necessarily be a participant in the loud talking and laughing. Under all the facts and circumstances adduced in evidence, the jury were warranted in finding that the motorman was not keeping the lookout required by the statute, and that, had he been doing so, he would have seen the horses on the railroad track some distance before they reached the trestle and would have observed that they were frightened by the approach of the motor car, and that they commenced to run and continued to run faster as the car approached them. Hence the jury might have found that he was guilty of negligence in not stopping the car when he had reason to believe the horses would not leave the track before reaching the trestle, and under such circumstances should have anticipated, as a natural and probable consequence of not stopping the car, that the horses would run into the trestle and be killed or injured. *St. Louis, I. M. & S. Ry. Co.* v. *Rhoden,* 93 Ark. 29.

The judgment will be affirmed.

COLEMAN v. FLOYD.

Opinion delivered October 28, 1912.

1. WILLS—PROBATE—APPEAL.—On appeal from an order of the probate court, where appellants were made parties in the circuit court,

held, on appeal from a judgment of the circuit court admitting the will to probate, that appellees could question the authority of the circuit court to make appellants parties without prosecuting a cross appeal. (Page 303.)

2. SAME—PROBATE—QUESTIONS REVIEWABLE.—On appeal to the Supreme Court from a judgment of the circuit court admitting a will to probate on appeal from an order of the probate court to the same effect, a question whether certain persons were properly made parties to the appeal in the circuit court is reviewable. (Page 305.)

3. SAME—PROBATE—APPEAL—SUBSTITUTION OF PARTIES—Under Acts 1909, p. 957, which provides who may appeal from a judgment of the probate court, *held*, that where it appears on such an appeal to the circuit court that the sole plaintiff has no right to appeal, other parties having independent rights can not be substituted as appellants. (Page 305.)

Appeal from Carroll Circuit Court, Western District; *J. S. Maples*, Judge; affirmed.

Charles D. James, for appellants.

Festus O. Butt, for appellees.

1. The cause should have been dismissed *ab initio* by the circuit court for want of jurisdiction. Regardless of the truth of the facts upon which Lula Coleman based her appeal, her appeal was irregular, the same not having been taken within six months from the rendition of the final order or judgment of the probate court, as required by the statute. Acts 1909, p. 957. The filing of the bond required by the act is jurisdictional, and without it the probate court had no jurisdiction to grant the appeal. 93 Ark. 263; 137 S. W. 804. The affidavit and prayer for appeal is personal to the appellant, and can not be made by the attorney. See Act; 5 Ark. 32; 21 Ark. 93; 27 Ark. 599; 42 Ark. 183; 65 Ark. 419.

2. If it be conceded that Lula Coleman's appeal was regular and that the circuit court had jurisdiction over it, it lost that jurisdiction when it dismissed her appeal before making the other appellants parties.

Charles D. James, for appellants in reply.

In the judgment wherein the court finds against Lula M. Coleman, it especially provides that "dismissing the appeal of Lula M. Coleman herein shall not in any way prejudice

the rights of Walcott H. Darrow *et al.*, on their motion to be made parties thereto." No objection was made nor exception saved to this order. Appellees can not now be heard to object. 59 Ark. 215; 61 Ark. 515; 62 Ark. 543; 70 Ark. 197.

No motion having been filed in the circuit court to dismiss the appeal from the probate court because no bond was filed by Mrs. Coleman and because she did not take her appeal within six months, etc., such objections were waived by appellees, and will not be considered on appeal. 77 Ark. 103; 71 Ark. 242; *Id.* 436; *Id.* 555; 55 Ark. 217; *Id.* 174; 50 Ark. 102; 46 Ark. 103; 75 Ark. 312; 74 Ark. 557; *Id.* 88.

FRAUENTHAL, J. This is an appeal from a judgment admitting to probate the last will and testament of Emeline D. Triggs. The proponent of the will is R. G. Floyd, administrator of her estate with the will annexed, representing the legatees therein; and the present contestants and appellants are her collateral heirs. The purported will was executed on February 1, 1908, and the testator died in May, 1909. On July 26, 1909, the probate court made an order admitting said will to probate in common form, without notice to interested persons, and without their being made parties in that court.

On July 26, 1910, one Lula M. Coleman, claiming to be an heir by adoption of the said Emeline D. Triggs, appealed to the circuit court from said judgment of the probate court admitting said will to probate. The appeal was taken by the attorney of said Lula M. Coleman, who was then a nonresident of the State, making an affidavit in form prescribed by law for such appeal. The appeal was then filed and docketed in the circuit court. On the 8th day of February, 1911, the present appellants filed in the circuit court a motion asking that they be made parties to said appeal, and therein stated that they were the collateral heirs of said Emeline D. Triggs, and alleged that the purported will was not her last will and testament. On June 26, 1911, said appellants filed an amended motion to be made parties to the appeal, in which they stated that they contested the probate of the will upon the grounds (1) that the instrument offered for probate did not constitute a will, and (2) that it was not regularly and legally probated, (3) that it was not properly and legally attested and published

by the testator as her will, and (4) because it had been obtained by fraud and undue influence, and the testator was of unsound mind at the time of its execution.

Thereupon the appellees filed a demurrer to, and a motion to strike from the files, said motion of appellants to be made parties, upon the ground that the circuit court was without authority to make the appellants parties to said appeal. Without then passing upon said motion, the court proceeded to hear the appeal of said Lula M. Coleman, and found that she was not legally adopted by the deceased, Emeline D. Triggs, and that she was therefore not a party in interest, and had no cause or right to appeal from said judgment of the probate court. The court thereupon entered a judgment dismissing the appeal of said Lula M. Coleman, and in said judgment it is further recited that the dismissal of her appeal should not in any way prejudice the rights of the present appellants on their motion to be made parties thereto. No appeal was taken from the judgment finding that said Lula M. Coleman was not a party in interest, that she had no right to appeal from the judgment of the probate court admitting said will to probate, and ordering a dismissal of her appeal.

Thereupon the court overruled the demurrer and motion of appellees attacking the right of appellants to be made parties to the appeal from the probate court, and entered an order making them parties to that appeal. To this action of the court the appellees duly objected and properly saved their exceptions.

The cause then proceeded to trial upon the grounds of the contest made by appellants, and resulted in a verdict finding that the purported will was the last will and testament of said Emeline D. Triggs; and the circuit court then rendered judgment admitting said will to probate. From that judgment those persons who had been made parties to the appeal in the circuit court have alone appealed.

It is contended by counsel for appellees that the circuit court was without authority to make appellants parties to the appeal taken by Lula M. Coleman from the judgment of the probate court, and erred in so doing; and for this reason they urge that the judgment should be affirmed. If this contention is correct, then it would not be necessary to note

the various assignments of error made by appellants for reversing the judgment of the circuit court, because, if the appellants had no right to be made parties to the appeal from the judgment of the probate court, then that judgment admitting the will to probate would be in full force and effect, for the reason that the appeal therefrom taken by Lula M. Coleman, the only proper party thereto, was dismissed, and that judgment of dismissal has not been appealed from. The question as to whether or not appellants could be made new parties to the appeal which had been taken by Lula M. Coleman from the judgment of the probate court was, we think, sufficiently raised by appellees in the circuit court. That question was passed upon by the circuit court when it overruled appellees' demurrer to the motion of appellants to be made parties, and exception was then properly preserved to that adverse ruling. Nor are the appellees precluded from having this question passed upon in this appeal because they did not pray a cross appeal to this court from the judgment of the circuit court admitting the will to probate. The judgment thus rendered by the circuit court was in favor of appellees, and the effect thereof as to them was therefore the same as if appellants had been denied the right to be made parties in that court; for the result of a denial to make them parties would have left the judgment of the probate court admitting the will to probate in full force. And, if we hold that this question should not be decided upon this appeal for the reason that appellees prayed no cross appeal, and thereupon should pass upon the errors assigned by appellants for a reversal of the judgment, and should sustain the same, we would still deem it necessary to pass upon this question in any opinion which we might render. If we should then determine that this contention of appellees is correct, and for the errors assigned by appellants should reverse the judgment, the appellees could, upon the case being remanded to the circuit court, still insist that said court should sustain their objection to making appellants parties to the appeal taken by said Lula M. Coleman from the said judgment of the probate court, and their objection should then be sustained. We are therefore of the opinion that the question as to whether or not appellants were entitled to be made parties to the action

appealing from the probate court judgment is properly before us for determination upon the present appeal.

It is urged by counsel for appellees that the appellants were not entitled to be made parties in the circuit court to the appeal taken from the judgment of the probate court because, (1) the appeal by Lula M. Coleman from said judgment was not taken within six months after the rendition thereof, and (2) because the appeal of Lula M. Coleman was dismissed before the appellants were actually made parties thereto.

The first ground is based upon the provisions of the act of 1909, which prescribe that any heir, devisee, legatee or judgment-creditor who feels aggrieved by the judgment of the probate court must prosecute an appeal therefrom by filing an affidavit and prayer for appeal, together with a bond for the costs, within six months from the rendition thereof. (Acts 1909, p. 957). In the view which we have taken of the matter, however, we do not deem it necessary to determine whether an heir is a party, by virtue of his interest, to a judgment of a probate court admitting a will to probate, although not expressly so made by order of that court, and therefore, as such party, has one year in which to take an appeal therefrom under the provisions of said act of 1909. (See *Ouachita Baptist College* v. *Scott*, 64 Ark. 349).

The appeal from the judgment of the probate court admitting said will to probate was taken by Lula M. Coleman alone. When that appeal was lodged in the circuit court, she was the sole party to the action then pending in that court upon said appeal. It was as if she had brought a cause of action in said circuit court as the sole plaintiff. While that cause of action on said appeal was pending in the circuit court, a motion was made to make appellants new parties thereto, and in effect to amend the proceeding by adding new parties (Kirby's Digest, § 6145). It was determined by the circuit court that Lula M. Coleman was not a party in interest in the matter or proceeding—in effect, that she had no cause of action or right to appeal from the judgment of the probate court. The appellants, with different and independent rights, sought to amend the proceeding by displacing Lula M. Coleman and substituting themselves and their

own cause of action. This could not be done. If Lula M. Coleman, the sole party to the appeal, and in effect the sole plaintiff, had no cause of action, then no amendment of the cause of action could be made by substituting other parties who did have a cause of action.

In the case of *State* v. *Rottaken*, 34 Ark. 144, it was held that where a plaintiff in his complaint shows that he has no such interest as entitles him to invoke the jurisdiction of the court, an amendment can not be made by making other persons plaintiffs who have a cause of action.

In the case of *Railway Company* v. *State*, 56 Ark. 166, the court in passing upon a similar question said: "The demurrer to the complaint was properly sustained, as it showed that plaintiff was not, and that the State was, the party entitled to prosecute the action. Leave to amend by striking out the sole plaintiff and substituting another could not have been granted. The right of amendment is broad, but it does not warrant the substitution of a stranger for the sole plaintiff in the cause." See, also, *Schiele* v. *Dillard*, 94 Ark. 277: *Greer* v. *Vaughan*, 96 Ark. 524; 1 Enc. Pl. & Pr. 545; 3 Estee's Pleading, § 4487; 31 Cyc. 475.

The appellants and Lula M. Coleman had no interest in common in the appeal which had been taken from the judgment of the probate court. The alleged right and claim of Lula M. Coleman was different from and independent of any right or claim which appellants may have or may make. According to the judgment of the circuit court, she had no right of appeal or cause of action upon an appeal, and her appeal and action was properly dismissed. The proceeding then could not be amended by thus striking out Lula M. Coleman, in effect the sole plaintiff, who had no right in the matter and no cause of action, and by substituting appellants who might have. If these appellants have rights entitling them to appeal from the judgment of the probate court, or any cause of action entitling then to invoke the jurisdiction of the court for its enforcement, it was their duty to institute proceedings to that end themselves.

It follows that the appellants were not proper parties to the proceeding in the circuit court, and that their motion to be made parties thereto should have been denied.

The judgment is accordingly affirmed.

COOLEY v. KSIR. 151 S.W. 254

Opinion del vered November 18, 1912.

1. LANDLORD AND TENANT—USE AND OCCUPATION.—Where the entry upon the land of another is peaceable and the occupation acquiesced in, without any agreement, written or verbal, as to rent, the owner may bring an action for use and occupation. (Page 308.)

2. AGENCY—EFFECT OF ACTING FOR UNDISCLOSED PRINCIPAL.—Where an agent discloses the fact that he is agent, but does not disclose the name of his principal, he may be held personally liable as principal. (Page 309.)

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver*, Judge; affirmed.

N. F. Lamb, for appellant.

Since the facts in evidence conclusively show that there was never a contract of letting, express or implied, between Ksir and Cooley, that the relation of landlord and tenant never existed between them, and that Cooley never had the "use and occupation" of the store, the action should have been dismissed. 7 Ark. 305; 10 Ark. 602; 4 N. Y. 217; 44 Ark. 444.

Hawthorne & Hawthone, for appellee.

Cooley's liability is established by the evidence. Whether he was in possession of the house with or without the consent of plaintiff does not change his liability. 3 Wend. 219; 34 N. Y. 284; 66 Ark. 145; 25 Ark. 134; 27 Ark. 55; 38 Ark. 112; 49 Ark. 503; 64 Ark. 240.

HART, J. Joe Ksir instituted this action against H. M. Cooley to recover compensation for the use and occupation of a certain brick storehouse situated in the town of Jonesboro, Arkansas.

The jury returned a verdict in favor of the plaintiff, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

The facts adduced by the plaintiff are substantially as follows: Sam Bryan rented a storehouse from Ksir at fifty-five dollars per month, and was conducting therein a mercantile business. The defendant Cooley, as attorney for creditors of Bryan, recovered judgments against him and

caused execution to be issued thereon. He threatened to have the executions levied on the stock of goods of Bryan unless payment was made at once. It was finally agreed between them that Bryan should turn over the keys of the storehouse to Cooley and let them remain in his possession pending negotiations for a settlement. In pursuance of this agreement, Bryan locked up the storehouse and turned over the keys to Cooley. Bryan did not thereafter exercise any control over the stock of goods, but allowed them to remain in the storehouse in the possession of Cooley for about two months, at which time bankruptcy proceedings were instituted against him. The plaintiff Ksir testified that about four or five days after Bryan was closed up he went to see Mr. Cooley about his rent, and that Cooley told him he would get dollar for dollar; that later on he went to see Mr. Cooley again and asked him how long he was going to keep it, and that Cooley answered that he could not tell, it might take him ten days or it might take him a month; that he again went to Cooley and told him he wanted his house, and that Cooley replied he could not get his house, but would get his rent.

H. M. Cooley testified: "When the storehouse was locked up, the keys were handed to me, and my recollection is that I left the keys in the First National Bank, as it was the largest creditor. During the time the store was locked up, I went in there several times to see about fastening up things and to see if anybody was molesting the stock of goods. At the end of about two months a petition in bankruptcy was filed against Sam Bryan, and later on he was adjudged a bankrupt. Shortly after the keys were turned over to me, Mr. Ksir came to my office and wanted to know about his rent. I told him I was only representing the creditors, and would not be responsible for the rent. Some time later he came back and demanded pay. I told him that I was only representing the creditors and trying to make a settlement with Bryan, and told him I would not be responsible personally for the rent."

It is undisputed that the storehouse belonged to Ksir, and that Bryan occupied it as his tenant. It is also undisputed that Bryan turned over the keys of the storehouse to the defendant Cooley, who represented certain creditors of Bryan. From this time on Cooley exercised sole control

over the stock of goods and kept possession of the storehouse in which the goods were situated. He admits that he went in there several times to see that the store was properly fastened and to see if anybody was molesting the goods. Ksir, the owner of the store, acquiesced in him so holding it. From this evidence but one inference can be legitimately drawn and that is, that Ksir was the owner of the store, and that by his permission Cooley held possession of it for two months for the benefit of certain creditors of Bryan. In the case of *Dell* v. *Gardner*, 25 Ark. 134, the court held:

"Where the entry upon the lands of another is peaceable and the occupation acquiesed in, without any agreement, written or verbal, as to rent, the owner may bring an action for use and occupation." See also *Bright* v. *Bostick*, 27 Ark. 55.

But the defendant contends that he told the plaintiff that he would not be personally responsible for the rent; that he was only acting as the representative of certain creditors of Bryan in the matter. It will be noted, however, that he did not disclose to the plaintiff the names of the creditors for whom he was acting. This it was his duty to do if he would excuse himself from responsibility on the ground of agency. The rule is that, though the agent discloses the fact he is agent but does not disclose the name of his principal, he may be held personally liable as principal. *Neely* v. *State*, 60 Ark. 66, and cases cited. In this view of the case, it is not necessary to consider whether the circuit court erred in its instruction to the jury. The judgment upon the facts and the law upon the whole case is right, and will therefore be permitted to stand. *Gibbons* v. *Dillingham*, 10 Ark. 9; *St. Louis S. W. Ry. Co.* v. *Russell*, 64 Ark. 236.

The judgment will therefore be affirmed.

DEANE *v.* MOORE.

Opinion delivered November 18, 1912.

LIMITATION OF ACTIONS—ADVERSE POSSESSION BY PAYMENT OF TAXES.—Kirby's Digest, § 5057, providing that "unimproved and uninclosed land shall be deemed and held to be in the possession of the person

who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession," etc., must be construed in connection with § 5056, *Id*, and the provisos of the latter section, relating to those laboring under disability, apply to § 5057; and the statute does not run against married women, infants or persons *non compotes mentis*.

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

B. S. & J. V. Johnson, M. Danaher and *Palmer Danaher*, for appellant.

Crawford & Hooker, for appellee.

SMITH, J. This suit was commenced in the chancery court of Jefferson County by P. C. Dooley against Mary K. Moore to confirm his title to the southwest quarter, southwest quarter, section 35, township 4 south, range 7 west, situated in that county. Afterwards upon petition of G. A. A. Deane, suggesting the death of P. C. Dooley and stating that before his death he had by his warranty deed conveyed said land to said Deane, an order was made substituting G. A. A. Deane as plaintiff.

There are no controverted facts which it will be material to consider, and the pleadings and proof present this state of case. During all the time herein mentioned plaintiff and his predecessors in title had color of title to the above described tract of land, and the same was unimproved and uninclosed. With this color of title plaintiff and those under whom he claimed commenced paying taxes on the land for the year 1887, and without a break in the payments paid the taxes continuously until the year 1902, when he paid the taxes for the year 1901. The taxes for the year 1902 were paid in the year 1903 by the defendant, since which time neither party has paid taxes continuously for the statutory period. The defendant has been twice married; her first marriage having been to one John P. Murphy April 7, 1875, but he died December 6, 1892; thereafter she was a widow until June 11, 1895, when she was married to her present husband, since which time she has been and is now a *feme covert*.

Both parties concede this case must turn upon our answer

to the question, "Was the void apparent title of the plaintiff made good by limitation against Mrs. Moore, the holder of the original and valid title, by reason of the act of March 18, 1899, and payment of taxes, notwithstanding Mrs. Moore's coverture?" This act is carried into Kirby's Digest as section 5057, and its provisions are as follows:

"Unimproved and uninclosed land shall be deemed and held to be in the possession of the person who pays the taxes thereon, if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act unless he and those under whom he claims shall bave paid such taxes for at least seven years in succession and not less than three of such payments must be made subsequent to the passage of this act."

This act has frequently been before the court, but this particular question has never been decided, although it was raised in the case of *Taylor* v. *Leonard,* 94 Ark. 122; however, the facts of that case were such that the decision of that point was unnecessary. Here the concession is made that plaintiff has paid such taxes as entitle him to have his title confirmed if this right is not defeated by the defendant's coverture. What, therefore, is the proper construction of the act under the facts stated? In determining the legislative intent, these propositions are urged upon our consideration, that while the act itself is not one of limitation it becomes so by reference to section 5056, Kirby's Digest; for, as Judge FRAUENTHAL said in *Taylor* v. *Leonard,* above referred to: "This statute in itself is not a statute of limitation. It only declared that the land shall be deemed to be in the possession of the person paying taxes thereon under color of title. It only makes the payment of taxes under the conditions named in the act a constructive possession, and it is only by applying thereto the general statute of limitations contained in section 5056 of Kirby's Digest that such possession, like actual possession, can ripen into title by limitation. In order to make effective this act as a statute of limitation, it must be considered in connection with and a part of section 5056, Kirby's Digest, so that, in addition to the actual adverse possession required by that section, the constructive adverse possession, declared by this act, may also result in a complete bar by limitation. And, in becoming thus a part of section 5056 of Kirby's Digest,

the provisos of that section relating to those laboring under disability apply also to this act." That where the seven consecutive payments of taxes have been made, at least three of which were subsequent to March 18, 1899, the date of the passage of the act, the constructive possession, resulting from these payments, related back to the beginning of the seven-year period of payment, and gave the same title by defeating any proceeding to recover possession that seven years' actual possession gave under section 5056. This possession, whether actual *possessio pedis* for seven years, or constructive from the payment of taxes for that time, defeats a recovery of possession by any one, except infants, married women, and insane persons. That, although this act was retroactive in its operation, the first case which construed it, that of *Towson* v. *Denson*, 74 Ark. 302, held it was not invalid on that account, for the reason that it gave reasonable time after its enactment in which an interested party could prevent the consequences of the act falling upon him.

This constructive possession may therefore in a proper case relate back for a period of four years prior to the passage of the act, and it does do so in this case if that result is not prevented by the coverture of the defendant at the time of its enactment.

If this act can be said to be retroactive as to persons who were under the disabilities mentioned at the time of its passage, then plaintiff's constructive possession related back to a time prior to the defendant's present marriage, to a time when she was not under disability of coverture, and the statute was thus set in motion when she was under no disability, and its running was not arrested by her subsequent marriage. To sustain this view, we are cited to those cases which hold that, where the statute is set in motion in the lifetime of the ancestor, its running is not arrested by the subsequent infancy of his heir during the remainder of the period of limitation; and to those cases which make the same holding where there is actual entry upon and adverse occupancy of the lands of a person, who subsequent to such entry and adverse occupancy, becomes insane, and we are reminded also of the rule that subsequent marriage does not toll the statute, where it is set in motion during discoverture. And we also have before

us the rule that, where the Legislature makes no exception in a statute of limitation, the court can make none, whatever be the hardships in individual cases. *Hill* v. *Gregory*, 64 Ark. 317.

These principles are here set out that it may appear that we have considered them, and because they explain the views of the two members of the court, who are of the opinion that the decree of the chancery court refusing to confirm and quiet plaintiff's title should be reversed. The view of a majority of the court is that, while the act is retroactive, it was not the legislative intent to so make it retroactive as to cut off the right to sue of persons under the disability of either insanity, infancy, or coverture at the time of its passage. To hold otherwise, would be to say that the Legislature intended that one who was an infant or *non compos mentis* at the passage of the act could be defeated by three payments of taxes subsequent thereto, because in the lifetime of the infant's ancestor, or during a sane period of one who subsequently became *non compos mentis*, taxes were begun to be paid by some one who had only color of title and whose mere payments, for even an indefinite period, could never have ripened into title without this act; yet at the passage of the act and during all the time subsequent thereto, which was necessary for this constructive possession to ripen into title, these persons who are thus being shut off from their right to sue were without capacity to sue. It does not answer this argument to say that a married woman is *sui juris* and may sue, and was given a reasonable time to do so before she was barred after the passage of the act, and therefore should be held to be barred if she did not sue, because the statute gives a married woman exactly the same exemption it gives an infant or one *non compos mentis*; and, as we have reached the conclusion that the Legislature never had the intention of barring an infant or one *non compos mentis*, by allowing only a period to sue for the recovery of his land during all of which time he had no capacity to sue, we have also concluded that there was no such intention in regard to women who were under the disability of coverture at the time of the passage of the act, and who have remained so since.

Affirmed.

HART and KIRBY, JJ., dissenting.

EDWARDS v. BOND.

Opinion delivered November 18, 1912.

MORTGAGES—ABSOLUTE DEED—BURDEN OF PROOF.—Where a deed is absolute in form, the burden is upon him who claims that it is a mortgage to prove same by evidence that is clear, unequivocal and convincing.

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

J. F. Wills and *C. L. O'Daniel,* for appellant.

W. Gorman, S. H. Mann and *J. W. Morrow,* for appellee.

An instrument, absolute on its face, is presumed by law to be what it purports to be, and to overcome this presumption the evidence must be clear, unequivocal and convincing. 88 Ark. 299; 75 Ark. 551.

KIRBY, J. This is a suit in chancery to declare a deed, absolute on its face, a mortgage, for an accounting and redemption of the land conveyed, and from a decree in favor of appellee, refusing to grant the relief prayed, this appeal comes.

The testimony is in sharp conflict, and it may be that there is a bare preponderance of it in favor of appellant.

The deed being absolute in form, the burden was upon appellant to show that it was a mortgage, the law presuming that an instrument is what it appears on its face to be, an absolute conveyance; and, in the absence of fraud or imposition, the proof to overcome this presumption and establish its character as a mortgage must be clear, unequivocal and convincing. *Hays* v. *Emerson,* 75 Ark. 551; *Rushton* v. *McIllvene,* 88 Ark. 299.

We are unable to say that the chancellor erred in holding the evidence insufficient to overcome the presumption arising from the deed of absolute conveyance, that it is what it purports to be, and the decree is affirmed.

FREEO VALLEY RAILROAD COMPANY v. HODGES.

Opinion delivered November 18, 1912.

1. RAILROADS—RIGHT TO SURRENDER CHARTER.—Kirby's Digest, § 957, providing that "any corporation may surrender its charter by resolution

adopted by the majority in value of the holders of the stock thereof, and a certified copy of such resolution filed in the office of the Secretary of State, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized, shall have effect to extinguish such corporation," is not applicable to railroad corporations, but only to corporations which are required to file a copy of their articles and certificate with the county clerk. (Page 316.)

2. SAME—RIGHT TO SURRENDER CHARTER.—Railroad corporations have powers not enjoyed by strictly private corporations, and are required to perform public duties which private corporations do not owe, and therefore are not authorized to surrender their charters. (Page 317.)

Appeal from Pulaski Circuit Court, Second Division; *F. Guy Fulk*, Judge; affirmed.

Gaughan & Sifford, for appellant.

The words "any corporation," by their terms include railroad corporations as well as any others. Kirby's Dig., § 957. To hold that the words as used do not include railroad corporations, it would be necessary to set aside the plain and well-known meaning of the word "any," and add to the act as written the words, "except railroad corporations." This the courts can not do. 72 Ark. 201; 89 Ark. 517; 65 Mich. 244; Endlich, Interpretation of Statutes, § 22; 1 T. R. 52; 6 Moore, P. C. 1; 117 U. S. 567, 579; 88 Ark. 588; 100 Ark. 467, 474; Black on Interpretation of Laws, Hornbook Series, 35.

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

When the whole of the act of April, 12, 1893, of which the statute relied on is section 4, is read, the conclusion is inevitable that the act applies only to insolvent corporations, and that the purpose of the act was to provide a forum for winding up the affairs of such corporations. The words "any corporations" in section 4 include any corporations mentioned in the act—insolvent corporations.

A railroad corporation can not surrender its charter without the consent of the granting power. It would be unreasonable to have a State Board of Railroad Incorporation, authorized to investigate the whole situation, exercise discretion and consider the interests of the public before granting a charter for a railroad, and then permit such railroad to surrender it, in disregard of the contract resulting from such

charter, without any reason or excuse, except that such corporation desires to renounce its obligations to the public and the State. Kirby's Dig., § § 6545, 6546; 41 L. R. A. 515; 45 L. R. A. 837; 29 Conn. 597; 1 Elliott on Railroads, (2 ed.), § 608; 93 Wis. 604; 7 Gray (Mass.) 393; Angell & Ames on Corporations, § 127 *et seq.*; 2 Kent, Com. (6 ed.), 280; 1 Ves. & B. 226, 240, 244; 2 Bland, 142.

HART, J. Appellant, Freeo Valley Railroad Company, is a railroad corporation organized under the laws of the State of Arkansas, and, as such, presented, to the Secretary of State a certified copy of a resolution adopted by its stockholders for the purpose of surrendering its charter, claiming that it had a right to do so under section 957, Kirby's Digest. The Secretary of State declined to file the resolution. Appellant then filed a petition in the Pulaski Circuit Court asking for a writ of mandamus against the Secretary of State to compel him to do so. To this petition the appellee filed a demurrer, which was sustained by the circuit court. The case is here on appeal.

The only issue raised by the appeal is, can appellant surrender its charter by complying with section 957, Kirby's Digest? It is as follows: "Any corporation may surrender its charter by resolution adopted by the majority in value of the holders of the stock thereof and a certified copy of such resolution filed in the office of the Secretary of State, and a copy thereof filed in the office of the county clerk of the county in which such corporation is organized shall have effect to extinguish such corporation."

It is contended that the words "any corporation," as used in the act, include railroad corporations. In the absence of a statute on the subject, the decided weight of authority is that strictly private corporations may surrender their charters and dissolve themselves except so far as creditors have a right to object. On the other hand, railroad corporations are invested with certain powers not enjoyed by strictly private corporations, and they also are required to perform certain duties to the public which the latter do not owe. Elliott on Railroads, § 608.

It will be presumed that the Legislature had knowledge of the state of the law as it existed at the time the act in ques-

tion was passed. The section of the act under consideration is a part of an act of the Legislature in regard to the dissolution of corporations. The act was passed April 12, 1893. At that time there was no board of railroad incorporation. Railroad corporations could be organized by the persons desiring to form such corporations complying with the requisites of the statute and filing their articles of association with the Secretary of State. Manufacturing and other business corporations were required to file their articles of association and certificate with the county clerk of the county in which the corporation was to have its principal place of business, and then to file said articles and certificate bearing the indorsement of the county clerk in the office of the Secretary of State. The act provides that said certificate shall be recorded by the county clerk and Secretary of State in books kept by them for that purpose. Kirby's Digest, § 845. The section of the act under consideration provides that any corporation may surrender its charter by filing a certified copy of the resolution with the Secretary of State and a copy thereof with the county clerk of the county in which such corporation is organized.

"Such" is defined by Webster as "having the particular quality or character specified; certain; representing the object as already particularized in terms which are not mentioned." That is to say, it is used in the sense of previously mentioned or specified. It is evident then that the word "such" has reference solely to any corporation which was authorized and directed to file its articles of association with the county clerk by the act under which it was incorporated. As we have seen, manufacturing and business corporations alone are required to file their articles of association and certificate with the Secretary of State and also with the clerk of the county court of the county in which they are organized. Therefore, the phrase "in which such corporation is organized" limits the words "any corporation" to corporations which are required to file a copy of their articles and certificate with the clerk of the county in which the incorporation is to have its principal place of business, and such corporations, being corporations formed for manufacturing and other business purposes, alone have the right to surrender their charters

without the consent of the State, and the act in question was for the purpose of providing a method by which voluntary dissolution should be made.

The judgment will be affirmed.

KEITH v. WHEELER.

Opinion delivered November 18, 1912.

1. TRUST—RESULTING TRUST—ADVANCEMENT.—When a man buys an estate and takes the deed in the name of a stranger, a trust results by operation of law to him who advances the purchase money; but if the nominal purchaser is the wife or child or one to whom the buyer stands in the relation of parent, an advancement or gift is presumed. (Page 322.)
2. ADVANCEMENT—PRESUMPTION.—The presumption of an advancement is not conclusive, but may be rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the person who furnished the money to buy the estate that the grantee should hold as trustee, and not beneficially for himself. (Page 322.)
3. TRUST—RESULTING TRUST—EVIDENCE.—A resulting trust can be established against a grantee of land in favor of the person furnishing the money to buy the land only by evidence that is clear, convincing and satisfactory. (Page 323.)
4. SAME—BURDEN OF PROOF.—Although there is a presumption of a trust resulting to the party paying the consideration for land, the burden of proof on the whole case is upon the one who seeks to establish a resulting trust. (Page 323.)
5. ADVANCEMENT—PERSON IN LOCO PARENTIS.—Where a stepfather treated his stepdaughter as his own child, and she treated him as a father, he stood to her *in loco parentis*, and a conveyance to her of land of which he furnished the consideration is presumed to have been an advancement. (Page 323.)
6. ADVERSE POSSESSION—WHAT CONSTITUTES.—Where a stepfather conveyed a one-half interest in land to his wife and the other half to his stepdaughter, the fact that he paid the taxes thereon and collected the rents during his lifetime, without making any claim adverse to the stepdaughter's interest did not amount to possession adverse to her. (Page 324.)

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

STATEMENT BY THE COURT.

Appellant brought suit in ejectment against appellee for the possession of lot 4, block 94, in the city of Little Rock, claiming to be the owner thereof, and that appellee had been in unlawful possession of same since September, 1908.

Appellee answered, denying that appellant was the owner of the property and that he was in unlawful possession thereof; alleged that the property was purchased by his father, James Keith, and paid for with his own money, but, for some reason unknown, the deed was taken in the name of appellee; that his father continued in the undisputed and adverse possession of the property, claiming it as his own, until his death, on September 14, 1908, and pleaded the seven years' statute of limitation.

Appellant replied, denying that James Keith purchased the property for his own use and benefit; alleged that it was purchased out of his consideration and love and affection for her, and given to her on that account and for services rendered and to be rendered for him by her; that he was never in the adverse possession thereof, and at all times acted in the control of said property as her agent and made no adverse claim thereto.

The cause was, by agreement, transferred to the chancery court, where appellant filed an amended answer and cross complaint, reiterating his claim of equitable ownership as in the first answer and praying that the legal title to one-half of the property be divested out of plaintiff and vested in him and his title quieted thereto.

Appellee replied to the cross complaint, alleging that in 1850, when she was a small child, her mother, Elizabeth Wheeler, married James Keith, father of appellant, from which marriage he was born; that from that time until the death of James Keith she was a member of the family of said James Keith, and lived at his home a greater part of the time, and was treated by him as his daughter, and looked upon him as her father, waited upon him as a daughter should, and that he advised her and attended to business matters for her, as a father would in such relations; that she was paid no regular sums for her services in the house or in the office, where she worked, but given various sums at different times, but nothing

like what her services were reasonably worth; that he was, from March, 1889, until the time of his death, a man of large property, and gave her a one-half undivided interest in the lot in controversy at that time in recognition of the services rendered by her in looking after business matters in St. Louis and elsewhere and for her services in waiting upon himself and plaintiff's mother, in consideration for love and affection; denied that James Keith bought the lot in controversy for his own benefit, and that he held exclusive possession of the same, and that appellant ever acquired a beneficial ownership in said lot, and that she never knew of the existence of the deed to said lot until after the death of James Keith; denied that she had no possession of same until after June 2, 1910, nor any possession thereafter until by virtue of the commissioners' deed of June 22, 1910, conveying the other undivided half interest; denied that the trust resulted to him in favor of James Keith, or that he became the equitable owner of the lot, and that she held the title for him, and alleged that he acted solely as her agent in all matters in regard to the control of said property and the collection of the rents.

It appears that James Keith married Elizabeth Wheeler in St. Louis in 1850, who, at the time, was the mother of Amelia Wheeler, appellee, and another daughter, who later became Mrs. Pierce, and that appellant is the only surviving child of said marriage. After the marriage, they lived in St. Louis, until 1874, the daughters by the former marriage living with the family as their children and were treated by James Keith as daughters and looked upon him as the head of the family and as their father, and so recognized him. In 1874 James Keith and his wife moved to Little Rock, and the daughters, at the time being grown and working in St. Louis, did not come to Little Rock, although urged to do so by Mr. Keith, but remained in St. Louis in their dress making business for some years. The relations between the parties continued intimate and close through the years, and in 1891 Mrs. Pierce, in response to frequent invitations, came to Little Rock and made her home again with Mr. and Mrs. Keith, and two years later appellee also came in response to like invitations and did likewise. Appellee, before her coming to Little Rock, attended to the business interests of James

Keith, still retained in St. Louis, and performed various and sundry services for him in relation thereto, without any charge for such services, being given presents by him and advice in regard to investments and matters of business. On March 9, 1899, James Keith purchased the lot in controversy, and had the deed thereto made to his wife, appellee's mother and to appellee jointly. This was before she came to Little Rock to live with them. After her arrival, he told her in the presence of her mother that he had purchased the lot and had it deeded to herself and her mother as a present to them, and she later went into his office and helped to attend to his affairs in business, as well as to take care of his household and personal belongings, and attend to the wants of her mother, his wife, who was sick. He paid her $30 a month for two or three months after she went into his office, and thereafter, although she continued to work in his office and care for his affairs at home, for about fifteen years and until his death, he paid her no stated salary, but gave her money along as she requested it.

Before his death, when he was an old man and during his visit to the old world, he frequently wrote to her about matters of business, his own feelings and health, and sent messages of affection to her, his son, Alex Keith, and appellee's sister. Appellee stated that he never, at any time, claimed to be the owner of the property after he told her he had it conveyed to her and her mother as a gift, and that he consulted her with reference to having another house placed upon the lot after its purchase, and approved her idea, and had a house moved thereon. He collected the rent and paid the taxes, during the life of his wife and on up to the time of his death, and did not account to appellee for rents, but made no claim of ownership to the lot. It is not disputed that the conveyance was intended as a gift to the other undivided half of the lot to appellee's mother, nor that appellee became the owner thereof at the partition sale.

Appellant was a man of large means and property on the date of the conveyance to his wife and daughter in March, 1899, and continued so until his death. The house testified to by appellee as having been moved upon the lot in controversy by James Keith, after consultation with her and her approval of the plan, was put there in 1904.

The court found that appellee was the owner of the lot, and had been the owner of the undivided one-half interest in same since March 2, 1899, and was entitled to the rents and profits collected by appellant and rendered a decree for recovery thereof, for the possession of the lot and said rents, from which judgment appellant appealed.

James Coates and *J. W. Blackwood,* for appellant.

1. A trust resulted by operation of law. 98 Ark. 452; 40 *Id.* 67; 2 Words & Phrases, 1125, 1136; 3 Pom., Eq. Jur., § 1039; 4 Words & Phrases, 3477.

2. Appellee is barred by *laches* and the statute of limitations. Kirby's Dig., § 5056; 180 U. S. 552; 99 Mass. 119; 61 Ark. 589; *Ib.* 538.

Ratcliffe & Ratcliffe, for appellee.

1. There was no resulting trust. Proof of such a trust must be clear and convincing. 79 Ark. 417; 1 Perry on Trusts, § 139; 88 S. W. 949; 76 Ark. 615; 71 *Id.* 373. The whole question is one of intention. 3 Pom., Eq. Jur., § § 1035-1040; 1 Perry on Trusts, § § 139-40; 40 Ark. 62; 27 *Id.* 77. Proof of intent to make the gift will rebut the presumption. 3 Pom., Eq. Jur., § 1040; 45 W. Va. 245; 32 S. E. 176; 71 Ala. 159. Keith stood *in loco parentis* to appellee, so the presumption of a trust is rebutted. Cases *supra.* Further, he told appellee it was a gift. 1 Perry on Trusts, § 147. He was a tenant in common. 68 Ark. 534.

2. The statute of limitations never commenced to run. 71 Ark. 373; 48 *Id.* 17; 52 *Id.* 188; 1 Perry on Trusts, § 146; 61 Ark. 527; 99 *Id.* 84; 57 *Id.* 583, 589; 65 Ark. 422.

3. There was no *laches.* 61 Ark. 527.

KIRBY, J., (after stating the facts). It is insisted for appellant that a trust resulted to James Keith, appellant's father, by operation of law, upon the purchase of the lot in controversy, and that appellee's claim is barred by laches and limitations.

"When a man buys an estate and takes the deed in the name of a stranger, a trust results by operation of law to him who advances the purchase money. If, however, the nominal purchaser is the wife or the child of the person from whom the money comes, it is presumed to have been an advancement

or a gift. But this presumption is not conclusive. It may be rebutted by antecedent or contemporaneous declarations and circumstances which tend to prove the intention of the person who furnished the money to buy the estate that the grantee should hold as trustee and not beneficially for himself." *Milner* v. *Freeman,* 40 Ark. 67; *Foster* v. *Treadway,* 98 Ark. 452; *Spradling* v. *Spradling,* 101 Ark. 451.

"But a determination of the question as to whether or not such trust resulted from the transaction depends entirely upon the intention of the parties themselves. When a husband pays the purchase money and takes the deed in the name of his wife, the law presumes that it was his intention to make a gift to her of the land, because he is under obligations to provide for her." *Spradling* v. *Spradling,* 101 Ark. 451.

Such a trust can not be established by a slight preponderance of the testimony, nor anything short of evidence that is clear, convincing and satisfactory. *Foster* v. *Beidler,* 79 Ark. 425; *Chambers* v. *Michael,* 71 Ark. 373; *Tillar* v. *Henry,* 75 Ark. 451; 3 Pom. Eq. Jur., § 1040.

"And, although there is a presumption of the trust resulting to the party paying the consideration, the burden of proof on the whole case is upon the one who seeks to establish a resulting trust." 1 Perry on Trusts, § 139; cases last cited *supra.*

Appellee was a child at the time of her mother's marriage and lived for years in the family with her stepfather, treating him as a father and being treated as a child, and after many years away from the family home, which had been transferred to Little Rock, upon his invitation and solicitation, resumed her place in the family, where the same relations continued, she asisting him at the office and caring for him and being cared for by him in the family, until his death, and her stepfather under these circumstances stood *in loco parentis* to her, and the conveyance is presumed to have been a gift.

It is undisputed that the conveyance to herself and her mother was a gift to her mother of the property conveyed and always so regarded, and there is no sufficient reason to regard the conveyance to her otherwise, nor is the testimony sufficient to overcome the presumption that it was intended as a gift.

From the purchase of the lot to the death of appellee's

mother, James Keith looked after the lot for his wife, who was tenant in common with appellee, until her death, and from then to the time of her death, being himself, during such last period, a tenant by the curtesy and in common with appellee. It is true he controlled the property, paid the taxes, collected the rents therefrom and did not account to appellee therefor, but he did not dispute appellee's title thereto, nor make any claim of title in himself, inconsistent with her ownership, and such action was referable to his duty to his wife and appellee in the relation occupied by him and could not amount to adverse possession.

Appellee was being cared for in the family and supported by her stepfather, and there was no reason why she should demand an accounting of the rents, and there was no knowledge of any adverse claim on his part brought home to her; and he had theretofore acknowledged her right upon the making of the gift and never thereafter disputed it. Under such circumstances, his possession, if he had been a stranger, being a tenant in common, could not have been regarded adverse to appellee, nor set the statute in motion against her. *Singer* v. *Naron*, 99 Ark. 451. It is not claimed that her suit was too long delayed after the death of her father, and possession taken by appellee.

The decision of the chancellor was right, and is affirmed.

McPHERSON v. CONSOLIDATED CASUALTY COMPANY OF ARKANSAS.

Opinion delivered November 18, 1912.

1. APPEAL AND ERROR—FINAL JUDGMENT.—An order setting aside a judgment by default is not final or appealable. (Page 325.)
2. SAME—APPEAL FROM ORDER GRANTING NEW TRIAL.—If an order setting aside a default judgment may be considered an order granting a new trial, an appeal therefrom will not lie under Kirby's Digest, § 1188, "unless the notice of appeal contains an assent on the part of the appellant that if the order be affirmed judgment absolute shall be rendered against appellant. (Page 326.)

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver*, Judge; appeal dismissed.

STATEMENT BY THE COURT.

J. M. McPherson, as administrator of the estate of Albert McPherson, deceased, sued the Consolidated Casualty Company and the sureties upon the bond which it gave to do business in this State, in the Craighead Circuit Court upon a certain policy of insurance set out in the complaint. It was alleged that plaintiff's intestate was entitled to certain indemnities on account of his illness prior to his death. The defendant failed to answer or otherwise plead, and on the fourth day of the term the court awarded judgment for the want of an answer for the amount sued for. Defendant's attorney, who lived at Pine Bluff, filed an affidavit in which he stated that he had never practiced in the Craighead Circuit Court, and was unacquainted with the terms of that court; that he had made inquiry and had been misled as to the date of this court. The plaintiff, however, was in no manner responsible for this misapprehension. On the day of filing this affidavit, the defendant also filed an answer controverting all the material allegations in the complaint, and especially pleaded, as a bar to any recovery, the intestate's failure during his illness to have reports made as it alleged was required by the terms of the policy of insurance. It also alleged that in the lifetime of the intestate it had paid to him all sums of money for which it could be liable under the policy. The court below treated this answer as a motion to vacate, and set aside the default judgment, and entered an order to that effect. Plaintiff excepted to the action of the court setting aside the default judgment, and prayed an appeal, which was granted.

Basil Baker, for appellant.

Hawthorne & Hawthorne and *Danaher & Danaher*, for appellee.

SMITH, J., (after stating the facts). This appeal must be dismissed for the reason that it was prematurely taken.

Cases can not be tried by piecemeal, and one can not delay the final adjudication of a cause by appealing from the separate orders of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative rights and liabilities of the respective parties, an appeal may then be taken, but not before. No such final

judgment has been entered here, and the appeal must be dismissed.

In the case of *Ayers* v. *Anderson-Tulley Co.*, 89 Ark. 162, it was said: "It is only from final judgments and decrees which conclude the rights of the parties with respect to the subject-matter of the controversy that appeals may be taken to this court, and it must be conceded that an order vacating a judgment or granting a new trial made in the term at which the judgment was rendered is not appealable, except on the terms prescribed by the statute." The statute referred to is section 1188, Kirby's Digest. And in this case, even if the action of the court below was equivalent to the granting of a new trial, that action of the court could not be reviewed on an appeal "unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against appellant." The language quoted is from the second subdivision of section 1188, Kirby's Digest. No such notice was filed in this case, and for this reason, if for no other, this appeal must be dismissed. And in the case last cited the following language was used in quoting from the case of *Huntington* v. *Finch*, 3 Ohio St. 444; "The Ohio court in construing a statute similar to the one prevailing in this State, with reference to appeals, said: 'The Court of Common Pleas has ample control over its orders and judgments during the term at which they are rendered and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of the court.' " See also Vol. 1 Crawford's Digest, Appeal and Error, I, d. *Womack* v. *Connor*, 74 Ark. 354; *Gates* v. *Solomon*, 73 Ark. 8; *Osborn* v. *LeMaire*, 82 Ark. 490; *Sanders* v. *Plunkett*, 40 Ark. 507; *Mallett* v. *Hampton*, 94 Ark. 119.

Appeal dismissed.

NATIONAL PACKING COMPANY *v.* BOULLION.

Opinion delivered November 18, 1912.

LIBEL AND SLANDER—LIABILITY OF CORPORATION FOR ACTS OF AGENT.—A corporation is not liable for the acts of an agent in making a slanderous charge against another unless the language was uttered by the

agent in the scope of his authority or was ratified by the corporation. Thus, a corporation is not liable for a slander committed by one of its servants who was authorized to investigate the accounts of its employees, to ascertain if there were shortages, and to gather the evidence tending to show who was responsible, but was not authorized to accuse any one of a crime in connection with such defalcations.

Appeal fron Pulaski Circuit Court, Second Division; *John W. Blackwood,* Special Judge; reversed.

STATEMENT BY THE COURT.

The National Packing Company is a corporation of Illinois, doing business in Arkansas. The appellee brought suit against the packing company for slander, alleging that its auditor, "while acting in due course of his employment, committed an injury to the name and character of plaintiff by speaking the following words to plaintiff in the presence and hearing of divers persons: "Boullion, the house has been robbed, and there have been some forgeries. You acknowledge to signing these tickets, and it is up to you to make settlement." That Boullion then said: "Do you mean to charge me with robbery and forgery?" To which Fisher replied: "You need not try to throw anything over my eyes; we are not asleep. You have acknowledged to the handwriting, and it is up to you to make settlement," implying that Boullion had committed some species of larceny and forgery. Appellee prayed for $10,000 actual damages and $5,000 punitive damages.

The appellant denied that its auditor meant any injury to the good name and character of appellee, and denied that he spoke the words set out in the complaint. It denied that its auditor used any language which either charged or implied that appellee had been dishonest or had committed any forgery, or had been guilty of appropriating to his own use any money belonging to appellant. It set up that, if the auditor used the language alleged, such language was not within the scope of his employment, and was not authorized by appellant; and further that, if such language was used, it was without appellant's knowledge or consent, and it had not at any time adopted or ratified the same.

The testimony on behalf of the appellee tended to show

that he was in the employ of appellant as shipping clerk. His duties were to see that the stock of meats was taken care of and to wait on the people, see that their orders were filled and to send out merchandise on orders which came in.

On the 19th of January, 1911, one Fisher, an auditor of the appellant, was in the office of the company checking up the office. On that occasion Fisher, in a conversation with appellee, in the presence of other employees of appellant, used the language, addressed to appellee, set out in the complaint. The language was used while the auditors were making an investigation of sales tickets which had been made out by the appellee, and which appeared to have been altered. The investigation showed that there was a shortage, and the appellee testified that the auditor of the appellant used the language above, intending to accuse him of forgery and larceny.

The testimony on behalf of appellant tended to show that its auditor did not use the language set out in appellee's complaint. The auditor of the appellant, to whom the language was attributed, testified that the conversation he had with the appellee was for the purpose of trying to find the guilty party. In so doing he was carrying out the business of the company intrusted to him. He denied that he used the language set up in appellee's complaint, but stated that whatever conversation he had with the appellee was with a view of "trying to locate who the guilty party was." It was his duty, not only to locate the shortage, but to locate the responsible party. He was to find out who the guilty party was and get all the evidence he could with reference to that matter. He was to gather all the evidence he could tending to reflect the guilt of the parties responsible and to report the same to the home office. He had authority to use his own judgment and methods in securing the evidence, but was not to have the guilty party arrested.

The appellant, among other prayers, asked the court to instruct the jury to find for the defendant, which the court refused, and appellant duly excepted.

The verdict and judgment were in favor of the appellee for $250.

Rose, Hemingway, Cantrell & Loughborough, for appellant; *Ralph Crews,* of Chicago, Ill., of Counsel.

1. A corporation is not liable for damages suffered by another by reason of a slander uttered against him by an employee of the corporation, unless the utterance was authorized in advance or ratified afterward by the corporation. 95 Ark. 534.

2. Even if Fisher wrongfully accused appellee, there was no slander, for the reason that, before the conference ended at which the alleged wrongful accusation was made, and in the presence of all who had heard the charge, it was retracted and appellee was fully exonerated. 13 Tex. 449; 3 Dana (Ky.) 138; 17 Ill. 579.

Gus Fulk and *Bradshaw, Rhoton & Helm,* for appellee.

1. A corporation is liable for the slander committed by its agent within the scope of his authority. 9 L. R. A. (N. S.) 931; 17 Ann. Cases 620.

2. If Fisher intended to charge the commission of a crime when he uttered his accusation, any explanation he made thereafter, however soon or complete, does not render his original words nonactionable.

WOOD, J., (after stating the facts). In *Lindsey* v. *St. Louis, I. M. & S. Ry. Co.,* 95 Ark. 534, Lindsey sued the corporation for slander. He alleged that the slanderous words were spoken "by special agents in the employ of defendant for the purpose of finding said missing cotton, and said charge was made by them in furtherance of the defendant's business, which they were employed to do for the purpose of ascertaining whether plaintiff was the guilty person or had guilty knowledge of the matter, and of inducing him, if guilty, to confess it," etc. Lindsey contended that the slanderous words uttered by the agents of the railway company, while engaged in ferreting out the crime, were within the scope of their employment, and that the company was liable to him for slander. The court, in passing upon his contention, said:

"Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as can not be anticipated, and for that reason can not be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by

an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, 'rather than to the act performed in the course of his employment and in aid of the interest of his employer,' and the corporation must be exonerated 'unless it authorized, approved or ratified the act of the agent in uttering the particular slander.' Here proof of agency will not be sufficient to prove such authority or ratification."

In *Waters-Pierce Oil Co.* v. *Bridwell,* 103 Ark. 345, the plaintiff sued the oil company and its agents for slander alleged to have been committed by making defamatory statements in regard to the inspection and quality of the oil which plaintiff was engaged in selling. The plaintiff alleged "that the agents of the Waters-Pierce Oil Company, while engaged in selling its oil, stated to the customers of the plaintiff that his oil would not stand the test prescribed by the inspection laws of the State of Arkansas, and that both plaintiff and his customers in selling said oil were acting in violation of the criminal laws of the State." It was alleged that the statements were made of and concerning plaintiff's business and were injurious thereto. The court, in that case, used the following language:

"There is some conflict of authority in respect to the liability of a corporation for slander; but, inasmuch as a corporation must transact its business and perform its duties through natural persons, it is now well settled that a corporation is liable in damages for slander as it is for other torts. To establish its liability, the utterance of the slander must be shown to have been made by its authority or ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he is employed."

The undisputed evidence in this case shows that it was the duty of appellant's auditor to investigate the accounts of its employees and to ascertain if there were shortages, and to gather the evidence tending to show who was responsible, but he did not have authority to accuse any one of crime in connection with such defalcations. He could select his own methods and use his own judgment in making his investigations

and in getting up the evidence; but he was not authorized to make arrests or make criminal charges against any one.

Conceding, therefore, that the language charged in the appellee's complaint was slanderous, there is no testimony to warrant the conclusion that this language was uttered by the agent of the appellant in the course of his employment or within the scope of his authority, nor was there any evidence tending to show that the alleged slanderous words were ratified by the appellant.

The facts of this record are similar to the facts in *Lindsey* v. *St. Louis, I. M. & S. Ry. Co. supra.* The agent, in that case, at the time of the alleged slanderous words, was engaged in ascertaining who committed the crime of stealing or taking cotton from the railway company. Judge HART, speaking for the court, in the case of *Waters-Pierce Oil Co.* v. *Bridwell, supra,* in approving the doctrine announced in *Lindsey* v. *Railway Co., supra,* said: "In that case the railway company had sent a special agent to trace some cotton which was missing, and the special agent accused the agent at Monticello of stealing it. The full measure of his duty was to trace the missing cotton, and his conduct in insulting the agent was entirely beyond any authority given him, either expressly or which could be fairly implied from the nature of his employment or the duties incident to it."

Applying the doctrine of the above cases to the undisputed facts in this record, we must hold that the appellant was not liable. The court therefore erred in not granting appellant's instruction No. 1, asking an instructed verdict, and in overruling appellant's motion for a new trial. The judgment is therefore reversed, and the cause dismissed.

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

Opinion delivered November 18, 1912.

APPEAL AND ERROR—INSTRUCTION—OBJECTION.—Where an instruction given by the trial court was objected to on a certain ground, the appellant can not on appeal insist that the instruction was erroneous upon another ground.

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

E. B. Kinsworthy, H. S. Powell, R. E. Wiley and *W. G. Riddick*, for appellant.

Mehaffy, Reid & Mehaffy, for appellee.

McCULLOCH, C. J. The plaintiffs, three of them, are owners of small tracts of land in Saline County, Arkansas, and instituted this action against the railway company to recover damages alleged to have been caused by reason of injury to saids lands from waters overflowing from Clift's Creek. It is alleged in the amended complaint that the overflowing of the lands was caused by the act of the defendant in allowing obstructions to be placed and to accumulate in the culvert where the railroad passes over Clift's Creek, the allegation being that, within three years before the commencement of the action, the agents and servants of the defendant, in repairing the culvert, dumped the old material, such as "guard rails, rotton ties, and ends of timbers cut off from fitting the material for said repairs, into the stream below," and that said timbers were allowed to remain in the stream below the culvert and dam it up, so that it caused the lands of plaintiffs to be injured by the overflow. It is also alleged that within three years next before the commencement of the action defendant's agents and servants, in repairing the culvert, had put new piling thereunder, "placing said new piling between the ends of the fill * * * and the edge of said stream; that the old piling was sawed off about two feet above the top of the ground, the stumps of the old piling being left sticking up out of the ground, and so near the channel of said stream, that, in times of high water, drift would lodge against said stumps and assist in backing the water up and forcing it to flow out of the original channel."

In the original complaint there was an allegation of negligence in narrowing the culvert; but this is alleged to have occurred five or six years before the commencement of the action, and no effort was made to recover under that allegation. The case was tried entirely upon the question whether the injury was caused by negligence of the defendant within three years before the commencement of the action. The cases

were consolidated, and on trial before a jury a verdict was rendered in favor of the plaintiffs assessing damages in the aggregate sum of $70, and the defendant has appealed from the judgment.

It is insisted, in the first place, that the testimony is not sufficient to support the verdict. Much space is given in the brief to the argument of the question whether damages could be recovered for the injury, if any, which resulted from the narrowing of the trestle or culvert; but plaintiffs concede that there is no right of recovery on account of that act, and the case was submitted to the jury entirely upon the right to recover upon alleged acts of negligence which occurred within three years.

While the great preponderance of the testimony seems to be in favor of the defendant, we are of the opinion that there was enough to go to the jury, and that the verdict is sustained by the evidence. The trial jury was the sole judge of the credibility of the witnesses, and it is not our duty to reverse a case simply because the verdict appears to us to be against the preponderance of the evidence. Many witnesses testified that Clift's Creek frequently overflowed, and that the alleged obstruction in the culvert did not and could not have any appreciable effect upon the flow of water; but there was some testimony to the effect that the stream did not overflow sufficiently to damage plaintiff's lands until these obstructions were allowed by the defendant to accumulate in the culvert.

The following instruction was given over defendant's objection, and the ruling is now assigned as error.

"If you believe from the evidence in this case that any obstructions put into the creek or negligently left in the creek by the defendant either caused the damage to plaintiffs' land or contributed to cause the damage, then your verdict must be for the plaintiffs."

It is insisted that this instruction is erroneous for the reason that it permits the recovery of all damages caused by the overflow merely because the damages may have been increased by reason of the obstructions placed in the culvert. We scarcely think the instruction is open to that objection, as it is fairly susceptible only of the meaning that the defendant is liable for that part of the injury to which negligent acts

of its servants contributed; but, even if this part of the instruction is not strictly accurate and is open to the objection now made to it, it is too late to complain for the reason that the defendant at the time based its objection upon an entirely different ground. It objected on the ground that the first part of the instruction was erroneous, and asked that the court strike out the following words, "any obstruction put into the creek or negligently left in the creek by the defendant." The use of those words was proper, and was clearly within the issues, so the court did not err in refusing to sustain that objection; and it is now too late to urge any other objection.

There are several other assignments of error which we do not deem of sufficient importance to discuss.

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

DELIGHT LUMBER COMPANY v. HENDERSON.

Opinion delivered November 4, 1912.

1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.—Though a defect in a wagon furnished a servant for his use was patent, the servant was not guilty of contributory negligence, as matter of law, in using it if the danger was not so obvious that a man of ordinary prudence would not have used it while in that condition. (Page 337.)
2. SAME—DEFECTIVE APPLIANCE—ASSUMED RISK.—Where the defect in a wagon furnished a servant for his use was not common to all the other wagons in the master's service, its use did not constitute one of the ordinary risks of the service, and was not assumed by the servant unless he knew of it and appreciated the danger therefrom. (Page 337.)
3. INSTRUCTIONS—REPETITION.—It was not error to refuse an instruction which was sufficiently covered by other instructions which the court gave. (Page 338.)
4. MASTER AND SERVANT—INSTRUCTIONS—EVIDENCE.—In an action for injuries to a servant while riding on and driving a log wagon, the court refused to instruct that it was the master's duty to exercise ordinary care to provide his servant with a reasonably safe appliance with which to discharge the duties of his employment, and that in determining whether or not the master had discharged his duty in this respect the surrounding circumstances must be considered, so that, if the wagon in question was not intended by the master as a conveyance for the servant but

only as a vehicle for hauling logs, the master did not owe the plaintiff any duty with respect to rendering such wagon safe as a conveyance for plaintiff to ride upon. The evidence for defendant tended to show a rule against riding on such wagons, but that for plaintiff tended to prove that if such a rule existed it was habitually violated with the knowledge of those in charge of the company's business. *Held* that the instruction, though abstractly correct, was erroneous in ignoring the issue raised as to the abrogation of the rule. (Page 339.)

Appeal from Pike Circuit Court; *W. P. Feazel,* Special Judge; affirmed.

T. D. Wynne, for appellant.

1. The evidence is not sufficient to establish any causal relation between the alleged broken fifth-wheel and the injury complained of. The conclusion that the appellee, occupying the precarious position the evidence shows he was in, balanced on the end of a log, his back toward the right-hand side of the road, his feet hanging down by the left side, fell over backwards on the right side of the wagon as the result of its left wheel striking a root at the same time the right wheel fell into a rut, is as consistent with the facts as the theory urged by appellee that the bolster dropped down into the broken fifth wheel and that without such happening the accident would not have occurred. Appellee, therefore has made out no case, and the jury should bave been so instructed. 76 Ark. 346; 76 S. W. 502; 48 S. W. 439; 2 Labatt, Master & Servant, § 837.

2. Instruction 6, requested by appellant, is a correct declaration of law as applied to the facts in this case, and the court erred in refusing to give it. 46 Ark. 555; 74 Ark. 19; 79 Ark. 437; 90 Ark. 326.

Where a specific instruction clearly applying the law to the facts in a case is refused, such refusal is error, even though the law in a general way is covered by other instructions. 87 Ark. 323; 80 Ark. 455; 69 Ark. 134.

3. The court erred in refusing instruction 8, requested by appellant.

4. Instruction 11, requested by appellant, should have been given. The exercise of ordinary care only is required of an employer in providing instrumentalities that are reasonably safe for the purposes for which they are intended. 107

S. W. 661; 22 S. W. 1081; 124 N. Y. 655, 26 N. E. 1027; 1 Labatt, Master & Servant, § 26.

J. O. A. Bush, for appellee.

McCULLOCH, C. J. Appellant is engaged in the sawmill business at Delight, Arkansas, and appellee, while engaged in the former's service, received personal injuries alleged to have been caused by negligence of the employer, and sues to recover compensation therefor. He recovered judgment below for damages in the sum of $1,250, and an appeal has been prosecuted to this court, numerous errors of the trial court being assigned.

Appellee, when injured, was driving a team of oxen and hauling logs from the woods to the skidway. He was riding on the wagon at the time, and the bolster tilted or dipped and threw him to the ground, one of the wheels striking him on the side of the face, inflicting severe injury. It is alleged that the tilting of the bolster resulted from the defective condition of the fifth wheel of the wagon, which permitted the bolster to drop down into the broken place and tilt. The evidence tends to show that a piece was broken out of the fifth wheel about a foot long, which left a gap between the bolster and hounds of the wagon, and that when the wagon was passing over uneven ground the bolster would drop down into the broken gap, sometimes causing the logs to roll off. Appellee had been working for appellant at times for several years, and on the day that he was injured he had been working there for two days, hauling logs. Appellant had a number of wagons for the use of log haulers. Some of them were eight-wheel wagons, equipped with fifth wheels, and some of them were four-wheel wagons. The fifth wheel is described as "a circular piece of iron, some thirty inches in diameter, situated beneath the rocking bolster half a foot, extending in a semicircle in front of the rocking bolster a half foot behind the bolster." Appellee had used both kinds of wagons, but during the period of his last service he had, before the time of his injury, only used a four-wheel wagon, and this particular wagon with the broken fifth wheel was furnished to him early in the morning of that day, and he was making his first trip when he received the injury. He testified that he had

not used this wagon before, and did not know of its defective condition until he received the injury. The testimony tended to show that a piece eight or ten inches long was broken out of the fifth wheel. It was a defect which was readily discernible to any one who looked. In other words, it was a patent defect. Appellee testified that he was driving along the road, when the wagon gave a tilt, the wheel of the wagon struck a small root, and the bolster dropped down and tilted so as to throw him to the ground.

It is earnestly insisted, in the first place, that the evidence does not sustain the verdict, in that it does not show that the tilting of the bolster was caused by the defect. A careful consideration of the evidence convinces us that this is a question which was properly left to the jury, and that there was sufficient evidence to justify the verdict. It is true, appellee testified that he did not know what caused the bolster to tilt over, and, so far as that statement is concerned, it may just as well be inferred that the tilting of the bolster was caused by the wheel striking the root as it was caused by the defect in the fifth wheel. But this omission is supplied by the positive statement of appellee that the bolster dropped down, and, considering this in the light of the testimony of other witnesses, the inference could properly be drawn that the tilting of the bolster was caused by its dropping down into the broken gap, and not by the wheel striking the root. The jury could, from the evidence, have found that either of the two things mentioned caused the plaintiff to be thrown from the wagon; but, if the statement of appellee be accepted as true, that, together with the other testimony, afforded substantial ground for the inference that it was caused by the defect in the fifth-wheel, and that it did not result merely on account of the wheel running over a root.

The state of the testimony also warranted the submission to the jury of the question of appellant's negligence in furnishing its servant the wagon with a broken fifth-wheel, and also the question of appellee's contributory negligence and assumption of risk. The defect in the wagon was a patent one, but the danger was not so obvious that a man of ordinary prudence would not have used it in that condition. Therefore, it can not be said as a matter of law that appellee was guilty of

contributory negligence in failing to discover the defect and in using the wagon in that condition. The facts of the case, when subjected to the test of what constitutes contributory negligence, called for the submission of that question to the jury. Nor can it be said, as a matter of law, that appellee assumed the risk. The defect in this particular wagon, though patent to all observers, was not one common to all the other wagons in service, and therefore the use of it did not constitute one of the ordinary risks of the service which appellee assumed under his contract. *Choctaw, O. &. G. Rd. Co.* v. *Thompson,* 92 Ark. 11. He did not contract to use this particular wagon, and the use of it in that condition resulted from the negligence of the master, which was a risk not assumed by the servant unless he knew of the defect and appreciated the danger of using the wagon in that condition. *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424; *St. Louis, I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102; *A. L. Clark Lumber Co.* v. *Johns,* 98 Ark. 211.

The next assignment of error is based on the refusal of the court to give the following instruction:

"6. You are instructed that the burden of proof rests upon the plaintiff to establish his claims to damage by a preponderance of the evidence. You are to indulge the presumption that the defendant was not guilty of negligence set out in plaintiff's complaint, namely, that of furnishing a defective fifth-wheel in the wagon which the plaintiff was using when he is alleged to have sustained his injury, and that this presumption attends it throughout the trial until it is overcome by evidence. If, after a consideration of all of the evidence, you find that the plaintiff has failed to make out his case, by the preponderance of the testimony, then your verdict will be for the defendant."

This was a correct instruction, but we think it was sufficiently covered by others which the court gave.

Appellant requested the following instruction, among others, and the court refused to give it, this being assigned as error:

"8. You are instructed that there was no duty resting upon the defendant to point out defects and dangers which were open, patent and easily seen. If you believe from the

evidence in this case that the fifth wheel of the wagon was in a defective and broken condition, and that the plaintiff knew of the defective condition, he assumed the risk arising from the use of the defective fifth wheel. If he did not know it, but you find by the exercise of ordinary care he could have known it, then the court tells you that he was guilty of contributory negligence in failing to know it; and in either event your verdict will be for the defendant."

This instruction is incorrect, and was properly refused for two reasons. In the first place, it was incorrect in telling the jury that, if plaintiff knew of the defective condition of the wagon, he assumed the risk arising from using it. This is not true. The defect having been caused by the negligence of the master, the servant did not assume the risk unless he appreciated the danger. He might have known that such a defect existed, and yet the danger might not have been so obvious that he must be deemed to have appreciated it and held to an assumption of the risk. See authorities *supra.* It was also erroneous in telling the jury that the servant was guilty of contributory negligence if by the exercise of ordinary care he could have discovered the defective condition of the fifth wheel. Even if the defect was an obvious one and could have been discovered by the exercise of ordinary care, yet, if the danger was not such as would have caused a man of ordinary prudence to desist from the use of the wagon, then it can not be said that he was guilty of contributory negligence in using it. So, for both of these reasons, the instruction was incorrect, and the court properly refused to give it.

The next and last assignment of error is that the court refused to give the following instruction:

"11. You are instructed that it is the duty of the master to exercise ordinary care to provide his employee with a reasonably safe appliance with which to discharge the duties of his employment; and in determining whether or not the master has discharged his duty in this respect you are to take into consideration the facts and circumstances surrounding the employment and the purpose for which the appliance is intended. If you believe from the evidence in this case that the wagon in question was not intended by the employer as a conveyance upon which the employee should ride in the

discharge of the duties of his employment, but was intended as a vehicle for hauling logs only, then you are instructed that the defendant did not owe plaintiff any duty with respect to rendering this wagon safe as a conveyance for plaintiff to ride upon."

This instruction, while correct as an abstract statement of the law, was improper in this case because it entirely ignored one of appellee's principal contentions, namely, that it was customary for the men to ride on the wagon while hauling logs. There was a sharp conflict in the testimony; that adduced by the appellant being to the effect that there was a positive rule of the company against men riding on the wagons; whereas the testimony adduced by appellee tended to establish the fact that, even if such a rule had been prescribed by the company, it was habitually violated with the knowledge of those in charge of the company's business, and in that way had been entirely abrogated. Appellee was entitled to have that controverted question submitted to the jury upon proper instructions, and it would have been erroneous to give instruction No. 11, for the reason that it entirely ignored that issue, and in effect took it away from the jury.

None of the assignments of error pressed upon our attention is found to be well taken, and it follows therefore that the judgment must be affirmed.

It is so ordered.

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

Opinion delivered November 4, 1912.

1. CARRIERS—CARE-TAKER OF LIVE STOCK AS PASSENGER.—A care-taker in charge of a shipment of live stock is a passenger, though according to defendant's custom he rides free. (Page 344.)
2. SAME—INJURY TO PASSENGER—PRESUMPTION.—Proof that plaintiff was injured by the fall of a brace rod, while riding as a passenger in a box car, makes a *prima facie* case of negligence against the railway company. (Page 344.)
3. SAME—INJURY TO PASSENGER—QUESTION FOR JURY.—Where, in an action by a care-taker for injuries received in being struck by a falling brace while he was riding in a box car in charge of a shipment

of live stock, there was evidence of a general custom for care-takers to ride in box cars, and that the conductor knew and assented to plaintiff so riding, it was a question for the jury whether plaintiff was negligent, though there was evidence that it was against the carrier's rules for a passenger to ride in a box car with live stock. (Page 345.)

4. SAME—LIABILITY FOR PASSENGER'S INJURIES—INSTRUCTIONS.—It was error, in an action by a care-taker for injuries received while riding as a passenger in a box car with live stock, to instruct that the carrier was liable if the conductor acquiesced in plaintiff's riding in the box car, as such instruction ignored the issue as to whether plaintiff was guilty of contributory negligence. (Page 346.)

Appeal from Greene Circuit Court; *W. J. Driver*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellant to recover damages for personal injuries which he claims he suffered because of the negligence of appellant in transporting him as a passenger on one of its local freight trains.

His complaint alleges that he was riding in a box car caring for a milch cow, some poultry and a load of household goods, the property of J. W. Jameson, and that while the train was running an iron brace rod fell down from the top of said box car and injured him. It also alleges that he was riding in said box car with the knowledge, permission and acquiescence of the conductor of said local freight train, and that when immigrant cars are being transported over appellant's line of railroad it is the custom for a care-taker to travel free in the car with the live stock to take care of the same.

The material facts adduced in evidence by appellee are as follows: On August 25, 1911, J. W. Jameson shipped from Jelks, Arkansas, to Paragould, Arkansas, in a box car some household and kitchen furniture, a milch cow and a coop of poultry and paid the freight charges on the same. A bill of lading for the shipment was issued to him by appellant's agent at Jelks. It did not provide transportation for any person with the goods, and no additional ticket or transportation was issued for any person to ride. The goods were loaded into the car at Fakes, a blind station near Jelks, on the evening of August 25, 1911, and appellee remained in the car all night. The next morning he rode in the car from Fakes to Wynne. There the car had to be transferred from

the Bald Knob branch of appellant's railroad to the Helena branch in order to be carried to destination. The car was switched from the train in which it came to Wynne to the yards, and remained in the yards for several hours. Appellee went to the yardmaster and told him that he wanted his car set out in order that it might be carried to destination. The yardmaster told him that he would send the car out on the local freight that evening. The conductor of the local freight was present at the time the conversation was had. The car was placed in the local freight, and appellee continued to ride in it. He kept the door partly open. While appellee was in the car in the yards at Wynne, the conductor and one Homer Moore came by, and appellee spoke to Moore. He got hurt that evening somewhere south of Nettleton before he arrived at his destination. The accident happened in this way: There was a big iron rod which runs lengthwise the car, and it broke loose at one end and struck appellee on the shoulder as it fell. When the train stopped at Nettleton, the conductor came along and asked appellee what was the matter with him. He told the conductor that the rod in the car fell and injured him severely. The conductor then told him that he had better get out of the car and go back to the caboose. Appellee says that he looked at the car when he went in it, and it looked to be a good solid car; that he did not notice that the rod was loose. The rod fell because the tap which fastened it up was gone. The rod was about an inch and a quarter in diameter and about thirty-five feet long. The extent and character of appellee's injuries were detailed in evidence.

The bill of lading contained no provision permitting any person to ride in the car with the goods, and no provision permitting any person to ride on the train with the goods without paying fare, but, according to the testimony adduced by appellee, it was shown that where a person ships a car of goods which contains any live stock it was the general custon for one man to go in charge of the car to take care of the stock, and for that purpose to ride in it.

Appellant adduced testimony tending to show that its rules required persons accompanying live stock to ride in the caboose, and that there was no such custom as attempted

to be proved by appellee; that it was against appellant's rules for any person to ride in a box car with stock.

The conductor testified that he did not know that appellee was in the box car until after he was hurt, and that he told him to get out and go back in the caboose as soon as he discovered him in the box car.

It was admitted by appellant that it was the general custom for persons shipping a car of goods containing any live stock to have a care-taker ride free to take care of the stock, but that the rules and regulations of the company required such person to ride in the caboose.

Other facts will be referred to in the opinion.

The jury returned a verdict for appellee, and fixed his damages at $400. The case is here on appeal.

E. B. Kinsworthy, S. D. Campbell, W. G. Riddick and *R. E. Wiley,* for appellant.

1. The court should have directed a verdict for appellant. The record shows appellee was hurt in a car not prepared nor intended for carriage of passengers, and that he would not have been injured if he had been in the car provided for passengers. Appellant owed him no duty as a passenger, and, the injury not having been inflicted wilfully or wantonly, it is not liable. 40 Ark. 298; 52 Am. St. Rep. 444; 61 Am. St. Rep. 80, 81, note; 76 Ark. 106; 97 Ark. 137; 96 Ark. 568.

It being undisputed that appellant's rules forbade passengers being carried otherwise than in the caboose, even if the conductor knew that appellee was riding in the stock car, that did not create the relation of carrier and passenger between appellant and appellee. 64 Tex. 144, 146; 76 Tex. 174; 92 Pa. St. 21, 37 Am. Rep. 651; 8 Kan. 505, 12 Am. Rep. 475; 55 Tex. 88; 14 Allen (Mass.) 431; 67 Fed. 523; 165 Fed. 403; 18 Col. 477, 484; 97 Ala. 316, 323; 19 Am St. Rep. 585; 96 Pa. St. 256; Wharton on Neg., § 354; Patterson's Railway Accident Law, § 214.

That a custom will in some circumstances excuse the violation of a rule is conceded; but there is a total failure in this case to prove the existence of such a custom. See 96 Ark. 558, 564; 59 Ark. 395.

2. Instruction 2 given by the court is erroneous in that

it fails to submit to the jury the question of appellant's negligence or of appellee's contributory negligence, and in making appellee's right to recover depend solely upon the conductor's seeing and acquiescing in appellee's riding in the stock car, and failing to warn him. 70 Ark. 481; 67 Ark. 54, 55.

W. W. Bandy, for appellee.

1. The evidence is sufficient to show that appellee was a passenger when he was injured, and was so received. Kirby's Dig., § 6705.

2. The injury was the result of the operation of the train, and was inflicted under such circumstances as to raise the presumption of negligence against the appellant. 63 Ark. 636.

3. The defense of contributory negligence will not bar recovery under the proof in this case. 40 Ark. 298; 93 U. S. 291; 29 Pac. 845; 38 La. Ann. 111; 61 Hun. 623; 16 N. Y. S. 62; 37 Ark. 519; 112 S. W. 291; 20 Minn. 125; 58 Me. 187; 86 Pa. St. 139; 11 S. E. 553; 11 S. W. 751; 46 Ark. 528; Wharton on Neg., c 364.

HART, J., (after stating the facts). It is contended by counsel for appellant that the court erred in refusing to take the case from the jury. We do not think so, but are of the opinion that under the facts and circumstances of this case it was proper to submit to the jury the question of appellant's negligence and appellee's contributory negligence. The train upon which appellee was injured was a local freight train, and was required to carry both freight and passengers. Kirby's Dig., § 6705.

Appellee adduced testimony tending to show that where a person shipped a car containing live stock over appellant's road it was the custom for appellant to permit a care-taker in charge of the live stock to ride free, and this much is conceded by appellant. Therefore, appellee was a passenger, notwithstanding he rode free. *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298.

Appellee says that he was injured by a brace rod in the box car falling on him while he was riding in the car in charge of the stock. The rod fell because the tap which held it in position had come off. This was an injury caused by the run-

ning of a train, and made a *prima facie* case of negligence against the railway company. *St. Louis, I. M. & S. Ry. Co.* v. *Neely,* 63 Ark. 636.

At the same time it was the duty of appellee to use reasonable care in protecting himself, and we consider the question of his contributory negligence the most serious one in the case. It is true that, according to the testimony of appellant, it was against its rules and regulations for a care-taker to ride in the car with the live stock, and the conductor says that he had no knowledge that appellee was riding there until after the injury was received; that he told him to ride in the caboose and supposed he was riding there. On the other hand, the jury might well have inferred from the testimony of appellee that the conductor saw him riding in the car with the live stock, and made no objections thereto; in other words, that appellee rode there with the knowledge and acquiescence of the conductor. Additional testimony was adduced by appellee tending to show that it was the general custom of persons in charge of live stock shipped upon one of appellant's trains to ride in the car with the live stock in order to take care of it. Appellee also says that when he took his place in the car he looked around in it, and it appeared to be a solid and substantial car. Looking at the matter from appellee's standpoint, we think that he was justified in believing that the conductor's action in permitting him to ride in the car with the live stock was equivalent to the act of assigning him to that place. If the place was one of hidden peril, since he was a passenger and could not be reasonably expected to know of such danger, the duty devolved upon the conductor to warn him that he was riding at a place on the train which was contrary to the rules of the company, and which would subject him to unusual risks. *Lake Shore & Michigan S. W. Ry. Co.* v. *Teeters,* (Ind.) 77 N. E. 599, 5 L. R. A. (N. S.) 425; *New Orleans & N. E. R. Co.* v. *Thomas,* 60 Fed. 379, 9 C. C. A. 29.

Hence we do not think that, under all of the facts and circumstances in this case, the court erred in refusing to declare as a matter of law that appellee was guilty of contributory negligence. It must be admitted that there is some conflict in the authorities upon this point, but after a consideration of the question we believe that the conclusion we have reached

is in accord with the better reasoning and with the trend of our authorities on the subject. *Little Rock & Fort Smith Ry. Co.* v. *Miles, supra; St. Louis & S. F. Rd. Co.* v. *Kitchen,* 98 Ark. 507.

It is next contended by counsel for appellant that the court erred in giving the following instruction to the jury:

"2. You are instructed that the duty of a conductor of a local train carrying passengers is to look after the safety and protection of all passengers on his train for the purpose of being conveyed from one point to another on the line of railroad over which his jurisdiction extends, and to assign them seats; and if he finds or sees a passenger in an exposed position, it is his duty to warn him of the danger to which he is exposed; and if you find in this case that the conductor of the local freight train on which plaintiff was injured saw plaintiff in the box car, and knew that he was travelling in said car, regardless of the fact whether said train was in motion or still, and failed to warn him of his danger, or permitted plaintiff to ride in said car, or acquiesced in his doing so, and plaintiff was injured thereby, your verdict will be for the plaintiff."

We agree with counsel in this contention. The instruction in effect excludes from the jury the question of appellee's contributory negligence, and makes the company liable in damages for the injuries if the conductor acquiesced in his riding in the car with the live stock and failed to warn him of his danger. While the railroad company owed him the duty to employ reasonable means and to exercise ordinary care to avoid injuring him, it was nevertheless his duty to use reasonable care in protecting himself; and, if the position he took in the train was one of such obvious danger that a person of ordinary prudence would not ride there, appellee assumed the risk of doing, so, and can not recover against appellant merely because the conductor failed to warn him of his danger. As we have already seen, the question of appellee's contributory negligence was one for the jury, and because the instruction under consideration practically excludes that question from the jury it was prejudicial to the rights of appellant.

Other errors are pressed upon us for the reversal of the judgment, but we think the principles of law already announced

practically cover the other assignments of error, and will be a sufficient guide for a retrial of the case.

For the error in giving instruction numbered 2, as indicated in the opinion, the judgment will be reversed and the cause remanded for a new trial.

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

Opinion delivered November 18, 1912.

1. DEATH—DAMAGES—EXCESSIVENESS.—An award to parents of $5,000 for the negligent killing of a boy seventeen years old was not excessive where decedent had an expectancy of 44 years, the father of 14.09 years, and the mother of 17.41 years, as shown by the mortuary tables; where decedent contributed the whole of his earnings to their support, and where his yearly salary, less his expenses for food and clothing, amounted to $540, and where decedent had stated that his parents could depend on him as long as he lived. (Page 350.)
2. SAME—DAMAGES—ELEMENTS TO BE CONSIDERED.—While the amount of a son's contributions to his parents, calculated upon the basis that they would continue without interruption for the term of his expectancy of life, should be discounted on account of the contingencies to which they were subject, the jury may take into consideration the fact that the son was in line of promotion, and that it was reasonably probable that his earning power would be increased. (Page 350.)
3. SAME—EVIDENCE—PARENT'S DEPENDENCE.—Proof that a parent was afflicted and dependent on his son is relevant to the issue whether the parent suffered any pecuniary loss by reason of the son's death. (Page 351.)
4. MASTER AND SERVANT—INSTRUCTION—ASSUMED RISK—CONTRIBUTORY NEGLIGENCE.—In an action against a master for the negligent death of a servant, it was not error to refuse to instruct that "if you find from the evidence that the injury and death of plaintiff's intestate was due to a dangerous position assumed by him, and which was wholly unnecessary in the discharge of his duties connected with his employment, then plaintiff can not recover;" for, although the jury may have found that intestate at the time of his death was in a dangerous and unnecessary position, it was still a jury question whether he assumed the risk or was guilty of contributory negligence. (Page 352.)

Appeal from Desha Circuit Court; *Antonio B. Grace*, Judge; affirmed.

STATEMENT BY THE COURT.

Elkins Jacks, a boy a little over sixteen years of age, was in the employ of the appellant as clerk to its storekeeper at McGehee. The appellant was handling its supplies from two box cars. They were placed on its coach track, at McGehee station. The cars were in bad condition, one of them having the drawbar out, permitting the cars to come within six or eight inches of each other. There were doors in the ends of the two cars so that one could pass from one car to the other. It was Jacks's duty to go in these cars and get out supplies for the employees who asked for them. It was his duty to go from one car to the other, and to stay around these cars. The appellant had been using these cars as a store room for four or five days while its regular store room was being repaired. Jacks had been working there in the store one or two months. There was nothing between these store room cars and the end of the track. The way to protect them from being bumped into by other cars on the track was to place a blue flag in the center of the track some distance above them. The rule required that no train should go over the flag. The servant whose duty it was to place the flag did not look to see that morning whether the flag was there. There was no reason to suppose that the cars would be moved. They were placed on the coach track for the special purpose of a store room.

While the switch crew was making couplings at McGehee on the morning of September 12, 1910, the switch engine caused a collision to take place with the cars where young Jacks was engaged in the discharge of his duties which caused his death. After the collision occurred Jacks was observed with one foot in one car and the other foot in the other car, standing up. He had his head between the two cars. When the engine released the pressure from the cars, he fell forward into the car.

There was a bolt projecting out of the end of one of the cars about as high as a man's head if he had been between the cars. This bolt was four or five inches from the door and projected out about one inch. There was blood on the bolt. The base of Jacks's skull was fractured, and both of his ears were bleeding. The blow against his ears on both

sides killed him, causing concussion of the brain. He died instantly. His administrator brought suit against the appellant, alleging that it negligently permitted and caused its engine to go upon the track upon which the cars were standing and collide with the cars while Jacks was at work, without any kind of warning to Jacks of their approach, with such violence that he was thrown about and knocked against the said car or some object or objects thereon or thereto attached and thereby injured him in such manner that he soon thereafter died from the effect of such injuries. The suit was brought for the benefit of Jacks's father and mother. Appellee alleged that they were entitled to his earnings until he reached his majority, and that he would have continued to have contributed to their support thereafter.

The appellant denied the allegations of the complaint, and pleaded contributory negligence and assumption of risk on the part of Jacks.

A witness was permitted, over the objection of appellant, to state that Jacks's father, on account of deafness, often did not have any employment.

The jury returned a verdict in favor of the appellee for $5,000. Judgment was rendered for this sum, and the appellant brings this appeal. Other facts will be stated in the opinion.

J. C. Knox and *Thos. B. Pryor*, for appellant.

1. There is no liability, under the evidence. The accident, under the undisputed evidence, was one which could never have been anticipated, much less foreseen, by the most cautious person. Pollock on Torts (8 ed.), 41; 213 U. S. 674. The court therefore erred in refusing a peremptory instruction in favor of appellant.

2. Evidence of the father's affliction and inability to work was clearly inadmissible, and should have been excluded.

3. The verdict is excessive. 42 Ark. 527; 57 Ark. 377-387; 55 Ark. 384; *Id.* 463; 33 Ark. 350.

M. Danaher and *Palmer Danaher*, for appellee.

1. The very purpose for which the cars were placed where they were and for which they were being utilized would negative the idea that they might be moved. It was appel-

lant's duty to use reasonable care not to cause the fall, and, under the circumstances of the case, it was negligent to move the car at all without first giving warning. 148 S. W. (Ark.) 647; 93 Ark. 15. There was no ground whatever for a peremptory instruction in favor of appellant.

2. Evidence of the father's affliction and of his inability to work was admissible for the purpose of showing that he was dependent. 48 Ark. 333. The age, circumstances and condition of the next of kin are always admissible in evidence. 11 Am. St. Rep. 482; 60 Kan. 113; 42 Ill. 169; 25 Am. & Eng. R. R. Cases, 338; 6 *Id.* 490.

3. The verdict is not excessive. 121 Ala. 50; 55 Ark. 462; 148 S. W. 822; 118 Pac. 1076; 156 Ill. App. 602; 141 S. W. 72; 141 S. W. 374.

WOOD, J., (after stating the facts). The appellant contends that the verdict was excessive. Jacks had an expectancy of forty-four years; his mother an expectancy of 17.41 years, and his father an expectancy of 14.09 years, as shown by the mortuary tables. Young Jacks was earning at the time of his death a salary of $55 per month, and was in line of promotion. He was industrious and intelligent. He contributed the whole of his earnings to his own and his father's and mother's support. He had stated that he would "stand by them (his father and mother) as long as he lived;" said they "could depend on him." At the time of his death his yearly salary, less his expenses for food and clothing, would have been $540. During the expectancy of his mother this income would have amounted to $9,396. That amount reduced to its present value, according to the Carlisle tables, would be $5,365.11.

In *Railway Co.* v. *Robbins*, 57 Ark. 377, this court said: "The amount of the contributions, calculated upon the basis that they would continue without interruption for the term of his expectancy of life, should have been discounted on account of the contingencies to which they were subject." But, while this is true, it is also true that the jury were warranted in taking into consideration the fact that Jacks was in line of promotion, as shown by the evidence, and the reasonable probability that he would have been promoted and his earning power thereby increased.

As was said by us in the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Brogan, post* p. 533, quoting from *Railway Co.* v. *Sweet,* 60 Ark. 550: "The jury doubtless weighed all the probabilities of loss from sickness and other various contingencies likely to arise during the course of a man's life, and balanced these against the probabilities also of an increase of efficiency in money-making power."

There is nothing in the amount of the verdict to indicate that the jury pursued any improper method in arriving at the same, and there is nothing in the record to warrant us in saying that they were actuated by passion, prejudice or sympathy. Their verdict was responsive to the evidence, and while the verdict, in the absence of pain and suffering, reached the limit perhaps of the amount that should have been allowed under the circumstances, yet we are of the opinion that Jacks's father and mother were not more than fully compensated for his death. Jacks was a bright, healthy, industrious boy, of good habits and affectionate disposition toward his parents. The proof makes it reasonably certain that he would have continued to contribute his earnings to their support as long as they lived. With the disposition and ability that he possessed, according to the proof, it is reasonably certain that he would have contributed to them, had he lived, during the course of their lives as much as the jury awarded by their verdict.

Appellant contends that the court erred in admitting evidence of the father's affliction (and inability to obtain work on that account) to go to the jury. We are of the opinion that this evidence was proper. It tended to show that young Jacks's father was dependent. The court was careful to tell the jury that the affliction of the father was not an element of damages in the case, but was only for the purpose of showing why his father was unemployed, and therefore needed his son's assistance. The instruction given on the measure of damages excluded any affliction of the father as an element of damages. Testimony showing the pecuniary circumstances of the next of kin calling for help from those upon whom they are dependent is certainly relevant and proper to be considered. It is relevant to the issue as to whether or not by reason of the injury and death the next of kin have

suffered any pecuniary loss. See *Cooper* v. *Railway Co.*, 11 Am. St. Rep. 482, and cases there cited.

The instructions of the court on the issues of negligence, contributory negligence and assumed risk covered every phase of the evidence and were exceptionally free from error. The charge was in accord with the doctrine on these subjects often announced by this court, and it is unnecessary to discuss them here.

Of the instructions given appellant only criticises No. 7.* This instruction was based upon the evidence, and was correct.

The court refused several prayers for instructions offered by appellant.† Two, three and ten of these were correct, but they were fully covered by instructions which the court

*"7. In passing upon the question of contributory negligence on the part of the deceased, and of assumed risk, you must take into consideration his age, experience, intelligence and means of knowledge; and, after considering these matters, if you believe from the evidence that the deceased, on account of his youth or inexperience, did not know or fully appreciate the dangers incident to the act or employment in which he was engaged at the time of the injury complained of, then you can not hold him guilty of contributory negligence, nor can he be held to have assumed the risk."

†Defendant's requests for instructions Nos. 2, 3, 7 and 10 were as follows:

"2. The court instructs the jury that the burden of proof in this case is upon the plaintiff to establish each and every material allegation of his complaint, and if he fails to discharge this duty, then your verdict should be for the defendant."

"3. It is alleged in the complaint that the servants of defendant negligently and carelessly, while operating an engine of cars without any kind of warning to plaintiff's intestate of their approach, caused the said engine and cars to collide with the cars in which plaintiff's intestate was at work, with such violence that he was thrown from his feet thereby receiving injuries from which he soon after died. Before the plaintiff can recover in this case, the burden is upon him to establish that plaintiff's intestate was killed at the time and in the way and manner alleged in the complaint."

"7. If you find from the evidence that the injury and death of plaintiff's intestate was due to a dangerous position assumed by him, and which was wholly unnecessary in the discharge of his duties connected with his employment, then plaintiff can not recover, and your verdict should be for the defendant."

"10. The court instructs the jury that the law does not presume negligence from the mere happening of the accident."

gave. Instruction No. 7 was erroneous. It did not follow as a matter of law that, if Jacks assumed a dangerous and wholly unnecessary position, appellant was not liable; for, although the jury may have found that Jacks at the time of his death was in a dangerous and unnecessary position, it was still a question for them to determine as to whether or not in so doing he assumed the risk or was guilty of contributory negligence.

Finding no error, the judgment is affirmed.

THOMAS v. JACKSON.

Opinion delivered November 18, 1912.

1. INSTRUCTIONS—REPETITION.—The court's refusal to give correct instructions which were covered by instructions given was not prejudicial. (Page 355.)

2. APPEAL AND ERROR—OBJECTIONS—WAIVER.—Objections to instructions and to the admission and exclusion of evidence are waived by failure to carry them into the motion for new trial as grounds therefor. (Page 355.)

3. CONTRACT—PERFORMANCE—ACCEPTANCE.—Where work has been done substantially in compliance with the terms of a contract, or there has been an acceptance of the work by the contractee, the contractor may, notwithstanding defects therein, recover the contract price less the cost of correcting such defects. (Page 356.)

Appeal from Lawrence Circuit Court, Eastern District; *R. E. Jeffery*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee brought suit against appellant for a balance of $329.21, due upon a contract for the building of a bungalow in Hoxie, and for foreclosure of a mechanic's lien.

Appellant filed answer and cross complaint, denying any indebtedness, admitted the payment of $450 on the contract price for use in the purchase of materials and paying of laborers; denied that appellant complied with his contract; claimed damages for defective and unworkmanlike construction and bad materials; alleged that it would cost the sum of $600 more than the balance claimed under the contract to put the house in such condition as appellee agreed to construct it, and that

it was not constructed in substantial compliance with the contract, and that he was damaged in the said sum of $450 already expended thereon.

The facts are, substantially, that the written contract was entered into between the parties for the construction of a one-story bungalow in the town of Hoxie, appellee agreeing to furnish materials and build the house for $743.46; the house to be built according to a certain plan drawn by appellant, with the interior and exterior arrangements as shown in the plan and certain photographs, the contract not including the canvassing, papering and painting of the house. "Said plan includes one fireplace, chimney exposed inside, and is to be built outside of red pressed brick."

Appellee testified that he was to be paid certain amounts for extras, as set out, the whole amount of the contract price, with extras, being $781.46. He acknowledged receipt of $450 and also a credit of $2.25 for broken glass and claimed a balance due of $329.21.

The appellant moved into the house with his family at about the time appellee was constructing the chimney, and, discovering that he was not going to use a certain kind of brick made in Coffeyville, refused to permit him to build the chimney, notwithstanding appellee was insisting on doing so and using a red pressed brick purchased from Jonesboro, which he claimed and stated was in accordance with the terms of the contract, and also that he was unable to get the Coffeyville brick because of the excessive freight rate.

Appellant testified that the house was not placed upon a level foundation, that the floors sagged, that one wall was twelve inches lower than the opposite wall, that the window and door casings were not square, and that one side of the roof was longer than the other, the comb not being in the center of the house, and that it would cost more to build the house properly in accordance with the contract than the original contract price, and that it had cost him $75 to construct the chimney, which he refused to let appellee build, because he was not going to use the Coffeyville brick therein. After the contract was entered into, appellee showed appellant a brick made in Coffeyville, which was being used at the Baptist Church, and told him he thought he could get the

brick to build the chimney from the church and would use that kind if he could procure it. He was unable to get this brick, and was using another red pressed brick, which he claimed was in accordance with the contract when appellant refused to permit him to proceed further with the construction.

Many witnesses testified as to the kind and character of the work, and their testimony is conflicting as to whether or not it was done in a neat and workmanlike manner. They also testified as to the cost of remedying certain defects, and appellee testified that the chimney could have been finished with materials in accordance with the terms of the contract already placed upon the ground by him with two or three days' more work.

The court refused to give each of the five instructions requested by appellant, and gave six, none of which were objected or excepted to.

The jury returned a verdict for appellee for $300, and from the judgment thereon this appeal comes.

Appellant, pro se.

W. P. Smith and *O. C. Blackford*, for appellee.

KIRBY, J., (after stating the facts). It is contended that the cause should be reversed for the failure to give said requested instructions, but we have examined same carefully, and the only two which correctly state the law were sufficiently covered by the instructions given by the court, none of which were excepted to, and no prejudice resulted from the refusal to give them.

Appellant objected, it is true, to the giving of each of said instructions by the court, but he failed to preserve his exceptions by carrying them into his motion for a new trial as a ground therefor, and thereby waived the right to complain of error in the court's ruling thereon. *St. Louis & S. F. Rd. Co.* v. *Fayetteville*, 75 Ark. 534; *Burris* v. *State*, 73 Ark. 455; *McCarroll* v. *Stafford*, 24 Ark. 224; *Ray* v. *Light*, 34 Ark. 421.

He likewise waived the right to complain of error in the admission and exclusion of evidence. *Fourche River Lbr. Co.* v. *Bryant Lbr. Co.*, 97 Ark. 632; *Choctaw & M. Rd. Co.* v. *Goset*, 70 Ark. 427; *St. Louis, I. M. & S. Ry. Co.* v. *Deshong*, 63 Ark. 443; *Ince* v. *State*, 77 Ark. 418; *Allen* v. *State*, 70 Ark. 337.

It is undisputed that appellant moved into the building and occupied it with his family after it was constructed, and that he still continues to do so.

When work has been done substantially in compliance with the terms of the contract, or there has been an acceptance of the work by the contractee, the contractor may, notwithstanding defects therein, recover the contract price, less the cost of correcting such defects. A substantial performance is all that is required to authorize a recovery of the contract price, less the additional cost of a literal compliance with the contract. *Mitchell* v. *Caplinger*, 97 Ark. 281; *Fitzgerald* v. *Laporte*, 64 Ark. 34; *Ark-Mo Zinc Co.* v. *Patterson*, 79 Ark. 506; *Harris* v. *Graham*, 86 Ark. 570.

Appellee was entitled to recover on the contract upon a substantial performance of it, or an acceptance of the work by the contractee, notwithstanding defects therein, the contract price, less the cost of correcting such defects. The jury only allowed $29.21 credit to appellant upon his claim of defective and unfinished work, but the issues were fairly submitted to them by the instructions given, and they have found them in favor of the appellee upon conflicting testimony, and their verdict will not be disturbed.

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

BLAGG v. FRY.

Opinion delivered November 25, 1912.

JUDGES—AUTHORITY OF SPECIAL CHANCELLOR—RIGHT TO QUESTION ON APPEAL.—Where the record in a chancery cause shows that the regular chancellor announced his disqualification, and that a special chancellor was elected and qualified in the manner provided by the Constitution, and that the proceedings were had at a regular term of the court, the power and authority of such special chancellor can not be questioned for the first time on appeal.

Appeal from Yell Chancery Court, Danville District; *T. D. Patton*, Special Chancellor; affirmed.

Jo Johnson, for appellant.

Where the record discloses none of the disqualifications

named in the law, there is no ground for the regular judge or chancellor to refuse to preside in the trial of a cause. He can not arbitrarily and without cause hold himself disqualified. Art. 7, § 20, Const.; Kirby's Dig., § 1526; art. 7, § 21, Const.; 48 Ark. 227; 17 Ark. 580; 43 Ark. 35; 61 Ark. 88; 31 Fla. 594; 121 Cal. 102; 97 Cal. 101.

Priddy & Chambers, for appellee.

Appellants were present when the chancellor announced his disqualification to sit in the trial of the case, and the cause thereof. It was their duty to object then, if they had any objections to urge, and, not having done so, they will not be heard to object now for the first time. 19 Ark. 96. The proceedings are presumed to have been regular, unless the contrary affirmatively appears from the record. *Id.*

HART, J. Appellees instituted this suit in the chancery court against appellants. The record shows that, when the case was reached on the regular call of the calendar, the Hon. J. G. Wallace, the regular chancellor, announced his disqualification to sit in the cause. Whereupon the clerk of the court proceeded to hold an election for a special chancellor to hear said cause, which resulted in the election of the Hon. T. D. Patton, a member of the bar of the court, as such special chancellor. The regular chancellor then administered to him the oath required by law, and, upon the regular chancellor vacating the bench, the special chancellor assumed the bench and proceeded to try the cause. A decree was rendered in favor of the appellees, the plaintiffs below, against appellants, the defendants below. The record recites that both the plaintiffs and defendants were present at the trial. The case is here on appeal.

It is now insisted by counsel for appellants that the regular chancellor had no right to withdraw and to cause the substitution of a special chancellor, and for this reason the decree should be reversed. In the case of *Sweeptzer* v. *Gaines,* 19 Ark. 96, the court held:

"In order to present any question in the appellate court, as to the right of a special judge to preside in the trial of the cause, his power and authority must be questioned in the court below, and the grounds of the objection stated in the record."

Both appellees and appellants were present at the trial of the cause in the chancery court, and, so far as the record discloses, no objection was at any time or in any manner made to the special chancellor acting as judge in the case. This court will not now for the first time hear such an objection. As held in the case of *Sweeptzer* v. *Gaines, supra,* in order to be available here, the power and authority of a special chancellor must have been questioned in the chancery court. The record shows that the regular chancellor announced his disqualification and that the special chancellor was elected and qualified in the manner provided by the Constitution. The parties went to trial before him without objection. The proceedings were had at a regular term of the court, and the usual presumption must be indulged in in favor of their regularity.

The decree will be affirmed.

JOHNSTON *v.* FUQUA.

Opinion delivered November 25, 1912.

1. BROKER—SALE OF LAND—COMMISSION.—Where, after employing plaintiffs as exclusive agents to effect a sale of certain land during a fixed period of time, defendant made a subsequent agreement with plaintiffs to the effect that defendant should have the right to sell the land himself and pay plaintiffs a commission named, this operated as a modification of the original contract, and plaintiffs were not entitled to notice of a sale so made by defendant and could not claim a commission on a sale thereafter made by them. (Page 362.)
2. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTION.—The giving of an erroneous instruction was not prejudicial where it is apparent from the verdict that the jury found against appellee on the issue involved in such instruction. (Page 363.)
3. INSTRUCTIONS—REPETITION.—It is not prejudicial error to refuse to give correct instructions where other instructions given fairly submitted the issues. (Page 363.)

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

James D. Head, for appellants.

1. Appellants were under no obligation to tender money or deed. The extent of their duty was to furnish a purchaser ready, able and willing to buy. 91 Ark. 212.

2. Instruction 1, given at appellee's request, was erroneous in that it is abstract and inapplicable to the facts in the case. It ignores any question of estoppel of appellee by reason of occurrences after the alleged statement that the contract expired June 1, was made. It applies the principle of estoppel as to appellants and absolves appellee therefrom. Not only was this instruction properly objected to at the time, but appellant's offered instruction No. 5 was tantamount to a specific objection to it. 147 S. W. (Ark.) 86-90.

Appellee, when advised at Ashdown that a sale had been made by appellants, did not then claim that appellants were estopped by anything said by Johnston in the conversation by telephone in April, nor claim any rights based upon that conversation. He ought not to be heard, now that suit has been brought, to advance the claim that no valid sale had been made, and that the purchaser was not able to pay. 45 Ark. 37; 8 Wend. 562; 46 N. Y. 223; 33 Ark. 465; 50 Ark. 116-131; 59 Ark. 405; 75 Ark. 410; 83 Ark. 548; 64 Ark. 627, 639.

3. Instruction 5 requested by appellant is the law, and should have been given. 140 S. W. 689.

William H. Arnold, for appellee.

1. Appellants will not be permitted to raise objections here to instruction 1 that were not called to the trial court's attention. There was only a general objection to the instruction. 90 Ark. 108; 78 Ark. 22; 83 Ark. 61; 88 Ark. 204.

2. Instruction 5 was properly refused. There was no evidence whatever upon which to base an instruction that appellee in any manner misled appellants with reference to his sale to Munn.

McCULLOCH, C. J. Appellants instituted this action in the circuit court of Miller County against appellee to recover the amount of commissions alleged to have been earned in the sale of a tract of land in Miller County owned by appellee. The tract of land in question is composed of about 2,000 acres, a part of which is in cultivation, and on March 1, 1911, a written contract was entered into between the parties to this action whereby appellee granted to appellants the exclusive right to sell said property during the period of four months thereafter, and provided that they should have as their commission

all the purchase price over and above $7 per acre. Appellants assert that within the time specified they procured a purchaser for the land "ready, willing and able" to purchase for the price of $8.50 per acre; that they thereby earned a profit or commission of $1.50 per acre, but that appellee refused to consummate the sale and refused to pay the commission. The commission, according to the contention of appellants, amounted to the sum of $3,075.48, and this is the amount for which they prayed judgment. On the trial of the cause before a jury, a verdict was rendered in favor of appellants for the sum of $500. They were not satisfied with the recovery of that amount, and have prosecuted an appeal to this court, and urge, as grounds for reversal, that the court erred in giving one of the instructions requested by appellee and in refusing to give two of the instructions which they requested.

It is undisputed that about the middle of the month of April, 1911, the parties had an interview, in which appellee stated that he had a prospective purchaser for the land, and proposed to pay appellants a commission of $500 on the sale, if made, and that appellants agreed to accept that amount if the sale should be made by appellee himself. There is, however, a dispute in the testimony as to one point in this interview: Appellants insist that, when this proposal was made, they agreed to accept the commission of $500 provided the sale was made in a day or two, and that they be notified of it; whereas appellee testified that the agreement did not embrace any such condition as that. Appellee testified that on the same occasion he asked appellants to tell him when the contract expired; that he had lost his copy of the contract and did not know the date of expiration; and that appellants informed him on that occasion that the contract expired on May 31, 1911. He further states that on the faith of that statement to him he gave to one Munn an option on the place to take effect on June 1, that, during the month of June, Munn elected to purchase the place, and that he consummated the sale and conveyed the property to him. Appellants testified that on or about June 15, they negotiated a sale of the land to one Sanderson, and immediately requested appellee to furnish an abstract of title, which he promised to do, but failed to comply with his promise. On June 30, which was the last

day of the contract, they closed the trade with Sanderson, and entered into a written contract with him for the sale of the property. It is upon this sale that they seek to recover the commission, but the jury allowed them the sum of $500 as a commission on the sale made by appellee himself.

Numerous instructions were given at the requestof each side.

The following instruction was one of those given at the request of appellants:

"If you find that plaintiffs did, in April, 1911, agree to allow defendant to sell the land to the party with whom he was negotiating, and did agree to accept $500 for their commissions, and that Fuqua did not, at the time, agree to make the sale in any specified time, and that plaintiffs did not lead Fuqua to believe and act upon the belief that their contract on said lands expired June 1, then you are instructed that plaintiffs, if the contract of sale was made by Fuqua on or prior to June 30, 1911, are entitled to recover in the sum of $500."

Now, this is the instruction upon which the jury evidently based the verdict in appellants' favor for the sum of $500. In following this instruction it is manifest that the jury found that appellants agreed to accept the commission of $500, without condition as to the time the sale should be made, and that they did not mislead appellee by any statement as to the date of the expiration of the contract.

Appellants also requested the court to give, among others, instructions numbered 4 and 5, which read as follows:

"4. If you find that in April, 1911, Fuqua did advise plaintiffs that he had a prospective purchaser and asked plaintiffs what they would charge as a commission if he sold the property himself, and they agreed to charge $500, yet if you further find that Fuqua represented at the time that if he made the sale it would be made in a day or two, and he would immediately report it, and failed to either make the sale within a day or two, or, having made it, failed to report it to plaintiffs within a reasonable time, then in either event plaintiffs would not be estopped from claiming commissions if thereafter they in good faith sold said property in accordance with

the terms of the written contract to a responsible party and within the time named in the contract."

"5. If you find that about April 15, 1911, plaintiffs did agree to accept in full payment from defendant the sum of $500 if defendant sold to the party with whom he was then negotiating, yet, if you further find from the proof that defendant did make the sale within the time contemplated and thereafter failed to promptly report such sale within the time stipulated (or, if no time was stipulated, then within a reasonable time thereafter), but withheld knowledge of such sale from plaintiff and requested or encouraged them or knowingly suffered them to continue their efforts to sell same, and as a result thereof plaintiffs did, within the time allowed by the contract, effect a sale, on the terms authorized by the contract, to a person who was able, ready and willing to take same on such terms, then plaintiffs are entitled to recover commissions as specified in the contract."

The court gave No. 4 as requested, but refused to give No. 5. The effect of instruction No. 4 was to tell the jury that appellants would be entitled to the full amount of commissions on the sale made by themselves if the agreement to accept $500 was limited to a sale made by appellee within a day or two and immediately reported to them. So, the jury necessarily found, in returning a verdict in favor of appellants for only $500, that there was no such limitation of time upon the sale made by appellee himself. But in refused instruction No. 5 appellants asked the court to go further and tell the jury that, even if appellee made a sale of the land within the time limited by the oral agreement and pursuant thereto, yet, if he failed to inform them of such sale, and suffered them to continue their efforts to effect a sale on the terms authorized by the original contract, they would be entitled to the full commission on the sale which they thereafter negotiated. This instruction was incorrect, and the court properly refused to give it. If a new agreement was made, to the effect that appellee should have the right to sell the land himself and pay appellants a commission of $500, this operated as a modification of the original contract, and it thereafter remained no longer a contract giving appellants the "exclusive" right to sell the property, and a sale made thereafter by appellee

pursuant to the agreement would operate as a revocation of appellant's authority. The effect of the instruction was to tell the jury that, unless appellee notified appellants of the sale thus made by himself, they could continue in their efforts to find a purchaser, and would be entitled to a commission if they found one "ready, willing and able" to purchase the property. As the sale made by appellee under the terms of the modified agreement operated as a revocation of appellant's authority to sell, they were not entitled to notice, and could not claim a commission on the sale thereafter made by themselves. *Hill* v. *Jebb*, 55 Ark. 574.

The next ground urged for reversal is that the court erred in giving instruction No. 1, on request of appellee, which reads as follows:

"If you believe from the evidence that defendant had forgotten the date of the expiration of the contract with plaintiffs, and called upon the plaintiffs to inform him of the date, and that plaintiff Johnston informed him that the contract expired June 1, 1911, and that Fuqua relied upon said information, and, believing that to be true, sold the lands which had been listed with plaintiffs after said date, then you will find for the defendant."

It is contended that this instruction was incorrect and prejudicial to appellants, for the reason that it ignored their contention that appellee, during the month of June, encouraged them to continue in their efforts to make a sale. This instruction is based entirely upon appellee's contention that appellants misrepresented to him the date of the expiration of the contract, and thereby induced him to enter into another contract for the sale of the property. The jury, however, found against appellee on that issue, otherwise they could not have found in favor of appellants for the $500. Therefore, the instruction was not prejudicial, even if it is open to the objection urged by appellants that it ignored one of their contentions in the case.

As to the other refused instruction, requested by appellants, we think that they were not prejudicial, as the other instructions in the case fairly submitted the issues.

We are of the opinion, upon the whole, that the case was

properly submitted to the jury, and that the verdict should not be disturbed.

Judgment affirmed.

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

Opinion delivered November 25, 1912.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—Where a trainman placed himself in a place of danger by crawling under a gravel car where he could not easily be seen, and thereafter failed to look out for approaching trains on the track, and was killed, he was guilty of such negligence as would bar a recovery on account of injuries received by him.

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

J. H. Harrod, for appellant.

Under the proof in this case it was a question for the jury to say whether Mitchell was guilty of contributory negligence. 57 Ark. 429; 59 Ark. 215; 128 U. S. 443.

Thos. S. Buzbee and *John T. Hicks*, for appellee.

No negligence whatever is shown on the part of appellee; but, if negligence on the part of appellee should be conceded, the negligence of the deceased was of such nature as to preclude recovery. It was the duty of the trial court to refuse to submit the case to the jury.

MCCULLOCH, C. J. Deceased, Frank Mitchell, was a brakeman in the service of appellee, and was run over by train and injured, from which injuries death ensued, and the administratrix of his estate instituted this action to recover damages for the benefit of the estate on account of pain and suffering endured by deceased and for the benefit of the next of kin for damages which resulted from the loss of contributions.

Mitchell was brakeman on a construction train, engaged, at the time of his injury, in cleaning out ditches along the track in and near Forrest City, Ark. The injury occurred shortly after the noon hour on May 25, 1909, while the train was in the yards at Forrest City. The work train was on the main track

while the crew of men were at work cleaning the ditches, and it was necessary to put out a flagman toward the east to protect the train and crew from trains approaching from that direction. This duty was assigned to deceased Mitchell, and he proceeded to a distance of about 500 feet east of the work train, and remained there several hours. On a storage track, running parallel with the main track and on the north side of it, was a loaded dirt car called a gondola car. This car had been set over on that track before that, probably the day before, and the testimony shows that Mitchell crawled under the side of that car in order to get in the shade, while he was on watch for approaching trains. When the time came to quit work at noon the signal was given for moving the work train, and it moved up to the switch and backed in on the storage track, striking the gondola car under which Mitchell was resting, and both of his legs were run over and cut off. He was sitting under the car between the rails, facing the south, with his feet extending over the south rail. His position was between the front and rear trucks, and the evidence shows that the journal boxes extended out an unusual distance on this particular kind of car and obscured his protruding legs more than would have been done if it had been a car of the ordinary make. He was seen in this position by a brakeman just a few moments before the train backed in, but the first that was known of his injury was when the car was moved his screams were heard by the men in charge of the train. Several loaded dirt cars were attached to the backing engine, and the testimony establishes the fact that no lookout was kept from the end of these cars as they were backed upon the storage track.

The trial judge instructed the jury to return a verdict in favor of the defendant, and the only question on this appeal is whether or not there was error in that ruling, it being contended by appellant, that there was enough testimony to go to the jury on the question of the negligence of appellee's servants in failing to give signals or keep a proper lookout, and also on the question of contributory negligence on the part of deceased.

We are of the opinion that the action of the trial court

in giving the peremptory instruction was correct, and that the judgment below should be affirmed.

There is no evidence sufficient to warrant a finding that the men in charge of the train saw deceased in his perilous position so as to be chargeable with negligence in failing to protect him after observing him in that position. No witness testified that any of the men on the train were in a position to see deceased while he was under the dirt car. There is one witness who testified that the fireman, immediately after the injury, exclaimed, "I think we have pinched Mitchell back there;" but that was after Mitchell's screams were heard, and it is not sufficient to establish the fact that the fireman, or any other man on the train, saw Mitchell under the car before it was moved. Conceding that it was possible for men on the engine to have seen Mitchell's legs protruding from underneath the car, yet there is no evidence that any of the men did see them.

Now, Mitchell's conduct in crawling under the car and remaining thereunder, without taking notice of the approaching train backing in upon the side track, is such that different minds can not draw different conclusions as to it being an act of negligence, and this bars a recovery of damages, regardless of any negligent act of the trainmen in failing to give signals or in failing to keep a lookout. Deceased was put there for the purpose of guarding the train, but he knew that any position on the track was a place of danger, and that it was particularly dangerous to crawl beneath a car. While he had a right to assume that proper signals would be given when the train approached, yet this did not absolve him from the duty of taking heed for his own safety and looking out for the approach of a train on the storage track. He was not misled in any way by the circumstances. On the contrary, the course of the work there was sufficient to put him upon notice that there was a probability that when the men ceased work at noon, and the cars were loaded with dirt, they would be backed on to the storage track. Be that, however, as it may, the conclusion is irresistible that when he crawled under the car, and put himself in a position where his peril could not be easily discovered, and thereafter failed to look out for approaching trains on that track, he was guilty of an act of negligence

which, notwithstanding any negligence on the part of the other trainmen, bars a recovery of damages on account of the injury.

The judgment of the circuit court is therefore affirmed.

WILKERSON v. STATE.

Opinion delivered November 25, 1912.

1. EVIDENCE—PAROL EVIDENCE TO CONTRADICT RECORD.—Where the record of a justice of the peace, offered in evidence, did not show that a certain witness was convicted of petit larceny, it was not error to refuse to permit the justice of the peace to testify that he intended the judgment entry as a conviction of petit larceny. (Page 369.)
2. APPEAL AND ERROR—NECESSITY OF OBJECTON TO EVIDENCE.—Appellant can not on appeal complain of the admission of improper evidence where he failed to object to same or to move the court to exclude such evidence from the jury. (Page 370.)
3. SAME—HARMLESS ERROR.—One convicted of murder in the second degree can not complain because the jury found him guilty of a lower degree than the evidence tended to prove him guilty of. (Page 370.)

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

STATEMENT BY THE COURT.

The indictment charged appellant with the crime of murder in the first degree, alleging that he "did unlawfully, wilfully, feloniously and of his malice aforethought, and of premeditation and deliberation, kill and murder one Amanda Turner by then and there striking, beating and cutting her with a certain axe," etc. The indictment was sufficient.

There was proof tending to show that on the morning of the killing the appellant sold Amanda Turner a pocketbook, and when she placed her money in the pocketbook the appellant handled some of it. He had in his hands a $5 gold piece, and said that he used to have one, and if he ever got another one he would keep it. Amanda Turner also had some silver and greenbacks. She took the money out of her stocking, and put it in the pocketbook, and put the pocketbook down in her bosom.

Without going into details, the testimony tended to show that the appellant had the opportunity to commit the crime.

He was seen in the vicinity of Amanda Turner's house the morning she was killed, and was also seen in the vicinity shortly after the killing. Amanda Turner was murdered by some one cutting her in the head with an axe. The axe was found with blood on it, under the house, and the cuts on her head and face indicated that the killing was done with an axe. When she was found, one stocking was pulled down. It was shown that she carried her pocketbook in her stocking.

The testimony tended to show that the motive for the crime was robbery. It was shown that the appellant, on the day of the killing, and some time afterwards, in company with a companion, went to the house where Amanda Turner was killed, and he was heard to remark that the officers had a writ for him, and he was going to leave. He left the community, and was arrested, some time after the killing, in Texas.

Tom Lucas, who was in jail with appellant, testified that appellant said he was "sitting on the bed making a cigarette and told her (Amanda Turner) to give him the pocket book as he wanted to put $5 in it; said she finally laid down on the bed, and Bill brought him the axe, and he hit the woman and then threw the axe under the house, and kicked it and cut his shoe. After that he pulled my shoe one night and woke me and asked me if I was going to appear against him, and I told him I didn't know, and he fell over and cried and prayed."

It was shown that appellant's shoe had holes cut in it. He said one of the holes was cut because the lining hurt his foot, the other hole he had not noticed before his testimony was given.

A witness by the name of Mark Hanna Washington testified as follows: "The defendant did not sleep in the cell with me, and Tom Lucas. I saw him and Lucas talking one night and also one day. They were whispering. One night defendant pulled my foot and then pulled Tom's, and Tom went down to the cell, and they talked. I could hear what they said, and he told Tom he did not want him to go and testify against him as to what he told him about the woman, and Tom said he wouldn't."

In the examination of this witness the following occurred:

"Q. Have you ever been arrested and tried and convicted for stealing? A. No, sir.

"Q. Were you ever arrested and carried before Squire W. L. Nance, justice of the peace, charged with having stolen Mr. Austin's watch, and fined five dollars? A. Yes, sir.

"Q. What did you say you hadn't been arrested for? A. I had not, just for stealing. Q. Didn't you say you was fined five dollars? A. Yes. sir. Q. What else did they do to you? A. They never done nothing to me. Q. Was there a jail sentence against you? A. No, sir. Q. Well, wasn't you put in jail? A. They just put me in jail, and mama paid my fine, five dollars."

At this juncture appellant's counsel offered to introduce page 453 of Justice W. L. Nance's record. The court stated, "That judgment doesn't show that he was convicted of petit larceny."

Appellant's counsel then asked permission to introduce Justice Nance and let him amend his record to show that the judgment was intended by him to apply as petit larceny. The court stated as follows: "I don't think he could amend it any by showing what it means. The court judicially knows that the lowest fine for petit larceny is ten dollars, and some time in jail. There is no judgment on that record showing that he was convicted of the crime of petit larceny." The court therefore refused to allow the testimony to be introduced.

The appellant was convicted of murder in the second degree, and sentenced to ten years in the penitentiary.

No brief filed for appellant.

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

WOOD, J., (after stating the facts). The instructions of the court applicable to the facts in evidence were correct, and we deem it unnecessary to set them out and comment upon them as they only involve familiar principles of law that have been often announced by this court.

There was no error in the ruling of the court in refusing to permit appellant to show by the justice of the peace that he intended by the page of his record which appellant offered to introduce to enter a judgment against the witness, Mark Hanna Washington, for petit larceny. The record shows that the lower court examined the offered page, and found

that it did not show that the witness Washington was convicted of petit larceny. This being true, it was not error for the court to refuse to allow the appellant to vary or contradict this record by the testimony of the justice to the effect that he intended the judgment entry as a conviction for petit larceny. If the justice made a mistake in his judgment entry, it should have been corrected and amended, upon proper notice, at a hearing for that purpose, and, after being so amended, could then have been introduced in evidence.

Moreover, the appellant, after excepting to the court's action in refusing to allow the docket to be introduced, permitted the witness Washington to testify without further objection and without moving the court to exclude his evidence from the jury. Appellant therefore can not complain of the testimony of the witness Washington.

The testimony shows a most horrible murder, and appellant, if guilty at all, was guilty of murder in the first degree. The testimony was amply sufficient to sustain a verdict for that degree, and he can not complain because the jury found him guilty of a lower offense.

Affirmed.

BEAL-DOYLE DRY GOODS CO. v. BELLER.

Opinion delivered November 11, 1912.

1. TAXATION—PLACE OF TAXATION OF CORPORATE PERSONALTY.—Under Kirby's Digest, § 6936, as amended by Acts 1907, p. 451, providing a method of assessing for taxes personal property of corporations, and requiring the officers of the corporation to file a statement showing the county in which the property assessed is situated, *held*, that property of a corporation is taxable in the county of its location. (Page 372.)
2. SAME—LOCATION OF PERSONALTY.—A stock of goods held in a county from March until October following was located and subject to taxation therein. (Page 373.)
3. SAME—DOUBLE TAXATION—WHO MAY COMPLAIN.—A corporation may not complain because it is required to pay taxes twice in different counties on the same personalty where such double taxation results from its failure to assess its personal property in the county where situated, and where it failed to pursue the remedy given by Kirby's Dig., § 7180, authorizing the refunding of a tax erroneously assessed and paid. (Page 374.)

4. SAME—EFFECT OF ERRONEOUS PAYMENT.—An erroneous payment of taxes on personal property in one county does not discharge a valid assessment for taxation in another. (Page 374.)

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

Sam T. Poe, for appellant.

The goods were not subject to assessment in Clay County, and the taxes had been paid in Pulaski County. The personal property of domestic corporations was assessable only in the county of the domicile of the corporation. 78 Ark. 187; Kirby's Digest, § 6936; Acts 1907, No. 451, § 2; 97 Ark. 260. A corporation can not be forced to pay taxes twice on the same property. 97 Ark. 260.

G. B. Oliver, for appellee.

Kirby's Dig., § 6936, was amended by Acts 1907, p. 1226. The property was in Clay County seven months, and was properly assessed there. This property was not in transit. 79 Fed. 282; 50 Atl. 364; 80 Ark. 138. If assessed twice, appellant had an adequate remedy. Kirby's Dig., § 7180.

SMITH, J. Appellant filed its complaint in Pulaski Chancery Court, alleging it was a corporation under the laws of this State with its principal and only place of business at Little Rock, and that it was engaged there in the wholesale dry goods business; that the defendant was sheriff of Pulaski County, and as such had in his hands a warrant issued by the county clerk of Clay County, Arkansas, for taxes purporting to have been assessed against plaintiff in Clay County for the year 1911. It further states that on ..... day of March, 1911, it purchased at a bankrupt sale the stock of goods that had belonged to one J. M. Hawks, who had been engaged in the mercantile business at Corning in Clay County; that said stock of goods was held by it on the first Monday in June, 1911, and thereafter until about October 1, 1911, at which time it sold said stock of goods and delivered them to one H. H. Gallop; that all plaintiff's property was assessed by the assessor of Pulaski County, Arkansas; and that the stock of goods above mentioned was included in that assessment; that plaintiff had no intention of engaging in business in Clay County, or holding the property there for any indefinite length

of time; and that the stock had been kept in Clay County only for the purpose of storage and convenience and to be sold in bulk.

It further alleged it had no knowledge of the said assessment until ..... day of May, 1912, after the time given by law had expired to have said assessment corrected by any officer of Clay County, and that it had in fact already paid to defendant as collector of taxes of Pulaski County the taxes assessed on the property in that county; that defendant was about to levy the warrant in his hands, and would do so unless restrained by the court; and that this would result in its being required to pay taxes twice in the same year upon this stock of goods. There was prayer that the defendant be enjoined from enforcing the collection of taxes assessed in Clay County, or that, if it be held that defendant is entitled to collect said taxes under the warrant held by him, that the defendant be ordered to pay said amount out of funds then held by him which he had collected on property assessed in Pulaski County.

By agreement, Clay County was made a party defendant, and both defendants demurred to the complaint, which demurrer read as follows:

"First. This court is without jurisdiction to grant plaintiff the relief prayed for or any other relief.

"Second. There is a defect of parties defendant herein.

"Third. Plaintiff's complaint fails to state facts sufficient to constitute a cause of action."

The cause was submitted on the demurrer, which was sustained, and the complaint was dismissed for want of equity. Plaintiff appeals.

It will not be necessary to consider either of the first two grounds of demurrer, as the third is decisive of the case, and is the one upon which the court below dismissed the complaint. Appellant contends that, under the facts recited in its complaint, the stock of goods was not subject to taxation in Clay County, and its assessment there was without authority and void. That this is true because all of the personal property of a domestic corporation was required to be assessed in the county of its domicile (*Harris Lumber Co.* v. *Grandstaff*, 78 Ark. 187), prior to the passage of act No. 451 of the Acts of 1907. This was an act entitled "An act to amend section

6936 of Kirby's Digest of the Statutes of Arkansas and to provide for the manner of assessing the personal property of corporations, companies, and associations," and appellants further contend that, as this act gave the authority to assess personal property of domestic corporations in counties other than that of their domicile, the assessment could be made only in the manner authorized in that act; and that, as there had been no compliance with its requirements, there was no assessment in Clay County. But this is not the language of the act in question, and certainly could not have been the purpose of the General Assembly in enacting it. This act amends section 6936 of Kirby's Digest, which provides the method of assessing for taxes all domestic corporations and all foreign corporations doing business in this State, except certain corporations whose assessment for taxation was otherwise specifically provided for; and the only change made by the act of 1907 in the said section was that it added the requirement that the corporation officer making the assessment should file a statement, showing the county in which the property assessed was situated; and that the assessor with whom this statement was filed should certify to the assessors of the respective counties the property located there.

Evidently, the purpose of this act was to make property taxable in the county of its location and to furnish the means by which that fact might be known, and it does not interfere with the operation of other laws on the subject of the assessment of personal property. It does not appear how this property was placed on the tax books of Clay County. The appellant contents itself with the allegation that it did not assess it, and that it was not subject to taxation, because of the noncompliance with the provisions of the act of 1907, above referred to, and the further fact that the stock of goods was only temporarily in Clay County. But, while the complaint does allege that appellant had no intention of engaging in business in Clay County, it also recites that the stock of goods had been stored there from the time of its purchase on the ..... day of March, 1911, until sold by it in October, 1911; and to sell these goods they must necessarily have been shown to prospective purchasers. The theory upon which property only temporarily in a taxing district is not taxable there is

that the property is in transit, but that is not true of this stock of goods under the allegations of the complaint. See *Eoff* v. *Kennefick-Hammond Mfg. Co.*, 80 Ark. 138, and cases there cited.

Finally, appellant's statement that it is being required to pay taxes twice on the same property can not avail here; for, if that statement is true, it results from its own failure to properly assess its property in Clay County, and an erroneous payment in one county can not discharge a valid assessment in another. Particularly must that holding be made in proceedings of this kind where, if there was an erroneous assessment, that error was in Pulaski County, and appellant would have had a simple remedy by following the provisions of section 7180 of Kirby's Digest, which provides: "In case any person has paid or may hereafter pay taxes on any property, real or personal, erroneously assessed, upon satisfactory proof being adduced to the county court of the fact, the said court shall make an order refunding to such person the amount of the county tax so erroneously assessed and paid, and upon production of a certified copy of such order he shall draw his warrant on the State Treasurer for the amount of the State tax erroneously assessed and paid." Kirby's Digest, § 7180.

Affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* HARRIS.

Opinion delivered November 18, 1912.

1. RAILROAD—DAMAGE BY FIRE—EVIDENCE.—In an action against a railroad company for injury to property by fire alleged to have been caused by defendant's locomotive, the question of defendant's liability was properly left to the jury if all the facts and circumstances fairly warrant the jury in finding that the fire did not originate from any other cause than that alleged in the complaint. (Page 377.)
2. SAME—DAMAGE BY FIRE—CONTRIBUTORY NEGLIGENCE.—Under the act of April 2, 1907, making railroads liable for damages caused by fires set out by their locomotives, contributory negligence of the owner, short of an act so grossly negligent as to amount to fraud, is no defense. (Page 379.)

Appeal from Polk Circuit Court; *Daniel Hon*, Judge on exchange; affirmed.

Read & McDonough, for appellant.

1. There is no evidence in the cause that warrants the submission of the case to the jury. Before appellee can recover under the act of 1907, it must appear that the fire originated from the operation of defendant's trains. 97 Ark. 287. The evidence is not sufficient to show any connection between the fire which sprung up between 6 o'clock and 7 o'clock (which was completely extinguished by the witness Williams) and the fire which destroyed plaintiff's property at 2 o'clock the next morning. 42 Pac. 602; 100 S. W. 504; 71 S. W. 1073; 83 N. W. 137; 79 N. W. 1032; 75 N. W. 1114; 47 N. E. 691; 33 S. E. 917; 29 S. E. 213; 121 Fed. 924; 100 N. W. 207; 79 N. W. 310; 55 S. E. 270; 110 N. W. 561; 86 Pac. 1010; 29 Pac. 664; 32 Pac. 345; 101 S. W. 636; 149 Mich. 400; 89 Ark. 274; 110 N. W. 561.

2. The court was requested to charge the jury, in substance, that, if plaintiff was negligent in not putting out the fire after discovering it, he could not recover, and erred in refusing such charge. This court's holding in the Evins case, 147 S. W. 452, to the effect that contributory negligence was not a defense in cases brought to recover damages resulting from fires set out by the operation of railroad locomotives, is not supported by the weight of authority. 3 Elliott on Railroads, § 1238; Thompson on Negligence, § 751; 55 So. 871; 38 Ark. 357; 49 Ark. 535.

In the Evins case, *supra*, the court held that "any fraud, any intentional exposure of property, any act of the owner which would have the effect to avoid a fire policy, should have the same effect in cases of this description." Under this holding the above requested charge should have been given. 19 Cyc., § 831, and cases cited; 95 Wis. 265; 57 Mass. 321; 29 Fed. Cases, 1384.

W. M. Pipkin, and *Hill, Brizzolara & Fitzhugh*, for appellee.

1. A mere statement of the evidence is sufficient reply to appellant's contention that there is not sufficient testimony to sustain the verdict. The fire was first seen in the old tramway a few minutes after the train had passed, emitting sparks which, the testimony shows, were falling at the identical point where the fire was discovered. Any other con-

clusion than that the fire originally started in the old tram, and had been fanned into fresh life, after the attempts to extinguish it, by the strong wind of the night and carried into the lumber piles, could hardly be reached by reasonable men.

The testimony was largely circumstantial; but, if the circumstances were such as a jury might reasonably infer that the fire came from the old tramway, appellee's case is made out. 58 Cal. 434; 2 Am. Dec. 91; 77 Ark. 434, 436; 59 Ark. 317; 76 Ark. 132; 101 S. W. 636; 13 Am. & Eng. Enc. of L. 510, 512; 62 Ia. 593; 3 Elliott on Railroads, § 1243; 126 Ind. 229; 131 Ind. 30; 19 L. R. A. (N. S.) 742; 12 *Id.* 526; 5 *Id.* 99; 2 Thompson's Com. on Negligence, 2291, and authorities cited; *Id.* § 2295.

2. There was no testimony whatever that appellee or his servants were guilty of contributory negligence. Moreover, contributory negligence is an affirmative defense which must be pleaded to be available, and appellant failed to plead it. 72 Ark. 23; 90 Ark. 64.

The Evins case, 147 S. W. 452, is conclusive against appellant's contention, and is in harmony with the construction placed on similar statutes. 3 Elliott on Railroads, § 1238; 2 Thompson's Com. on Negligence, §§ 2337 to 2350.

Read & McDonough, for appellant in reply.

Regardless of allegations of the answer, the record is clear that contributory negligence was made an issue in the lower court. Both parties so regarded it, introduced testimony directed to that issue, and requested instructions upon the same issue. 64 Ark. 305; 71 Ark. 242; 74 Ark. 615; 72 Ark. 47; 75 Ark. 571; *Id.* 312; 76 Ark. 391; 35 Ark. 109.

WOOD, J. This suit was brought by appellee against appellant to recover damages for the alleged destruction of certain lumber and other property which appellee alleged in his complaint was destroyed by fire from one of appellent's engines while the same was being operated on appellant's railroad in Polk County, Arkansas, on April 19, 1910.

The answer denied all the material allegations of the complaint. There was no specific plea of contributory negligence. Verdict and judgment were in favor of the appellee in the sum of $1,102.80, from which this appeal has been duly prosecuted.

The testimony stated most strongly in favor of the appellee is substantially as follows:

Appellant's freight train passed Eagleton going north about 6 o'clock in the afternoon. At that point there was an up-grade to the track, and it was a heavy train. Sparks and fire were emitted from the smoke stack and were falling in an old tramway between fifty and one hundred feet from the railroad track. A short time after the train passed fire was discovered in the tramway. There had been no other fire anywhere in the vicinity for several days. The planing mill had not been running. A witness attempted to extinguish the fire in the old tramway but was unsuccessful. The fire was burning in trash and old rotten wood, and other debris. About a half hour after the first attempt to put out the fire the witness returned to the spot and found fire at the identical place where he first attempted to extinguish it, and by that time it had covered an area of ten or twelve feet. In his second attempt to extinguish the fire he scattered the same, pouring water on it, and thought that he had put it out.

Witness testified that when fire gets started in trash and rotten wood it is difficult not only to put it out, but almost impossible to tell when it has been extinguished. In such debris as that described fire will smoulder for hours at a time, and then kindle up and spread. At a later hour in the night, left uncertain in the testimony, probably between 12 and 2 o'clock, the alarm of fire was again given, and witnesses who had seen the fire earlier in the evening, and others, went to the scene. The old tramway was burning at this later time, and a large part of the same had been consumed. At that time large coals and sparks were being carried from the old tramway across the road into the lumber piles and a new tramway. The wind was blowing from the direction of the old tramway toward the lumber pile. The piles of lumber and other property that were consumed by these fires constituted the loss for which appellee sued and has obtained judgment.

The appellant contends that the above facts are not sufficient to sustain the verdict, and cites many cases where under the circumstances peculiar to these cases it was held that the evidence was insufficient, but each case must necessarily depend upon its own facts, and we are of the opinion

that the above evidence makes it a question for the jury as to whether the fire originated from appellant's engine or from some other cause. In *St. Louis, I. M. & S. Ry. Co.* v. *Dawson*, 77 Ark. 436, we said: "It is not required that the evidence should exclude all possibility of another origin or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause."

Applying this doctrine, we are of the opinion that the facts disclosed by the testimony in the record, giving it the strongest probative effect in favor of the appellee, would warrant the jury in finding that the fire could not have originated from any other cause than that alleged in the complaint.

The testimony makes it reasonably certain that the fires discovered at about 6:30 o'clock in the old tramway, and again at 7 o'clock, were caused by appellant's engine. The witness attempted to put out the first fire, thought the had done so, but after the fire broke out again he saw that he had failed in the first attempt. On the second attempt to put the fire out he again thought he had done so, and testified as a fact that he had done so. But the discovery of the fire later in the night, when considered in connection with the evidence tending to show the direction from which the wind was blowing, and the manner in which the fire is shown to have consumed the trash and other combustible material between the old tramway and the new tramway and lumber pile, was sufficient to warrant the jury in finding that the witness was mistaken in saying that he had put out the fire, and sufficient to justify their conclusion that the last fire originated from, and was but a continuation of, the first.

A witness stated that he saw "fire and smoke and sparks going from the old tramway to the new tramway." Another witness said. "The fire had started on the edge of the tram where I had seen Mr. Williams first working at it on the north side." "The fire was spreading across towards the new tramway, it was across and burning in the edge of the tram and stacks of lumber. The ground was burnt from where I first saw the fire where Williams was putting it out across the road into the tram."

Another witness said, speaking concerning the fire that

he saw about 2 o'clock that night burning in the lumber: "Well, there was quite a bit of fire there in the old tramway; it had burned out the trailway of the old tram."

We are of the opinion that these facts were sufficient to sustain the verdict. There is really no evidence to justify any other conclusion than that the fire was caused in the manner alleged in the complaint; but, even if it could be said that there might have been another origin of the fire, still it would be a question for the jury, because the above facts certainly tended to show that the last fire was caused from the same source as the first.

The appellant contends that the court erred in refusing to instruct the jury that contributory negligence was a defense to this action. This court in a well considered opinion recently rendered construing the act of April 2, 1907, held that under that act, making railroads liable for damages caused by fires set out by their locomotives, contributory negligence of the owner, short of an act so grossly negligent as to amount to fraud, is no defense. *Evins* v. *St. Louis, & S. F. Rd. Co.*, 104 Ark. 79, in addition to authorities there cited; 2 Thompson's Commentaries on Neg., § § 2337 *et seq.*, 2350.

Under this statute, if the owner of property, or those duly authorized to represent him, should stand by and see a fire consume his property which it was within their power with reasonable efforts to prevent, of course, this would be an act of gross negligence, and would be tantamount to fraud that would prevent recovery under the statute. *Denver & R. G. Rd. Co.* v. *Morton*, 3 Col. App. 155, 32 Pac. 345; *Union etc. R. Co.* v. *Williams*, 3 Col. App. 526, 34 Pac. 731. See also *Peter* v. *Chicago, etc. Ry. Co.*, 121 Mich, 324, 80 N. W. 295, 80 Am. St. 500, 46 L. R. A. 224, 226, 228, cited in 3 Elliott on Railroads, § 1238, note 127. But we are of the opinion that the jury were warranted in finding that no such negligence or fraud was committed by the appellee or his servants.

Other objections were urged to rulings of the court for a reversal of the judgment, but we do not find that there was any error in any of the court's rulings.

The judgment is therefore affirmed.

FERRELL v. KEEL.

Opinion delivered October 15, 1912.

1. CONSTITUTIONAL LAW—CONSTITUTIONAL AMENDMENTS—CONSTRUCTION.—In determining the intention in framing an amendment to the Constitution, the court must keep in mind the Constitution as it existed before it was amended, the evil to be remedied by the amendment, and the amendment itself. (Page 383.)
2. SAME—AMENDMENT—IMPLIED REPEAL.—Repeals of constitutional provisions by implication are not favored, and, in order that a constitutional provision may be abrogated by an amendment to the Constitution, there must be an irreconcilable conflict between the purposes of the two provisions. (Page 387.)
3. STATUTES—ENACTING CLAUSE.—The Initiative and Referendum Amendment, in providing that the style of all bills shall be, "Be it enacted by the people of the State of Arkansas," referred only to bills initiated by the people under such amendment, and did not repeal section 19 of article 5 of the Constitution, which provides that legislative bills shall be styled, "Be it Enacted by the General Assembly of the State of Arkansas." (Page 387.)
4. DRAINS—CREATION OF DRAINAGE DISTRICT—CERTAINTY.—Act approved March 9, 1911 (Sp. & Priv. Laws 1911, p. 184), attempting to create the Village Creek and White River Levee District, was void for failure to define its boundaries with certainty. (Page 391.)

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

McCaleb & Reeder and *Jno. W. & Jos. M. Stayton*, for appellants.

1. The act is void because of the uncertainty of the boundaries of the district. 125 U. S. 345; 72 Ark. 126; 81 *Id.* 565; 42 Oh. St. 527; Cooley on Taxation (3 ed.) 225; 14 Cyc. 1030-3, 1039; Welty on Assessments, § 297; 35 Cyc. 844; 28 *Id.* 1123; 32 So. Rep. 27; 34 Ark. 224.

2. The enacting clause is void. There must be an enacting clause substantially as prescribed by the Constitution. Under the Initiative and Referendum clause, the style should be, "Be it enacted by the people of the State of Arkansas." This is self-executing and mandatory, and repeals § 19, art. 5, of our Constitution. 27 Ark. 284; 101 Ark. 437; 179 U. S. 251; 105 Pac. 106; 70 Ark. 25; 72 *Id.* 8; 76 *Id.* 32; 1 *Id.* 21; 26 *Id.* 265; 31 *Id.* 710; 9 *Id.* 270; 12 *Id.*

101; 51 *Id.* 534; 60 *Id.* 343; 26 *Id.* 534, 285; 76 *Id.* 309; 99 Pac. 427; 103 *Id.* 780; 104 Pac. 426; 72 Cent. L. J. 367, 237; 130 S. W. 692; 50 N. W. 1110; 106 Pac. 540; 73 Atl. 679; 124 S. W. 757.

The act is void.

Stuckey & Stuckey and *Morris M. Cohn,* for appellee.

1. The enacting clause is not void. The people did not pass this act, nor was it referred to the people. It was passed by the Legislature and became a law when approved by the Governor. It may be that all laws passed by the people should have the enacting clause as prescribed by Amendment No. 10, but the word "all" refers only to acts passed by the people, and not those passed under art. 5, § 18; 29 Ark. 42-3; 106 Pac. 540; 106 *Id.* 544; 109 *Id.* 821; 95 Ia. 435.

The amendment is not self-executing. 95 Pac. 435; 115 *Id.* 383; 98 *Id.* 149, 1111; 85 Ark. 89; 65 *Id.* 312; 60 *Id.* 325, 332; 34 *Id.* 501; 109 Pac. 478; 102 *Id.* 829; 67 S. E. 940; 95 S. W. 824; 121 Am. St. 967; 209 U. S. 211; 80 N. W. 143.

2. The description of the boundaries is sufficient. 48 Ark. 370; 52 *Id.* 107; 70 *Id.* 451; 96 *Id.* 410; 167 U. S. 548, 589-90; 180 U. S. 324, 342; 60 S. E. 75; 30 Cal. 467; 25 Cal. 296; 89 Pac. 275; 106 S. W. 815; 116 Ky. 441; 66 Me. 354; 144 Ky. 184; 107 S. W. 1121. *Falsa demonstatio non nocet.* 4 Enc. Law, 797; 4 *Id.* (2 ed.) 763, note 2; 52 Ark. 107; 84 *Id.* 257, 267; 167 U. S. 548; 147 N. Y. 675; 42 N. E. 344.

F. S. Osborne, amicus curiae.

[The regular judges being disqualified herein, this cause was tried before James H. Harrod, Joseph M. Hill, Joseph W. House, J. V. Walker, and James H. McCollum, special judges The opinion of the court was handed down by]

HARROD, Special Judge. The judges of the Supreme Court having certified to the Governor their disqualification to determine the validity of the enacting clause of the act involved in this suit, this special court was appointed by the Governor, under section 9 of article 7 of the Constitution, to determine this cause.

The General Assembly of this State, at the 1911 regular session, created the Village Creek & White River Levee District, by and act approved March 9, 1911. The commissioners

of the district organized, selected assessors and engineers, and proceeded to assess the lands of the district for the levee tax. Various land owners commenced suit in the Jackson Chancery Court to enjoin the proceedings. A demurrer was interposed to their complaint, and it was sustained, and, electing to stand on their complaint, their suit was dismissed, and they appealed to this court to reverse that decree.

The appellants urge here, among others, the following grounds for reversal:

First. That the act is void because its enacting clause is, "Be it enacted by the General Assembly of the State of Arkansas."

Second. That the boundaries of the district are so indefinitely described by the act that the land subject to the tax could not be definitely ascertained, and that the act was therefore void.

The style of the act in question is: "Be it Enacted by the General Assembly of the State of Arkansas." Is that style of bill or enacting clause valid since the adoption of the Initiative and Referendum Amendment? The amendment is as follows:

"That section 1, article 5, of the Constitution of the State of Arkansas be amended so as to read as follows:

"Section 1. The legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people of each municipality, each county and of the State, reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls as independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the Initiative, and not more than 8 per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon.

"The second power is a Referendum, and it may be ordered (except as to laws necessary for the immediate preservation

of the public peace, health or safety) either by the petition signed by 5 per cent. of the legal voters or by the legislative assembly as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety says after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial general regular elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when it is approved by a majority of the votes cast thereon and not otherwise. The style of all bills shall be, 'Be it Enacted by the People of the State of Arkansas.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for the office of Governor at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal votes necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretay of State, and in submitting the same to the people he and all other officers shall be guided by the general laws and the acts submitting this amendment until legislation shall be specially provided therefor."

The amendment proposes to amend section 1 of article 5 of the Constitution. That section is as follows:

"The legislative powers of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives."

No other section or article of the Constitution of 1874 is mentioned in the amendment.

Section 19 (section 18, Kirby's Digest) of article 5 of the Constitution reads as follows:

"The style of the laws of the State of Arkansas shall be: 'Be it Enacted by the General Assembly of the State of Arkansas.' "

The question is, Was this provision of the Constitution

abrogated by the Initiative and Referendum Amendment? Is this specific provision of our organic law to be treated as no longer in force? It is claimed that it was annulled by this provision of the Initiative and Referendum Amendment: "The style of all bills shall be, 'Be it Enacted by the People of the State of Arkansas.' " So the question we are to consider involves the construction of the Initiative and Referendum Amendment in relation to the enacting clause of this act. Two constructions are open to the court. It may be held that section 18 is abrogated by the amendment, or it may be held that it remains in force as not affected by the amendment. The correct decision of the case involves nothing but the application of rules of law that must govern the court in the construction of the amendment. By what rules of law should we be governed? More than sixty years ago, in the case of *State* v. *Scott*, 9 Ark. 270, Mr. Justice WALKER, in a case involving the construction of an amendment to the Constitution, said: "In determining the intentions of the framers of the amendment, we must keep in view the Constitution as it stood at the time the amendment was made, the evil to be remedied by the amendment, and the amendment proposed, by which the evil is to be remedied. No interpretation should be allowed which would conflict with any other provision of the Constitution, or which is not absolutely necessary in order to give effect to the proposed amendment. On the contrary, such construction should be given as will, if possible, leave all the other provisions in the Constitution unimpaired and in full force."

These rules of construction were laid down at an early day, when the jurisprudence of our State was in its infancy; but none better have been proposed at any time or any place. Let us try this case by these rules of construction, and see what the result will be. How did the Constitution stand when the amendment was adopted? It provided that all legislative power was in the General Assembly (section 1 article 5), and that the style of all laws should be: "Be it Enacted by the General Assembly of the State of Arkansas." Section 19, article 5. Now, what was the evil the Initiative and Referendum Amendment was designed to remedy? It is well known that it was the failure of the legislative depart-

ment of the State government to respond to the will and wishes of the people. This failure sometimes took one form and sometimes another. Sometimes it was the failure or refusal to enact laws the people wanted; sometimes it was in passing laws the people did not want passed. Now, how were these evils to be remedied? By adding to existing legislative power the power of the people to pass the laws they wanted, and by diminishing the legislative power to the extent of permitting the people to pass upon and approve or reject laws enacted by the General Assembly. The evil to be remedied was not the style of the bills, but the substance of the bills. The people were not especially concerned with the style of enacting clause, but they were profoundly interested in the provisions of the laws. The Initiative and Referendum Amendment was not intended to interfere with the ordinary processes of legislation, nor was it intended in any manner to entirely abolish the legislative power of the General Assembly. It was intended as a supplement to the existing legislative power, on the one hand, and as a curb or restraint on that power, on the other hand. The amendment was not intended in any sense as an abandonment of representative government, but, rather, its very aim and purpose was to make government representative.

In construing this amendment, it is our duty to keep constantly in mind the purpose of its adoption and the object it sought to accomplish. That object and purpose was to increase the sense of responsibility that the lawmaking power should feel to the people by establishing a power to initiate proper, and to reject improper, legislation. If the adoption of this amendment creates in the minds of senators and representatives a true sense of their responsibility to the people, and thereby makes the legislative department of the government truly representative, its wise and beneficent purpose will have been accomplished if no bill is ever initiated and no legislative act is ever referred. But, a new method of legislation being provided for by the amendment, that is, the right of the people to initiate legislation, it became both important and necessary that the style of laws enacted by the people should be provided for in the amendment. Was the style of any bills or laws except those to be initiated by the people contemplated,

considered, or in any manner thought of, by the framers of the Initiative and Referendum Amendment? Why should we suppose that they were thinking of anything else except the business they had in hand? The business they had in hand was to establish a power in the people to legislate and to provide a manner of exercising that power. Was the style of laws enacted by the General Assembly material to the procedure of the people in enacting laws? We are sure that the people knew, when they adopted the Initiative and Referendum Amendment, that the great bulk of legislation would continue to be enacted by the General Assembly, that the Initiative would only be used and the Referendum invoked on great and important questions. When they spoke of the style of bills, were the framers of the amendment thinking about the exercise of the old legislative power of the General Assembly, or were they thinking about the exercise of the new power they were creating? We are told that no interpretation should be allowed that would conflict with any other provision of the Constitution. If we hold that the words of the amendment, that the style of all bills shall be, "Be it Enacted by the People of the State of Arkansas," apply to bills passed by the General Assembly as well as to bills initiated by the people, the interpretation will be in direct conflict with section 19, article 5, which says that the style of laws of the State of Arkansas shall be, "Be it Enacted by the General Assembly of the State of Arkansas," Is an interpretation that will cause a conflict between section 19, article 5, and the amendment, necessary to give full effect to the amendment? Not at all. The fullest possible effect is given to the amendment when it is said that bills initiated by the people shall be styled, "Be it Enacted by the People of the State of Arkansas." So far as the introduction or presentation of bills is concerned, the amendment refers only to laws initiated by the people, and, necessarily, when it speaks of the style of bills, it means bills for the introduction and presenting of which it is providing. From the object to be attained, the mischief to be remedied, the language used, its position in the text, and its relation to other language used, we entertain no doubt that this conclusion is sound. Now, it is our duty to construe the amendment, if possible, so as to leave other provisions

of the Constitution unimpaired and in full force. Why not leave section 19, article 5, in full force? It is said that if this construction is adopted bills enacted by the General Assembly will have one style, "Be it Enacted by the General Assembly of the State of Arkansas," and that bills initiated by the people will have another style, "Be it Enacted by the People of the State of Arkansas." This of course, is true, but what of it? Is that a matter of such importance that it will justify us in disregarding the provisions of the Constitution? Is there anything out of the way, unusual, unreasonable, or extraordinary in having one style for laws enacted by the General Assembly and a different style for laws initiated and enacted by the people? Instead of being unreasonable, it seems to us wholly reasonable and logical. What is the object of the style of a bill or enacting clause any way? To show the authority by which the bill is enacted into the law, to show that the act comes from a place pointed out by the Constitution as the source of legislation.

It is clear, from the canons of construction we have taken for our guide, that section 19 of article 5 must stand unless it is expressly repealed, or unless it is in conflict with or repugnant to the amendment. Of course, it was not expressly abrogated, for it was not referred to. It is equally true that it is not in conflict with or repugnant to the Initiative and Referendum Amendment. They are not in conflict because one relates to legislation by the General Assembly and the other relates to legislation initiated by the people. They could only be repugnant if the Initiative and Referendum Amendment covered the whole scope of legislation. This, in our judgment, it did not do. The amendment not only does not deal with the whole scope of legislation, but it shows on its face affirmatively that it is only creating an additional legislative power and regulating the manner of its exercise. Instead of dealing with the whole scope of legislation, the Initiative and Referendum Amendment leaves absolutely untouched the many provisions of the Constitution contained in article 5 that relate to the exercise of legislative power by the General Assembly. Before any court would be justified in holding a provision of the Constitution abrogated on account of repugnancy to some other provision, it must appear that

there is an irreconcilable conflict between the purposes of the provisions that are claimed to be repugnant. Surely, there is nothing of that kind here. Repeal by implication is not favored, even in the construction of ordinary acts of the General Assembly, and certainly such repeal should not be favored when applied to long-established provisions of the organic law.

It is said that the words "all bills" in the Initiative and Referendum Amendment mean "all bills," from whatever source they emanate. In our opinion, they mean all bills that were being considered, that were in the minds of the proposers of the amendment; that is to say, bills that were to be initiated by the people.

We have endeavored to follow rules of construction that have been formulated by the wisdom of ages, and they lead us irresistibly to the conclusion that section 19, article 5, of the Constitution of 1874 is still unimpaired and in full force as to all bills not initiated by the people. The principles of law and rules of construction that support the view we have reached are so elementary and well established that citation of authority is deemed unnecessary. In our judgment any other conclusion would do violence to the language used and would violate all cardinal rules of construction.

In these views Mr. Special Justice HOUSE and Mr. Special Justice WALKER concur, and we unite in holding that the style of the bill in question in this case is proper, and that the act is not invalid because of the style of its enacting clause.

Mr. Special Justice HILL and Mr. Special Justice MCCOLLUM dissent from the foregoing opinion wherein it holds that the act with the style, "Be it Enacted by the General Assembly of the State of Arkansas," is valid, for these reasons: This was the style prescribed by the successive Constitutions of the State from 1836 to 1874, inclusive, and is still the necessary style unless the Initiative and Referendum Amendment has changed it. The Initiative and Referendum Amendment re-enacts section 1, article 5, of the Constitution, vesting the legislative power of the State in the General Assembly, consisting of the Senate and House of Representatives, and adds thereto a reservation to the people of the right to legislate themselves through the Initiative and Referendum therein incorporated into the organic law. This court has recently

held that the Initiative and Referendum Amendment suspended the operation of all acts passed by the General Assembly until ninety days after its adjournment, and if within that time a proper referendum petition was filed against any act (except emergency acts) it is suspended until adopted by the affirmative vote of the people, and also that the Referendum extends to all acts passed by the General Assembly (except the emergency bills permitted it to exercise free of this right) even extending unto local bills. The amendment prescribes the number of votes necessary to adopt any measure submitted to the people, and provides that the people or the General Assembly may submit amendments to the Constitution, or measures, for adoption or rejection, at general elections, or special elections to be called to vote thereon. The lawmaking power of the State is thereby revolutionized, and all of it vested, affirmatively or negatively (save alone a limited class of emergency acts) in the people themselves. The power of the Referendum may not be exercised, but the people have a given time in which to exercise it, and the absence of its exercise is as certainly an approval of an act as active exercise of it by its adoption at the polls. It is similar to the veto power of the Governor. He has a given number of days after the adjournment of the Legislature to approve bills; and, if he fails to do so, the bill becomes a law without his approval, and he, by his nonaction, when he has a right to act, as positively approves a measure as if he signed it. And thus the people have the right to determine all legislation, either affirmatively or negatively. In the amendment carrying to the people this power is the clause in question, "The style of all bills shall be, 'Be it Enacted by the People of the State of Arkansas.' " As long ago as 1871 this court, in *Vinsant* v. *Knox*, 27 Ark. 266, held that the constitutional provision that the style of all bills should be, "Be it Enacted by the General Assembly of the State of Arkansas," was mandatory, and that a bill without this style (or substantially this style) was void, although otherwise regularly passed and approved. Therefore, the people knew that the style of a bill could not be disregarded, and it was vital, before they incorporated this clause in the Initiative and Referendum Amendment. When they provided in this amendment that the style should be, "Be it Enacted by the People," they

deliberately changed a vital part of bills from the style prevailing since the State was admitted into the Union.

It is argued that this applies only to initiated bills, but the law is not so written. It plainly says, "all bills." Moreover, it is found in the sections specially dealing with the Referendum and, from context and position, necessarily applies to referred bills. The amendment deals with initiated and referred measures, and becomes a substitute for the preexisting law wherever the old provisions are inconsistent with the new. It makes radical changes in the existing Constitution, and one of the provisions of the existing Constitution prescribes that the style should show enactment by the General Assembly. Both clauses can not stand, one applying to bills enacted by the General Assembly, and the other applying to bills initiated or referred, because any bill may be referred (with the exceptions noted), and it will not be known until after the adjournment what bills are referred. Every act passed might be referred and every one adopted, and their adoption would be by the people, not the General Assembly; and every act might be defeated, and none become laws. No act might be referred, in which event by negative action the people permitted acts of the General Assembly to become laws after ninety days from its adjournment. Thus it is seen that it is consistent with the new order of things for the source of the power to be disclosed in the face of an act, and not consistent with that power for the old source of authority—the General Assembly—to appear on the act when in fact it was no longer concerned in the enactment except in the few instances of emergency legislation permitted the General Assembly free of the control of the people by direct action. The wisdom of making the formal part of an act vital may well be questioned, but that is not for the court to determine. The adoption of this amendment determines that the people themselves are the source from which all legislation emanated directly and no longer remained in their representatives other than as they—after examining their work concluded to approve it by nonaction. This new style of a bill was to give emphasis to the new method of legislation, and it is an outward form and expression of this concrete fact.

The Oregon court, in considering the effect of a consti-

tutional amendment upon provisions in the existing Constitution not consistent with it, said: "There is no express repeal, they simply cease to exist by reason of new provisions on the subject being substituted for them." Ex parte *Prindle*, 94 Pac. 871.

That is exactly the situation in regard to section 19, article 5, of the Constitution of 1874. By reason of this new provision prescribing the form of enacting clause for all bills, it ceased to exist, and this new style was then substituted therefor. Therefore, we conclude that an enacting clause running in the name of the General Assembly is invalid since the adoption of the Initiative and Referendum Amendment, and all bills, before they can become laws, must have an enacting clause substantially as prescribed in the amendment. "Be it Enacted by the General Assembly" can not be substantial compliance with "Be it Enacted by the People." Each has a definite meaning. Each indicates the source of power giving force to the act. Each represents its day and the stage of popular government of that day. They are not interchangeable; they present different thoughts, different views, different hopes, and mayhap different illusions. The use of one is not equivalent to the use of the other, so as to fulfill the rule of substantial compliance.

With the conclusion of special Justices HILL and MCCOLLUM as to the validity of bills enacted by the Legislature, upon its own initiative, bearing the style, "Be it Enacted by the People of the State of Arkansas," Special Justices HOUSE and WALKER concur, but for reasons different from those holding that the style of such bills is a substantial compliance with the provisions of section 19 of article 5 of the Constitution, and that, therefore, any bill bearing the title, "Be it Enacted by the People of the State of Arkansas," is a valid enactment, whether it be enacted by the General Assembly or initiated and enacted by the people. *Vinsant* v. *Knox*, 27 Ark. 266; *Jackson* v. *State*, 101 Ark. 437.

With this view I do not concur, as I do not think the enacting clause, "Be it Enacted by the People of the State of Arkansas," is a substantial compliance with section 19, article 5, of the Constitution.

That leaves for our consideration the question as to

whether or not the district is invalid because of the alleged uncertainty of the description of the territory proposed to be embraced therein. We understand the law to be that, when the Legislature creates a levee or other improvement district, it must define its boundaries with certainty, or provide for the same being done by some other agency. The Legislature undertook to define the limits of this district. We have carefully considered the act, and hold that it fails to define the limits of the district with sufficient certainty to determine what lands are included therein. Among other defects in the description are these: The stopping point of the line of the district in section 2, township 10 north, range 3 west, being the end of the first call, is not located. The course through sections 1, 2, 11, 10, 9, 16, in township 9 north, range 3 west, is not sufficiently defined. The line along White River is not fixed, but is left to be placed where it is deemed most practical. There are other defects in the description, but we do not discuss them, as those already mentioned are sufficient to defeat the act for uncertainty in the description of the territory proposed to be embraced therein. We hold the act invalid for this reason.

The cause is, therefore, reversed and remanded with directions to the court below to overrule the demurrer and grant the petitioners the relief prayed.

OAK LEAF MILL COMPANY v. LITTLETON.

Opinion delivered October 21, 1912.

1. MASTER AND SERVANT—DUTY AS TO APPLIANCES AND PLACE TO WORK.—The test of a master's duty in furnishing appliances and a place to work is what a reasonably prudent person would have ordinarily done in such a situation; and proof of what was the custom of others under like conditions and circumstances is evidence, but not conclusive, of what a reasonably prudent person would ordinarily do. (Page 399.)
2. SAME—NEGLIGENCE QUESTION FOR JURY WHEN.—Where a master furnishes, or causes to be built under his direction and control, a platform, scaffold, staging or like structure for the use of his servant in the prosecution of the work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated; and

where the facts are such with reference to the negligence of the parties that reasonable minds might differ with respect thereof, the case should go to the jury. (Page 401.)

3. SAME—INJURY TO SERVANT—PROXIMATE CAUSE.—Leaving two planks unfastened in the floor of a log deck in a saw mill was the proximate cause of an injury to a log scaler where, when he was on the deck in the course of his duties, a log rolled down, struck the lower end of one of the planks and caused the other end to fly up and dislodge other logs which rolled down on him. (Page 403.)

4. SAME—ASSUMED RISKS.—A servant is bound only to see patent risks and does not assmue risks arising from latent defects or dangers in the machinery, appliances or place furnished for his use by the master. (Page 404.)

5. INSTRUCTIONS—IGNORING EVIDENCE.—An instruction to the effect that if defendant was guilty of negligence which caused plaintiff's injuries, and plaintiff was not himself guilty of contributory negligence, he was entitled to recover, was not objectionable as leaving the jury to find the defendant negligent, regardless of the evidence, where other instructions told the jury that a finding of negligence must be based on evidence. (Page 404.)

6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.—A verdict of $1,500 for injury to plaintiff's ankle was not excessive where he was confined to his room for a month, where his ankle was stiff and painful at the trial four months after the injury, and there was evidence that the injury was permanent. (Page 405.)

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

STATEMENT BY THE COURT.

This is an action by a laborer against his employer to recover damages for injuries received in the course of his employment. The facts in the case are substantially as follows:

The Oak Leaf Mill Company is a corporation engaged in the operation of a saw mill, and is the defendant in this action. The plaintiff, William Littleton, was a log scaler for the company, and his duties required him to pull the logs up into the mill from the mill pond, scale them, kick them out on the log deck and keep them down against the saw-carriage, where the sawyer could throw them on his carriage by a mechanical appliance called a "trip." Littleton's duties made it necessary for him to go at times to all parts of the log deck to keep the logs down where the sawyer could reach them. He was injured on the 20th day of September, 1911, and had been at work in the position of scaler for about one year before he was

injured. About one month before his injury the mill company constructed a new log deck. This log deck is situated in the east end of the saw mill. The log deck is an inclined platform sloping from north to south, with a gradual fall of three feet from the highest to the lowest point. It is eighteen feet long from north to south and between twenty-four and twenty-six feet wide from east to west. Attached to the log deck, and running north and south the length of the deck and parallel to one another, were skid rails along which the logs were rolled from the upper to the lower side of the deck. These skids were placed at a distance of about six feet apart, and were between six and eight inches higher than the deck floor. The deck was floored with planks two inches thick and twelve inches wide. The planks were nailed down upon heavy sills, which are eight inches thich and eight inches wide. All of the planks in the floor are nailed down except two at the lower side of the deck. The two unfastened planks are between five and six feet in length, and have the same width and thickness as the other planks in the deck floor. They are situated something like one half way between the east and west side of the deck, and are located on the lower side of the deck. An appliance called the "nigger bar" is situated directly beneath these two unfastened planks. The two unfastened planks rest upon the first and second sills, and their upper ends are supported by the second sill and fit up against the ends of the other planks of the floor which are nailed to the sill. Their lower ends are supported by the first sill and extend over the sill from five to six inches. The two unfastened boards are made to fit the other parts of the floor. To keep them in place and prevent their slipping, cleats of wood are nailed upon the under side of the two planks at both ends and fit up against the sides of the two sills which support the boards. In this way the two planks are fitted into the floor of the deck, so that they can be taken out and placed back without delay and inconvenience. The purpose of this is to enable the operatives to get to the bolts and other attachments of the nigger bar, which are located under the deck floor at this place, and by means of which the nigger bar is adjusted. Parallel with the south or lower side of the log deck and adjacent to it is the carriage track along which the saw carriage

runs. The logs were loaded from the deck on the saw carriage by means of a loading appliance which is situated at the lower end of the deck and operated by a lever in the sawyer's stand. This loading appliance consists of what is called a trip or "nigger bar" and the loader. The "nigger bar" is a perpendicular iron bar set back in the log deck some three feet from the edge of the deck which is next to the carriage track. It is about half way from the east and west side of the deck. The trip or nigger bar is secured by means of bolts and other attachments beneath the deck floor. South of the nigger bar, and between it and the edge of the log deck, is the "loader." This is a cylindrical shaft of iron some four inches in diameter, running east and west across the deck floor, and attached to the floor in such a manner as to enable the sawyer to operate a lever and make the loader seize the logs and throw them on the carriage. Attached to the loader, and extending at right angles with it, are iron arms or knives about two and one half feet long, which reach out and take hold of the logs on the deck which are to be loaded on the carriage.

William Littleton testified: "I had been working as log scaler for the defendant company about one year before I was injured. My duties made it necessary for me to go at times to all parts of the log deck to roll the logs down to where the sawyer could reach them. On the day I was injured I had pulled up from the pond and kicked out on the log deck enough logs to make the deck about half full. Some of the logs had knots on them and stopped on the inclined platform so there were no logs nearer the saw-carriage than about four feet. This made it necessary for me to move the logs down where the sawyer could get to them with his trip. The log nearest to the sawyer's carriage had a knot on it, and I took my cant hook and shoved the log down at its east end. I then went to the west end and pushed the other end of the log down. This left the other logs standing between four and five feet from the lower end of the log deck. They were stationary because of the small knots in the logs which kept them from rolling on down the log deck. After I had shoved the first log down I started to go back across the deck from the west to the east and walked between the log I had already shoved down and those which were stationary under the

deck above me. While walking back across the deck, and just as I got about midway, and stepped on one of the unfastened planks, the sawyer, being ready for the log which I had pushed down next to the carriage, worked his trip, and the log, being by the trip turned forcibly, fell with a knot striking the projecting end of one of the unfastened planks with such force that it caused the upper unfastened end to fly up. The upper unfastened end when it flew up struck one of the logs with such force that it jarred the logs loose and caused them to roll down towards me. Because of the fact that I was on the unfastened plank that flew up, I became unbalanced, and in jumping towards the east to get clear of the logs I was caught by one of the logs rolling down on my foot before I could get in the clear, and my foot was badly crushed. The old log deck had all of the planks on it nailed down. The deck floor was habitually covered with bark and trash, and the fact that the two planks were not nailed to the floor was not noticeable, and I did not know that they were not nailed down like the rest of the floor."

Another witness for the plaintiff testified that he was a scaler for the mill company, and that a day or two before he had seen the loose planks kick up by having a log roll over and strike the lower end of them. He said the upper end of the loose planks would jump up when the logs struck the lower end.

The sawyer for the mill company testified that just before Littleton was hurt it was not necessary for him to operate the trip and throw a log on the carriage because he already had one on there. He said that he did not operate the trip. He said that he never operated the trip until he was ready to place another log on the carriage, and that when he was ready to do this he made a fuss with the trip to give the scaler notice.

The dogger on the saw-carriage testified that he was looking at Mr. Littleton when the injury occurred. He said it was his duty to watch him so he did not roll the logs so far that they would run on the carriage. That when Mr. Littleton was hurt he was rolling down the logs himself. That he had his shoulder against the handle of his cant hook trying to roll a log down. That the log he was prying at broke loose from the other logs and the one just behind it rolled

down on Mr. Littleton before he could get out of the way.

W. N. Mosley testified: "I am the foreman of the defendant's mill, and have been engaged in the saw mill business about seventeen years. For the first ten years I was engaged in construction work, and during the last seven years in the operation of saw mills. During my employment in construction work I have built log decks for saw mills. I know what is considered a good log deck. I have examined log decks at other saw mills. The log deck at the mill of the defendant, where Mr. Littleton was hurt, is about the same as other log decks. I constructed it, and left the two planks unfastened in order that we might get down where the nigger bar was and adjust the bolts when it became necessary. It is necessary very frequently to adjust the bolts of the nigger bar. The logs do not, as a usual thing, roll down and cause the planks to kick up. They could not kick them up on account of the shaft on the other side of the mill. They go under the shaft, and I do not see how anything could go higher than that shaft. It could not go higher than four inches. It only extends about three inches over the shaft, and the logs rolling down there could not knock them and make them go higher than the shaft. It is the customary method of constructing log decks to have loose planks like the ones in question so as to take them out. I have not worked in any mill where they did not have the loose boards in the log deck. I never saw any mill that did not have the loose boards in the log deck, as we have them here. I do not see how the boards would kick up if a rolling log with a knot on it were to roll down and strike the end of the boards, because the shaft extends over the sill, as I have already indicated. The planks go under the skids and extend over the sill; if a log rolls down with a knot on it, the knot would not strike the two planks on account of the shaft. You would have to take the shaft out before it would.

William Littleton, recalled, testified:

"Q. Mr. Littleton, you heard what Mr. Mosley there testified with reference to that shaft preventing that plank from kicking up; under the circumstances I wish you would explain to the jury just how that is—I will ask you, first, is he or is he not mistaken about what he says?

"A. Well, I will make my statement, and they can say

for themselves. Now, this shaft runs across under there for these rollers to hang on; it is about five inches above the floor; and, when a log has a knot on it, it runs down and strikes under that shaft, and when it strikes down there, this plank flies up; the knot can go in between this shaft and the end of these boards, and that throws that up, like that (indicating).

"Q. There is nothing then to prevent a knot from striking that plank there and kicking that plank up, just like that, or just like it did do?

"A. No, there is nothing to prevent it from doing that; and he can describe it just like I can, and he knows it done it."

Other facts will be stated or referred to in the opinion.

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

T. D. Wynne, for appellant.

1. An employer is not an insurer of his employee's safety. He is not bound to furnish hisser vant with absolutely safe appliances, nor an absolutely safe place in which to work, but in the discharge of his duty in this respect he is held to the exercise of ordinary care only. 79 Ark. 437; 80 Ark. 263; 92 Ark. 138, 143; 97 Ark. 180. In determining whether the master has performed his duty of ordinary care with reference to providing reasonably safe instrumentalities and places for the employee to do his work, the legal standard is the custom and usages of employers engaged in like business, and with establishments similar to his own. 1 Labatt, Master & Servant, p. 110, § 44; 60 Ark. 582, 586; 159 Fed. 680, 86 C. C. A. 548; 17 S. W. 580; 136 S. W. 720; 67 S. E. 357; 125 S. W. 739. The presumption will prevail that the appellant was without negligence in the construction of its log deck until overcome by a preponderance of the evidence. 46 Ark. 567; 79 Ark. 437.

2. The evidence does not show that the two loose boards in the log deck were the proximate cause of the accident. Negligence, to be actionable, must be the proximate cause of the injury complained of. 76 Ark. 436; 77 Ark. 367; 86 Ark. 289.

3. The injury complained of was the result of a risk which appellee assumed. A servant assumes all the risks of his employment ordinarily incident to the service, and the

extraordinary risks when it is shown that he knew and appreciated the danger, and, in the absence of physical compulsion, elected to bear them. 68 Ark. 316; 77 Ark. 367; 82 Ark. 11; 97 Ark. 486.

4. Instruction No. 1 ignores the evidence in the case and practically charges the jury to find for the plaintiff regardless of the evidence if it believed that defendant was negligent in the construction of its log deck. 70 N. W. 671. An instruction not based on the evidence is erroneous. 35 U. S. 657; 183 U. S. 42; 63 Ark. 563; 76 Ark. 333; 77 Ark. 201.

J. C. Ross, for appellee.

1. There was evidence to sustain the verdict. The question whether appellant was negligent in the construction of the log deck was one for the jury. 97 Ark. 558, 559. It was the duty of appellant to exercise such degree of care as the particular circumstances demanded. 1 Thompson on Neg., § 25; *Id.* § 30; *Id.* § 32; 38 Ark. 266; 68 Ark. 259; 61 Tex. 3; 7 Mo. App. 359; 55 Me. 444; 31 Ala. 508; 50 Ill. 65; 109 Mass. 127; 1 Wash. 446; 43 Minn. 289.

2. Whether appellant was negligent, and whether that negligence caused appellee's injuries, were questions for the jury to decide under the disputed facts, and were properly submitted to them. 77 Ark. 458; 87 Ark. 217; 92 Ark. 102; 97 Ark. 358.

3. A servant does not assume the risks growing out of the negligence of the master.

4. No prejudice resulted to appellant by the giving of instruction No. 1. The jury was fully informed by other instructions given that the burden was on appellee to establish his claim to damages by a preponderance of the evidence.

HART, J., (after stating the facts). The defendant adduced evidence tending to show that the log deck in question was built like those in common use by other saw mills. Counsel for the defendant insist that, inasmuch as the master is not bound to use the newest and best appliances, he performs his duty when he furnishes those which are in common use and are reasonably safe, and that the former is the test of the latter. There is an irreconcilable conflict of opinion upon the question whether or not the master, in furnishing appliances

for the servant, has fulfilled his duty in this regard by furnishing those which are ordinarily used in the business. An extended discussion and citation of authority on both sides of the question will be found in the case note to *Niko Wiita* v. *Interstate Iron Company*, 103 Minn. 303, 16 L. R. A. (N. S.) 128.

A careful consideration of the question leads us to the conclusion that the contention of the defendant is not sound. It is true that a master is only bound to exercise ordinary care to furnish his servant a safe place in which to work. *Holmes* v. *Bluff City Lumber Co.*, 97 Ark. 180; *Ozan Lumber Co.* v. *Bryan*, 90 Ark. 223.

In the case of *Wilcox* v. *Hebert*, 90 Ark. 145, we held: "A master is only held to the exercise of ordinary care, proportionate to the danger to be incurred, in the selection of reasonably safe machinery and appliances, and in keeping them in proper condition, and it is not an insurer of the safety of the appliances furnished, nor bound to supply any particular kind of machinery, nor to use any particular character of safeguard against danger." But the controlling test of the exercise of reasonable care is not what has been practiced by others in like situation, but what a reasonably prudent person would have ordinarily done in such a situation. A bad custom may have grown up through ignorance or selfishness.

The jury were required to test the character of the defendant's conduct by what a reasonably prudent person would ordinarily have done in the like circumstances, as disclosed by all of the evidence, including that relating to the conduct and practice of others. What was the custom of others under like conditions and circumstances is evidence of what a reasonably prudent man would ordinarily do, but it is not conclusive evidence of that fact. Professor Wigmore, in discussing this phase of the question, says:

"The distinction is in itself a simple one: (1) The conduct of others evidences the tendency of the thing in question; and such conduct—*e. g.*, in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence

that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence in spite of the above evidence. (2) Meanwhile, the substantive laws tell them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law. This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential, and is not to serve as a legal standard." Wigmore on Evidence, § 461. See also 1 Labatt on Master & Servant, § 50; *Chicago Great Western Ry. Co.* v. *McDonough*, 161 Fed. 657, 88 C. C. A. 517; *Chicago, M. & St. P. R. Co.* v. *Moore*, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 963.

It is next insisted by counsel for defendant that there was no negligence on its part, and that the court erred in refusing to take the case away from the jury. As we have already seen, it is the duty of the master to exercise ordinary care in seeing that the servant is provided with a reasonably safe place in which to work, and in default thereof he is guilty of negligence. Where a master furnishes, or causes to be built under his direction and control, a platform, scaffold, staging or like structure for the use of his servant in the prosecution of his work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated. 26 Cyc. 1115. The general rule is that, where the facts are such with respect to the negligence of the parties that reasonable minds might differ with respect thereof, the case should go to the jury.

The alleged defect in the log deck was a structural one. The evidence on the part of the plaintiff shows that in the

discharge of his duties he was required at times to go on all parts of the deck, that frequently when the logs were started by him down the deck they would stop rolling on account of the knots in them, pinning them to the floor; that in such cases he was required to go down and take a cant hook and roll them down to the foot of the deck near the saw carriage; that the deck in question had two loose boards, which had cleats on the under side to keep them in place, but which were not nailed down to the sills like the other planks in the floor; that these unfastened planks fitted closely in to the other parts of the flooring; and that on this account, and because of the accumulation of shavings on the deck floor, he was not aware that the planks were not nailed down. On the day he was injured, a lot of logs had accumulated on the upper part of the deck, and failed to roll down to the lower end of it because of some knots in the logs. The plaintiff took his cant hook and rolled one of these logs down the deck next to the saw carriage. He says that on his way back from the west to the east end of the deck he had occasion to walk across these unfastened planks, and that just as he stepped on one of them the sawyer worked the trip, and this caused the log at the lower end of the deck to strike the unfastened plank and make it fly upwards. The plank as it flew upwards struck the mass of logs piled up above them on the floor of the deck with such violence as to dislodge them, and they rolled down and crushed his foot. The evidence on the part of the defendant shows that it was necessary to construct the log deck with these unfastened planks in order to go down under the deck to adjust the nigger bar, when it became necessary. Evidence was also adduced by it tending to show that this was the usual and customary way to construct log decks. It will be observed that the two planks had cleats nailed on their under side to keep them in place, so that the planks were constructed in the nature of a trap door. At but little cost, hinges or other fastenings could have been put on them so that when a log with a knot on it struck the lower part of the planks they would not fly up. The evidence for the defendant also tends to show that the injury did not happen as testified to by the plaintiff himself, but that the plaintiff himself started the logs to rolling by pulling on them with his cant hook.

It is also insisted by counsel for defendant that the case should have been taken from the jury because the physical facts are opposed to the testimony given on the part of the plaintiff. We can not agree with him in this contention. The plaintiff himself testified that the injury occurred as detailed above. Another witness for the plaintiff testified that he was a log scaler at the defendant's mill and had seen the unfastened planks fly up by reason of a log with a knot on it striking the lower end thereof. He said this had occurred only a day or two before the day he testified. The undisputed testimony shows that the unfastened planks extended about five inches over the sill next to the saw carriage, and, according to the testimony of the plaintiff, there was sufficient room for a log with a knot on it to strike the lower end of these unfastened planks and cause them to fly up. The shaft extended in a parallel direction to the lower end of the deck floor. The plaintiff said that a knot could go between this shaft and the end of the unfastened plank; that there was nothing to prevent the knot from striking the plank and kicking the plank up.

Under all the facts and circumstances adduced in evidence, we think both the question of the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury. As bearing on the question and as illustrative cases, we cite the following: *Oak Leaf Mill Co.* v. *Smith,* 98 Ark. 34; *Doyle* v. *Missouri, K. & T. Trust Co.,* 41 S. W. (Mo. Sup. Ct.) 255; *Rice & Bullen Malting Co.* v. *Paulsen,* 51 Ill. App. 123; *Burnside* v. *Peterson,* (Col.) 17 L. R. A. (N. S.) 76.

It was contended by counsel for defendant that the leaving of the two loose boards in the log deck floor was not the proximate cause of the accident, but we can not agree with his contention, It is a fundamental rule of law that, to recover damages on account of unintentional negligence of another, it must appear that the injury was the natural and probable consequence thereof, and that it ought to have been foreseen in the light of the attending circumstances. *St. Louis, I. M. & S. Ry. Co.* v. *Bragg,* 69 Ark. 402; *St. Louis, I. M. & S. Ry. Co.* v. *Buckner,* 89 Ark. 58; *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576.

From the evidence it appears that it was the duty of the plaintiff to go at times on all parts of the deck floor. The logs, by reason of having knots on them, frequently lodged on the deck floor, and the plaintiff was required to pry them apart and roll them down next to the saw carriage. According to the testimony of the plaintiff, it would sometimes happen that when the sawyer worked the trip on a log with a knot on it the knot would strike one of these loose boards and cause the upper end to fly up. That the end which flew up might strike logs which had lodged just above it and cause them to roll down was an occurrence which might reasonably have been anticipated and regarded as likely to happen.

Inasmuch as the plaintiff's duty required him to be on all parts of the log deck, and as, according to his testimony, he had no notice and could not be charged with notice that the planks were not nailed down to the floor, the injurious consequences of such an accident as did happen might have been avoided if the defendant had nailed the unfastened planks to the floor or had warned the plaintiff that they were not nailed down. When the situation of the plaintiff with reference to his work is considered, we are of the opinion that a man of ordinary experience and sagacity could foresee that the result which did happen might ensue.

Little need be said on the question of the assumption of risk. The alleged defect was a structural one, necessarily known to the master. A servant is bound only to see patent defects, and he does not assume the risks arising from latent defects or dangers in the machinery, appliances or place furnished for his use by the master. *Archer-Foster Construction Co.* v. *Vaughan,* 79 Ark. 20. As we have already seen, the deck floor was nailed down, except the two short planks, and, according to the testimony of the plaintiffs, these planks fitted up closely to the other part of the deck floor, and the whole floor was habitually covered with bark and trash, so that the fact of the two planks not being nailed down was not apparent. Therefore, the risk was not an obvious one, and for that reason was not one assumed by the plaintiff as an incident to his employment, and the question of assumed risk was properly submitted to the jury.

It is next insisted by counsel for defendant that the court erred in giving the following instruction to the jury:

"The court instructs the jury that it was the duty of the plaintiff, in the performance of his duties of employment, to exercise ordinary care for his own safety, and it was also the duty of defendant company to exercise ordinary care in furnishing plaintiff a reasonably safe deck floor on which to perform his duties and work. If, in the construction of said deck floor, defendant left unfastened planks so fitted up against the ends of other planks as not to be noticeable; and if you believe this was negligence, and further believe such negligence caused plaintiff's injuries to his foot and ankle, as charged in the complaint, then, unless the plaintiff was guilty of negligence, causing or contributing to his own injury, or assumed the risk of injury, he is entitled to recover in this case."

Counsel for the defendant insists that the instruction leaves out of consideration entirely the evidence in the case, and in fact tells the jury to find for the plaintiff if they believe that defendant was negligent in the construction of its log deck, regardless of the testimony in the case. We do not think the instruction is susceptible of that construction. The court in another instruction had told the jury what the relative duty of the plaintiff and defendant to each other was, and had expressly told them that their finding of negligence or not must be based upon the evidence. The court explained to the jury what constituted negligence on the part of the defendant, and manifestly by the language used in this instruction did not intend to tell the jury it might set up an arbitrary standard of negligence of its own, but, on the contrary, meant to tell the jury that negligence on the part of the defendant must be found by them from the evidence introduced in the case, under the law as given them by the court.

Finally, it is contended by counsel for defendant that the verdict is excessive. The jury returned a verdict for the plaintiff in the sum of fifteen hundred dollars. The plaintiff was confined to his room for one month. He testified that his ankle was still stiff, and that he could only walk with difficulty. Other evidence was introduced by him tending to show that his injury was permanent. The plaintiff testified that he suffered great pain from the injuries, and that his foot pained him

at the time of the trial, which was nearly four months after the injuries were received by him. Therefore we do not think the verdict is excessive. The judgment will be affirmed.

KIRBY, J., dissents.

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

Opinion delivered October 28, 1912.

1. PLEADING—AMENDMENT—DISCRETION OF COURT.—It was not an abuse of discretion to refuse to permit plaintiff to amend his complaint several days after the cause of action had been dismissed. (Page 410.)
2. SAME—AMENDMENT—DISCRETION OF COURT.—The court did not err in refusing to allow an amendment to the complaint which in the court's view would have rendered the complaint inconsistent and contradictory. (Page 410.)
3. CARRIERS—REASONABLENESS OF REGULATION—QUESTION FOR COURT.—The act of April 30, 1907, § 3, p. 558, provided that it shall be lawful for railroads to prescribe rules and regulations for the transportation of merchandise, live stock and other freight that are reasonable and not inconsistent with the common law or statutory duties and liabilities of railroads as common carriers; and that "the reasonableness or unreasonableness of such rules and regulations mentioned in this section shall be determined by a jury in all cases where the same becomes an issue before any court." *Held*, that the latter provision has no application where the facts are undisputed upon which the issue of reasonableness or unreasonableness is predicated. (Page 410.)
4. SAME—INJURIES TO GOODS—NOTICE.—A provision in a bill of lading of fruit that a written notice of intention to claim damages should be presented to the carrier within thirty-six hours after notice to the consignee of arrival of the fruit at the place of delivery is not unreasonable, as it is the consignor's duty to have the consignee or an agent at the destination to ascertain the condition of the fruit. (Page 411).
5. SAME—INJURIES TO GOODS—NOTICE.—Provisions in a bill of lading requiring a written notice of intention to claim damages are not limitations upon or exemptions from liability, but merely conditions precedent to recovery, and such notice is not necessary where the carrier has examined and knows the condition of the goods upon their arrival at their destination. (Page 413.)

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

STATEMENT BY THE COURT.

This was a suit by the appellants against the appellee to recover damages for loss to a shipment of peaches which appellants allege in their complaint were delivered to the appellee at Greenwood, Arkansas, for shipment to St. Joseph, Missouri, and that through the negligence of appellee in carrying out its contract, (which alleged acts of negligence are specifically set out in the complaint), plaintiffs were damaged, for which the appellants pray judgment.

The complaint in the present case is, in all essential particulars except the amendment to paragraph 1, similar to that which was held sufficient in *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie,* 101 Ark. 172. The amendment to paragraph 1 of the complaint is as follows:

"That after said peaches were accepted for shipment by the defendant and had been loaded into said car for shipment, and without further consideration passing, the defendant issued and delivered a receipt or bill of lading therefor and delivered the same to R. C. Cumbie. That a copy thereof is hereto attached and marked Exhibits A and B. That the defendant used no other form of receipt, and would not have given plaintiff a different one, and that plaintiff paid full rates upon said shipment. That said writing contained a clause providing that in case of damage to said fruit the consignee should give notice to the delivering carrier of an intention to claim damage therefor within thirty-six hours after notice of arrival of the freight at the place of delivery. That said clause was inserted therein without the consent of plaintiff, or the owners of said peaches or of the said J. B. Paine, consignee thereof. That said provision was unreasonable in this, towit: That the owners of said fruit lived at Greenwood, Ark., when said peaches were shipped and when the same arrived at St. Joseph, Mo.; that it was more than thirty-six hours before the same could be examined in the regular course of business and the damage found; that the consignee thereof was at Van Buren, Ark., at the time, and had hundreds of cars of peaches in transit to different points of destination from Denver, Col., to New York, N. Y., and was obliged to obtain the same from the delivering carriers to commission merchants who were mere selling agents, and had no

authority, and who, in this case, had no knowledge of the condition of said peaches when loaded by the initial carrier, and who had no knowledge or information that the same had been damaged in transit, and had been damaged through the fault and negligence of any of the carriers, and had no means of knowing of the intention of the consignee thereof or of the owners thereof to claim damage therefor; that the consignee could not give said notice within said time for the reason that he did not know within said time that the same had been damaged; or of the real condition of the peaches when accepted for shipment or upon arrival; that the time was unreasonably short; that the delivering carrier examined said peaches upon arrival and knew for itself the condition of the consignment on arrival; that the defendant, the general agent for fruit shipments, C. F. Carstarphen, and its local agent at Greenwood, Ark., L. W. Rhodes, knew of the foregoing material matters; that by reason of delay in arrival of said peaches at their destination as aforesaid the market value thereof declined $1.00 per crate before their arrival, and plaintiff was damaged said amount by reason thereof."

A demurrer was interposed to the complaint, containing nine grounds, the sixth of which is as follows: "There is no allegation of a compliance with the terms of the written contract to any paragraph of plaintiff's complaint; that the bill of lading provided: 'Claims for damages must be reported by consignee in writting to the delivering line within thirty-six hours after the consignee had been notified of the arrival of the freight at place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable.'" The seventh ground raised practically the same question as the sixth ground, copied above. The court sustained the demurrer, among others, on the sixth and seventh grounds, and dismissed the complaint. Several days after the complaint had been dismissed, the appellants offered certain amendments, which the court refused to allow, and appellants had their exceptions noted to the ruling of the court in refusing to allow these amendments. They also duly expected to the ruling of the court in sustaining the demurrer and dismissing their complaint, and have duly prosecuted this appeal.

Robert A. Rowe, Rowe & Rowe and *C. A. Starbird,* for appellant.

1. The provision in the bill of lading for notice of claim for damages within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery is not a condition precedent to the right of the shipper to recover, but is a mere limitation upon that right which is a matter of defense, the burden of pleading and proving which is on the defendant. 1 Hutchinson on Carriers, § 447, and cases cited; 14 Am. & Eng. Ann. Cases, 414; 108 S. W. 1032; 113 S. W. 6; 122 App. Div. 10; 106 N. Y. S. 702.

The validity of such a provision depends in any event upon its reasonableness; and where it is prohibited, as in our State, by statutory enactment, it is void. Acts 1907, pp. 557-8 §§ 1, 2, 3 and 4; 90 Ark. 312. The reasonableness of such a provision must be determined from all the facts and circumstances of each particular case. *Id.*; 67 Ark. 407; 165 Ill. 78; 41 Ill. App. 608; 54 Miss. 566; 180 U. S. 49; 67 Tex. 166; 70 Tex. 611; 75 O. St. 249; 9 Am. & Eng. Ann. Cases 15; 1 Hutchinson on Carriers, § 452; *Id.* § 443; 58 Ark. 138; 59 Fed. 879; 132 Fed. 52. Carriers may waive such condition. 1 Hutchinson on Carriers, § 444, and authorities cited; 70 Ark 401; 69 Ark. 256, 257.

2. In an action to recover damages for deterioration in a fruit shipment caused by the negligent failure of the company to properly ice the cars, etc, a complaint which alleges amongst other things that the delivering carrier examined the fruit and knew for itself the condition of the shipment on arrival, and that the defendant carrier, its general agent for fruit shipments and its local agent at the initial point of shipment knew all of the material matters alleged, is good on demurrer, since under such conditions notice under the thirty-six hour provision would not be necessary. 63 Ark. 331; 38 S. W. 515; 8 Kan. App. 642; 56 Pac. 538; 89 Pac. 903; 68 Ark. 218; 57 S. W. 258; 68 Ark. 218; 67 Ark. 407; 60 Miss. 1017; 62 Mo. App. 1; 34 *Id.* 98; 23 *Id.* 50; 25 S. W. 142; 86 Tenn. 198, 97 Va. 248; 68 Mo. 268; 65 Mo. 629.

3. The court should have allowed the amendment after sustaining the demurrer. Kirby's Dig., § 6145.

Thos. B. Pryor, for appellee.

1. Appellants can not avoid the effect of the provision in the contract providing for notice within thirty-six hours of any claim for damages by pleading that that clause was inserted without the consent of the owners of the fruit. 50 Ark. 406.

2. The giving of the notice provided for in the contract was a condition precedent to the right of recovery, and an allegation in the complaint of a compliance therewith was essential. 90 Ark. 308; 82 Ark. 357.

3. There was no abuse of discretion in refusing plaintiffs leave to amend after the demurrer was sustained, especially where the amendment offered was in direct conflict with the former complaints filed.

WOOD, J., (after stating the facts). 1. Conceding, without deciding, that the amendments tendered contained subject-matter germane to the cause of action set up in the original complaint, the court nevertheless did not abuse its discretion in refusing to allow these amendments to be made at the time when they were offered. Appellants did not offer to amend the complaint until several days after the cause of action had been dismissed.

The court, in sustaining the demurrer and dismissing the complaint for the reasons set forth in the sixth and seventh grounds of the demurrer thereto, held that there was no allegation of a compliance with the terms of the written contract set up in the complaint. Having so decided, the court did not err in refusing to allow an amendment which, in the court's view of the complaint, would have rendered the same inconsistent and contradictory.

The only question we now decide with reference to these amendments is that the court did not abuse its discretion in refusing to allow them at the time they were offered. As the case must be reversed for reasons hereinafter stated, if counsel are so advised, they may offer and obtain a ruling of the lower court on these amendments at the next hearing.

2. The question presented by the court's ruling on the sixth and seventh grounds of the demurrer is whether or not appellants allege in their complaint facts sufficient to show a compliance on their part with the contract of shipment,

as set up in their complaint, which provides that "in case of damage to said fruit that the consignee thereof shall give notice to the delivering carrier of an intention to claim damages therefor within thirty-six hours after notice of the arrival of the freight at the place of delivery."

The appellants did not allege in their complaint that they complied with this provision of the contract by giving the written notice specified therein, but they allege that the provision requiring written notice was unreasonable, and set out facts which they say show it to be an unreasonable provision. The facts as alleged must be taken on demurrer as uncontroverted. It therefore becomes a question of law as to whether these facts are sufficient to show that the provision is or is not unreasonable, and not an issue to be submitted to the jury under the provisions of the act approved April 30, 1907, requiring "the reasonableness or unreasonableness of such rules and regulations to be determined by a jury." That provision can have no application in cases where the facts are undisputed upon which the issue of reasonableness or unreasonableness is predicated. See *Kansas & Arkansas Valley Ry. Co.* v. *Ayers*, 63 Ark. 332.

Without repeating here the facts alleged in the complaint to show that the provision for written notice was unreasonable, it is sufficient to say that in our opinion these facts are not sufficient to show that the provision was unreasonable. The fact that the owners of the fruit shipped lived at Greenwood, and the destination of the fruit was at St. Joseph and other distant points out of the State where the goods were consigned, would not show that the provision for notice was unreasonable, nor would the fact that the consignee was at Van Buren, Arkansas. The fact that the consignor and the consignee depended upon commission merchants at points of destination to receive the shipments for them, and that these commission merchants had no knowledge of the condition of the peaches when loaded, and no knowledge that they had been damaged by the carrier in transit would not be sufficient. If the consignor or the consignee could not themselves be at the points of destination so as to obtain the necessary knowledge of the condition of the peaches when delivered to enable them to give notice of an intention to claim damages therefor in

case of damage or loss, they would have to have agents at such points of consignment, and could give such notice within the time prescribed. *Arkadelphia Milling Co.* v. *Smoker Mdse. Co.*, 100 Ark. 37; *Chicago, R. I. & P. Ry. Co.* v. *Neusch*, 99 Ark. 568; *St. Louis, I. M. & S. Ry. Co.* v. *Townes*, 93 Ark. 430.

It would be the consignor's duty to have either the consignee himself at the point of destination or to have some agent there representing him to whom the delivery could be made, and who could ascertain the condition of the shipment when it arrived at its destination, and who could give the notice required by the contract. Thirty-six hours after notice of arrival for notice of a claim for damages is not an unreasonably short time for the consignee to receive all the information necessary as to the damage he has sustained, if any, and to give written notice of an intention to claim such damage to the delivering carrier.

Mr. Hutchinson, in his work on Carriers, (3 ed.), § 442, says: "The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such lapse of time as to frequently make it difficult, if not impossible, for him to ascertain the truth. It is just, therefore, that the owner, when the loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the reasonable conditions of the contract."

We quoted the above from Mr. Hutchinson in the case of *St. Louis & San Francisco Rd. Co.* v. *Keller*, 90 Ark. 308. In the latter case the contract for notice provided that "no carrier shall be responsible for loss or damage of any of the freight shipped unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination. No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery."

The court, in discussing this provision, made no distinc-

tion between the provision requiring notice for loss or damage and one requiring notice of an intention to claim damage, but treated such provision as meaning the same thing, as shown by the authorities cited and the language of the opinion. In the above case it was held that such a provision in the contract is "a condition of recovery and not an exemption from liability." "Its effect," says Judge FRAUENTHAL, speaking for the court, "is to require the one who has the peculiar knowledge to inform the other who has not that knowledge to seek the facts while they exist, so that the facts may be obtained and presented by both sides; its effect is therefore to uphold and enforce rights if they are founded on truth, and not to limit or defeat those rights." And, continuing, he says, "This court has uniformly upheld and enforced similar provisions in contracts of common carriers where the same, under the circumstances of the case, were reasonable and the damages occurred during the actual transportation of the goods;" citing many cases of this court where the provision of the contract required "notice of intention to claim damages" to be given in writing, etc.

So, under our decisions, it makes no difference whether the provision of the contract requires written notice "of loss or damage" to be given, or whether the language of the contract provides for written notice of an "intention to claim" for loss or damage. Under our decisions, the purport of these provisions is the same, have the same legal effect, and are not limitations upon or exemptions from liability of the carrier, but are only conditions precedent to recovery. *St. Louis, I. M. & S. Ry. Co.* v. *Furlow*, 89 Ark. 404; *St. Louis, I. M. & S. Ry. Co.* v. *Keller, supra.*

It is alleged, in the concluding portion of the amendment to the complaint, that "the delivering carrier examined said peaches upon arrival and knew for itself the condition of the consignment on arrival. That the defendant, the general agent for fruit shipments, C. F. Carstarphen, and its local agent at Greenwood, Ark., L. W. Rhodes, knew all of the foregoing material matters."

In *Kansas & Arkansas Valley Railway Co.* v. *Ayers, supra,* there was a shipment of cattle under a contract which contained a provision for notice similar to the one at bar.

The proof showed that the notice in writing was not given. The agent at the depot where the cattle were delivered saw the cattle and knew that some of them were dead, and that they were in a bad shape generally, but he did not know and was not informed that any claim would be made for damages. The court, in passing upon the question as to whether written notice of damage for the dead cattle was required, said: "The cattle that were dead in the car before the stock was removed and mingled with other cattle were not within this provision of the contract as to notice. The object of requiring the notice by the shipper of his intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railway company a fair opportunity to examine the cattle before they were removed and mingled with other cattle. As to those that were dead, the company had all the opportunity it could have had to examine them."

Under the doctrine of the above case, it was not necessary as a condition of recovery that the appellants give appellee written notice of an intention to claim for damages to the peaches if the delivering carrier, through its agents, examined and knew the condition of the peaches while in its possession after their arrival at their destination. The complaint alleged such knowledge on the part of the carrier, and hence, in this respect, stated facts sufficient to show that the written notice was unnecessary. Where the facts stated show that the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then written notice is not required, and a provision requiring it under such circumstances would be unreasonable.

Appellee relies upon the recent case of *Chicago, Rock Island & Pacific R. Co.* v. *Williams*, 101 Ark. 436, to sustain its contention as to the alleged failure of the appellee to comply with provisions of the contract as to notice. But appellant fails to observe the distinction between the Williams case and the cases of *Kansas & Arkansas Valley Ry. Co.* v. *Ayers* and *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie*, 101 Ark. 172. The present case is controlled by the rule in the latter cases. In the Williams case the provision requires that the claim for the loss, damage or delay should be made within four months. The language of the

contract in that case contemplated the presentation of a formal claim for damages, specifying what was lost or damaged and the amount thereof, etc. But here, as we construe the language of the contract, it only requires that the consignee report that he has sustained loss or damage and his intention to claim therefor; but it does not contemplate the presentation within the short time of thirty-six hours of the formal claim, as required in *Chicago, R. I. & P. Ry. Co.* v. *Williams, supra.* If such were the case, the provision as to time might be considered unreasonable. Whereas, as the provision is only for notice that damage has resulted, and requiring that the consignee report that fact, it is not unreasonable. The distinction between the cases is pointed out by the Chief Justice in *Chicago, R. I. & P. Ry. Co.* v. *Williams,* as follows:

"In the present case the requirement is not merely for notice to the carrier that damage has resulted, but it is that the claim for the loss, damage or delay shall be presented within the stipulated time. The purpose of the requirement is to give the carrier timely opportunity to investigate the claim for damage after the same has been presented. This involves the right to investigate the contents of lost packages, the value of lost articles, as well as the facts bearing upon the question of its liability. The distinction is clearly pointed out by Judge RIDDICK in the opinion of the court in *Western Union Tel. Co.* v. *Moxley,* 80 Ark. 554, and we are of the opinion that that decision is conclusive of the present case."

The court therefore erred in sustaining the demurrer, and for this error the judgment is reversed, and the cause is remanded with directions to overrule the demurrer and for further proceedings.

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

Opinion delivered November 4, 1912.

1. CARRIERS—CARRIAGE OF FREIGHT—FACILITIES FOR TRANSPORTATION.—The statute requiring carriers to furnish without discrimination or delay sufficient facilities for the transportation of freight is not intended to impose an absolute duty, but is declaratory merely of the

common law, and does not require the carrier to provide in advance for any unprecedented and unexpected rush of business. (Page 418.)

2. SAME—CARRIAGE OF FREIGHT—CONTRACT.—Where a carrier expressly contracted to transport the peach crop of a certain locality, on its failure to do so it can not defend on the ground that it was prevented from doing so by heavy and unprecedented traffic or other unavoidable casualties, but the contract does not relieve the shipper from ordering the cars for a specified time and place as required by law. (Page 419.)

3. SAME—CONTRACT TO FURNISH CARS—MUTUALITY.—A shipper's order, calling for a specified number of cars for a specified day, when accepted by a common carrier, constitutes a contract binding the carrier to furnish the cars and the shipper to furnish the goods to load the cars, but such contract does not render the carrier liable for failure to furnish cars to parties who did not authorize the order, but who would have used the cars if they had arrived. (Page 420.)

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

STATEMENT BY THE COURT.

Appellants instituted separate suits against appellee to recover damages for appellee failing to furnish them cars for the shipment of peaches. These cases were consolidated and tried together in the court below. The same judgment was rendered in each case, and the issues involved in the appeal are the same.

The evidence adduced by appellants tends to prove substantially the following state of facts:

Quite a number of people were engaged in the business of growing peaches for sale and shipment, and some of them organized themselves into what they called a "Fruit Growers' Association." Mr. C. E. Carstarphen was the agent of appellee railway company to solicit shipments of freight over its line of railroad. In the spring of 1907 he went to Greenwood for the purpose of soliciting in advance the shipment of peaches over appellee's line of railroad. He talked with Mr. R. C. Cumbie, and others in regard to the matter. He asked them what they wanted, and Mr. Cumbie told him they wanted a shed. Carstarphen said that it was too late to build a shed for that season, and, if it would suit the peach growers as well, the railroad company would keep iced cars there for the surplus left over, and it would be much better than a shed;

that at that late day he would rather do that than to undertake to build a shed, and it was agreed that he was to do that. R. C. Cumbie estimated that from between seventy-five and one hundred cars of peaches would be shipped from Greenwood, Arkansas. Carstarphen agreed to keep cars there at all times for the peaches to be loaded in. He said that the shippers could load the peaches direct from the wagon into the iced cars.

When the season arrived for the shipment of the peaches, R. C. Cumbie said: "The understanding was that I was to order cars orally. We agreed that it would be unnecessary to order cars by making a written order because I was the agent and was supposed to be right there on the ground with the railroad agent; that is the plan we hit on and the plan we worked on and the plan we ordered on. The understanding over there was that I was to make the order by 5 o'clock in the evening so as to be sure we would get the cars." We further quote from his testimony as follows:

"Q. Then when would the cars be expected? A. We would be expecting them, if he ordered for the next morning at 10 o'clock, that is if they could get them here; they agreed to get them there if they could on the 10 o'clock train the next morning; if not by 5 o'clock the next evening; get some cars for the next morning by 10 o'clock ordering them at 5 o'clock this evening. Q. That is the understanding that they would bring part of the cars on the 10 o'clock train that you ordered for 5? A. Or bring them out on the evening train; would make the order for 10 o'clock, and they would get them if they could; if not, they would get them on the evening train at 5 o'clock. Q. If you made the order for the 10 o'clock train, they would bring them on the 10? A. Yes, they did not always do it. Q. It was the understanding they would? A. Yes, sir. Q. But didn't always do it? A. No, sir. Q. You made the order for the evening train, it was the understanding they would get them that way? A. Yes, but they did not always do that. Q. I will ask you if the orders had come out as you made them, whether you made them in time for them to have had cars there for the peaches if they had filled your orders? A. I think practically so; of course anybody might make a mistake and order a car too many or

might lack having enough, because you don't know this evening at 5 o'clock how many wagon loads come in, but we tried to ascertain those things about how many were gathered and about how many wagon loads came in, and tried to make an estimate at 5 o'clock about how many cars would be needed the next day and order that amount; I think if he had got the cars we ordered, we would have had plenty of cars. Q. To have loaded them right off the wagons without having to stack them out there? A. Yes, sir. Q. Or on sheds or platforms. How long after the shipping season was it until they failed to fill your orders for cars? A. I am not sure, but my impression is that the first failure they made was about either Saturday or Sunday, and we began the first of the week, perhaps about the first of the week; I do not think it was more than three or four days. Q. I will ask you if at the time the peaches there in controversy—were left there on the shed, being no cars for them—I will ask you if you did not order plenty of cars then if they had filled your orders to have taken the peaches? A. Yes, I ordered cars every day—that is right at the very beginning—I do not know whether I ordered cars the first day or began the next day, I think I did, but at one time might be a few peaches scattered around there and might need car today and would not need one a day or two—during the active part of the season I did."

The testimony on the part of the appellants tended to show that their peaches rotted because of the fact of appellee failing to furnish them cars in which to ship them.

The testimony on the part of the railway company tended to show that when the time arrived to ship the peaches the matter of ordering cars was left to the railroad company's agent at Greenwood, and that his judgment as to the number of cars necessary from day to day was to be controlling.

Other facts will be stated or referred to in the opinion.

There was a verdict in favor of the railway company, and the cases are here on appeal.

Rowe & Rowe and *R. A. Rowe*, for appellants.

Thos B. Pryor, for appellee.

HART, J., (after stating the facts). Counsel for appellants first insist that the effect of the agreement made with

Mr. Carstarphen, as detailed in the statement of facts, obviated the necessity of them ordering cars for the shipment of their peaches, and that it was the duty of the railway company to have the cars there at all times for the shipment of peaches, whether ordered by appellants or not. We do not agree with them in this contention. We have held that our statute requiring carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight is not intended to make the duty of carriers to furnish transportation facilities an absolute one, but is simply declaratory of one of the requirements of the common law, and therefore does not require the carrier to provide in advance for any unprecedented and unexpected rush of business. *St. Louis S. W. Ry. Co.* v. *Clay County Gin Co.*, 77 Ark. 357.

In the case of *Mauldin* v. *Seaboard Air Line Ry. Co.*, 73 S. C. 9, 52 S. E. 677, it is held that the difference between the obligation to furnish cars imposed by law and that imposed by a contract to furnish them is that the contractual obligation is more onerous; for, while a railroad is not liable for nonperformance of its legal obligations where it has a reasonable excuse to furnish cars as such heavy and unprecedented traffic, it is not relieved from the obligation to perform its contracts by unexpected emergencies in its business.

In 4 Elliott on Railroads, (2 ed.), § 1473, the author states the difference as follows: "Where a railroad company expressly undertakes by special contract to furnish cars at a specified time, it is bound to perform its contract. Where there is no express contract, then, as we have seen, an unusual press of business may excuse the company for a failure to furnish cars; but where there is an express contract, the rule is that a press of business, although unusual and unexpected, will not relieve the company from liability. Where there is an express contract, of the character above indicated, to furnish cars at a specified time, the fact that an unavoidable accident prevents the company from performing its contract will not exonerate it from liability to a shipper who suffers an injury because of the failure to perform the contract." See also *Midland Valley R. Co.* v. *Hoffman Coal Co.*, 91 Ark. 180.

In view of these principles, we think the effect of the contract, as stated in the statement of facts, was to preclude

the railroad company from interposing as a defense for failing to furnish cars that it was prevented from doing so by heavy and unprecedented traffic or other unavoidable casualties, and that the contract did not relieve the shipper of the obligation of ordering cars for a specified time and place as required by law.

It is next contended by counsel for appellants that when the time for the shipment of the peaches was at hand R. C. Cumbie made an agreement for himself and all others who intended to ship peaches from the locality that he was to order cars orally; that if the order was made on one afternoon the cars were to be sent out on the first train the next morning, or in default of that on the afternoon train. Such a contract would be void for want of mutuality as to all parties except Cumbie and those who had authorized him to make such contract for them. It is well settled that a shipper's order calling for a specified number of cars for a specified day when accepted by a common carrier constitutes a contract binding the carrier to furnish the cars and the shipper to furnish the goods wherewith to load the cars. 2 Hutchinson on Carriers, (3 ed.), § 495; *Railway Co.* v. *Bundy*, 97 Ill. App. 202.

In the present cases there is no testimony that appellants authorized R. C. Cumbie to make such a contract for them. Let us suppose that Cumbie had ordered a given number of cars for a designated day and the railroad had furnished them in compliance with the order. Can it be said that the railroad company would have had an action against these appellants if a sufficient number of peaches had not been placed in the cars for shipment to fill them? There can be no doubt but that this question must be answered in the negative. A request to a carrier for cars carries with it by implication of law an agreement to make use of the cars if the request is complied with and a correlative promise to pay the railroad company whatever loss might be incurred by it in the event the cars were not used. The contract must be sufficiently definite to bind the carrier to furnish the cars and the shipper to use the cars when furnished. Under the facts of these cases, as detailed by appellants, if cars ordered by R. C. Cumbie had been furnished by the railroad company and had not been used, the railroad company would have had a cause of action against R. C.

Cumbie, but none against these appellants, because they did not authorize him to order cars for them, and the jury could not have inferred a promise by them to do something which they had not agreed to do.

Indeed, all of the appellants except N. G. Cumbie expressly stated that they did not order any cars on the day in question, nor authorize any one else to order cars for them. They had brought their peaches to the town of Greenwood, and, failing to find a local market for them, then carried them to the depot, and offered them for shipment.

Therefore, the judgment will be affirmed.

ALF BENNETT LUMBER COMPANY v. WALNUT LAKE CYPRESS COMPANY.

Opinion delivered November 11, 1912.

1. CONTRACTS—INTERPRETATION.—The purpose of the interpretation of contracts is to ascertain the intent of the parties as shown by the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into consideration, the words used would commonly be understood. (Page 428.)
2. AGENCY—TERMINATION OF AGENCY.—A contract between a manufacturer of cypress lumber and a selling company, making the latter the former's exclusive sales agent and providing that it should remain in force as long as the former was operating its plant and until the lumber it then owned and should in the future purchase should have been cut into lumber, did not authorize the former to terminate it by ceasing to operate its mill, but required that it should not be terminated until the lumber owned by the former, tributary to its mill, should have been cut into lumber. (Page 429.)
3. CONTRACT—BREACH—WAIVER.—Where a party to a contract, with knowledge of breaches by the other party, solicits and receives an additional loan under the contract, it will be held to have waived the breaches of the contract. (Page 430.)
4. DAMAGES—BREACH OF CONTRACT—PROSPECTIVE PROFITS.—Where a party to a contract is prevented from performing same by fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the other party carried out his contract. (Page 432.)
5. SAME—BURDEN OF PROOF.—One suing to recover profits lost through defendant's breach of a contract has the burden of proving the amount of its damages therefrom. (Page 433.)

6. CORPORATIONS—DISSOLUTION—DEBTS.—Under Kirby's Digest, § 958, providing that when a corporation surrenders its charter, the chancery court shall have jurisdiction to pay its debts and distribute its assets, a liability of such a corporation arising from its wrongful cancellation of a contract is a debt for which its assets are liable. (Page 434.)

Appeal from Jefferson Chancery Court; *John M. Elliott*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellee Walnut Lake Cypress Company was a corporation organized under the laws of the State of Arkansas on February 16, 1907. Its stockholders were E. P. Ladd, C. S. Bacon, W. B. Craft and R. E. Schulze. Mr. Ladd was president, and Mr. Craft was secretary and treasurer, and was in the active management of the business. It does not appear that the other two stockholders took any active part in the business. The corporation was organized for the purpose of owning and operating a saw mill for the manufacture of cypress lumber. The company owned about twenty-five million feet of cypress lumber situated near Walnut Lake, Arkansas, and the mill was built and operated at that point. The saw mill had not been built at the time of the incorporation of the company, and it did not commence to operate until May, 1908. In the fall of 1907 the company, being pressed for money to finish the erection of the mill, opened negotiations for a loan with the appellant, Alf Bennett Lumber Company, located at St. Louis, Missouri. The latter company was engaged in the business of selling the output of various lumber mills. Alf Bennett was the president of the company, and Mr. Ladd, president of the Walnut Lake Compny, had known him for several years. Ladd gave Craft a letter of introduction to Bennett. Craft then went to St. Louis, and asked Bennett for a loan of a sum of money, which it was afterwards agreed to be fifteen thousand dollars. The indebtedness was to be evidenced by short time notes, which were to be extended from time to time until the Walnut Lake Company began to sell its output. As an inducement to the Alf Bennett Company to make this loan, Craft proposed that the two companies should enter into a contract by which the Bennett Company should have the entire charge of selling the output of the Wal-

nut Lake Company. Such a contract was finally agreed upon. It was dated October 16, 1907, and is as follows:

"This agreement, made and entered into on the 16th day of October, 1907, between the Walnut Lake Cypress Company, a corporation organized and doing business under the laws of the State of Arkansas, party of the first part, and the Alf Bennett Lumber Company, a corporation organized and doing business under the laws of the State of Missouri, party of the second part. Witnesseth:

"Whereas, the party of the first part is operating a saw mill for the manufacture of cypress, oak and gum lumber and lath at Walnut Lake, Arkansas; and,

"Whereas, it is deemed mutually advantageous for the party of the second part to be the exclusive sales agent for the party of the first part for its entire cypress, oak and gum manufactured products aforesaid, for the period of time hereinafter set out in this contract, and upon the terms and conditions set out;

"Now, therefore, to that end it is agreed between the parties hereto as follows:

"1. The party of the first part agrees that, during the life of this contract, the party of the second part shall be its exclusive sales agent for the sale and marketing of the entire cypress, oak and gum manufactured products of its saw mill and plant as aforesaid.

"2. As such sales agent, the party of the second part shall fix the selling price of said manufactured products, subject to the approval of the party of the first part, and shall pay the party of the first part the same price that they obtain for such products.

"3. In the event that the party of the first part receives orders for any of its cypress, gum and oak lumber products direct from proposed purchasers or through any sources other than the party of the second part, such orders shall be filled upon the direction and order of the party of the second part.

"4. All shipments shall be made and billed and invoiced to the persons and as directed by the parties of the second part.

"5. The party of the second part agrees to guarantee the payment of the net amount (after deducting commissions

of the party of the second part) upon all shipments sold and delivered through orders secured by the party of the second part within fifteen (15) days from the date of invoice or invoices for such shipments.

"6. In the event that, upon shipments paid for to the party of the second part, the purchaser shall make deductions on account of the grade of the lumber shipped, or because of damage in transit, the party of the second part shall be credited by the party of the first part with the amount of such deductions, and adjustments shall be made between the party making such deductions and the party of the first part.

"7. The party of the second part for its services shall be entitled to, and may retain, out of any settlement made with the party of the first part, a commission of 5 per cent. upon the net amount of invoices for all shipments, after deducting freight, in addition to the regular 2 per cent. discount for cash.

"8. In view of the fact that settlements between the parties hereto on account of shipments will often be made on estimated freight charges, it is agreed that monthly corrections and adjustments of the accounts of the parties hereto shall be made on or before the 10th day of each calendar month throughout the year.

"9. This contract shall be and remain in force and effect as long as the party of the first part is operating their plant at that point, and until all the timber they now own and shall in the future purchase shall have been cut into lumber.

"10. It is further agreed that the party of the first part shall have the right to inspect all orders on the books of the party of the second part whenever they may desire, and the party of the second part obligates itself at all times to secure the highest market price which it is their ability to obtain.

"11. It is understood that any local sales of lumber by the party of the first part in less than carload lots shall be exempt from the commission of the party of the second part."

After the contract had been entered into, the Bennett Company proceeded to lend the Walnut Lake Company the sum of fifteen thousand dollars, as had been verbally agreed upon. The loan was made during the winter of 1907 and 1908. As the notes became due, they were renewed from time to time,

and the accruing interest was by agreement between the parties entered on the books of the Bennett Company as an open account charged against the Walnut Lake Company. The Walnut Lake Company commenced cutting lumber in May, 1908, and the Bennett Company, as its agent, began to sell the output under the terms of the contract. The testimony shows that it requires from three to four months for lumber to become sufficiently dry to ship, and that none of the stock of the Walnut Lake Company was in condition to ship until about the middle of July. On October 26, 1908, Mr. Craft wrote to the Bennett Company and cancelled the contract between the two companies. The letter stated that the Bennett Company had failed to make sales according to the contract and to advise truthfully in regard thereto, and that for these and many other violations of the contract the Walnut Lake Company cancelled the contract and refused to permit the Bennett Company to make any further sales of lumber for it.

On October 28, 1908, a meeting of the stockholders of the Walnut Lake Company was held, and a resolution to dissolve the corporation was adopted. On October 30, 1908, a petition was filed in the chancery court praying for the appointment of a receiver to take charge of the assets of the company. This was done in pursuance of section 958, Kirby's Digest, which provides that when any corporation has surrendered its charter the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests.

A receiver was duly appointed, and subsequently filed a report showing assets amounting to $229,388.55 and liabilities in the sum of $87,866.67. On December 5, 1908, the Alf Bennett Company filed an intervention in the nature of a claim for damages in the sum of $32,000, which it alleged it would have earned under the contract had it been permitted to have carried it out. In its intervention it alleged that it had complied with its part of the contract, and that the notification of the abrogation of the contract, the surrender of the charter and the appointment of a receiver were in pursuance of a conspiracy entered into by the stockholders of the Walnut Lake Company for the purpose of evading the obligations of the contract between that company and the Bennett Company.

On January 20, 1909, the court ordered the receiver to sell the assets of the Walnut Lake Company at public sale. This was done on February 28, following, and the entire property was bought in by Mr. Craft for $115,000. Craft gave bond to secure the deferred payments, with Mr. Bacon and Mr. Ladd as his sureties. Mr. Craft in purchasing the assets of the receiver acted for himself, for Mr. Ladd, Mr. Shultze and Mr. Guthrie. Mr. Bacon had already sold his interest to Mr. Ladd. Immediately after the sale the mill and all the assets were turned over to the new company, which had been organized with the same stockholders, except Mr. Bacon, who had sold his interest to Mr. Ladd, and Mr. Guthrie who had subscribed for five thousand dollars stock in the new company. The new company, called "The E. P. Ladd Cypress Company," took up the indebtedness of the Walnut Lake Company, and proceeded to operate the saw mill. It operated it for the next three years, and during the time cut about eighteen million feet of lumber.

The testimony in the case is very voluminous, and, that the opinion may not be too long, the remaining facts in the case will be stated and referred to under appropriate headings in the opinion.

The chancellor found in favor of appellee, Walnut Lake Cypress Company, and the case is here on appeal.

A. H. Rowell and *Charles A. Houts,* for appellant.

1. The contract was not induced by any misrepresentations on the part of Bennett, and the claim that he violated the contract is without merit, there being no substantial violation.

2. If there were any violations by appellant of the contract, or any misrepresentations in inducing the contract, they were waived by the Walnut Lake Company when Ladd, after charging Bennett with all the violations which appellees now claim authorized the cancellation, and with full knowledge of all the facts, offered Bennett one thousand dollars to cancel the contract, and, on being refused, asked for and obtained a loan to the Walnut Lake Company of five thousand dollars additional, and thereafter they proceeded under the contract to sell lumber just as before. 88 Ark. 491.

3. The contract was not terminable under its terms until all the timber owned by the Walnut Lake Cypress Company was cut into lumber. See paragraph 9 of the contract. 69 Fed. 773; 108 Ill. 656; 40 Minn. 497; 1 Wash. 579; 116 Wis. 549; 61 Mo. 534.

4. The assets in the hands of the receiver of the Walnut Lake Cypress Company are liable for any damages accrued to appellant by reason of the abrogation of the contract. 60 Minn. 284; 74 Minn. 98; 40 Atl. (N. J.) 591; 54 O. St. 157.

5. The damages claimed by appellant are the proximate and certain result of the breach of contract. 78 Ark. 336.

Bradshaw, Rhoton & Helm and *Danaher & Danaher*, for appellees.

1. The court was right in finding that the contract was obtained by misrepresentations. Bennett's statements that he possessed good ability in selling cypress lumber, had better facilities for making sales than appellee cypress company, and could handle its output to better advantage, induced the latter to enter into the agreement. It was not, as appellant claims, a mere expression of opinion, but was a statement of a material inducing fact.

2. There was no waiver. In order to constitute a waiver, there must exist either an agreement to waive, based on a valuable consideration, or an implied waiver based on the conduct of the party amounting to an estoppel. 130 Cal. 245, 253; 116 N. W. 132, 136; 140 Mass. 261, 264; 35 Minn. 451; 98 Mo. App. 53; 57 N. Y. 500; 1 Am. Rep. 548; 30 N. Y. 136; 86 Am. Dec. 362; 132 N. Y. App. Div. 250; 24 *Id.* 547; 63 O. St. 183; 79 Pa. St. 46; 95 Tenn. 38; 41 Am. Rep. 647; 31 Tex. 633; 40 Vt. 316. Conduct forced upon a party by circumstances can not be held to be voluntary, and waiver can not be predicated thereon. 12 Ill. App. 463; 19 Wis. 26; 69 N. C. 7; 34 La. Ann. 209; 17 N. Y. 173, 72 Am. Dec. 442; 33 O. St. 336.

3. Appellant's contention as to the duration of the contract is untenable. There is nothing in paragraph 9 to indicate an intention to bind the appellee cypress company to operate the plant for any definite time, or to cut all the timber then owned into lumber. The manifest intent of the parties was

that the contract should be in force only so long as both of the conditions named continued to exist, viz., while the Walnut Lake Cypress Company operated its plant at that point, and its lumber remained uncut. 1 App. Cas. 256, 47 L. J. Exch. 396; L. R. 5 Ch. 737, 39 L. J. Ch. 685, 23 L. T. Rep. 685, 18 Wkly. Rep. 1122; 21 T. L. R. 82; 14 Can. L. T. O. C. C. notes 394, 25 Ont. 291.

4. That a corporation can not escape from its liabilities by dissolving is conceded; but the dissolution of the company in this case worked a termination of the contract because the parties contracted that the dissolution of the corporation should terminate their dealings.

5. There is no evidence in the record from which a proper estimate of the damages to which appellant was entitled, if any, can be made.

HART, J., (after stating the facts). The right of appellant to recover in this case depends upon the construction of the ninth clause of the contract, which is as follows: "This contract shall be and remain in force and effect as long as the party of the first part is operating their plant at that point, and until all the timber they now own and shall in future purchase shall have been cut into lumber."

The purpose of all interpretation is to ascertain and give effect to the intention of the parties to the contract as expressed by their writing, and in doing this it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties and the sense in which, taking these things into consideration, the words used would be commonly understood; for it fairly may be assumed that the parties used and understood them in that sense. Applying this fundamental rule of construction, it is contended by counsel for appellee that the Walnut Lake Company in making this contract foresaw that it might wish to sell or be forced to quit business at any time, and therefore embodied in the contract the provision that the contract should remain in force only so long as it was "operating their plant at that point." They insist that the further words, "and until all the timber they now own and shall in the future purchase shall have been cut into lumber," were added to cover the possible contingency that the Walnut Lake Company, in

case of fire or other casualties to its plant, might wish to rebuild at some other point and cut the timber at a new mill site. They contend that the evident intention of the parties, as expressed by the language of the contract, was that the contract should be in force only so long as both of the conditions may continue to exist, viz: While the Walnut Lake Company operates its plant at Walnut Lake, and its timber remained uncut. We can not agree with their contention. The Bennett Company was not engaged in the business of loaning money, but was engaged in the business of selling lumber for those who manufactured it. The lending of money to its customers was merely an incident to its principal business. It was principally engaged in the business of selling pine lumber at the time the contract was entered into, and, in order to carry out the contract with the Walnut Lake Company, it was necessary to make some changes in the conduct of its business in order to enable it to successfully sell cypress lumber. Under these circumstances, it is unreasonable to suppose that the parties to the contract contemplated an agreement which could be terminated by the Walnut Lake Company ceasing to operate its mill at Walnut Lake before its timber was sawed into lumber. Such a construction would not give any meaning to the clause, "and until all the timber they now own and in the future shall purchase shall have been cut into lumber."

We are of the opinion that the contract as made clearly indicates that it was not intended that the contract should be terminated until the timber owned by the Walnut Lake Company, tributary to the site of the mill at Walnut Lake, should have been cut into lumber. As illustrative cases sustaining our contention, we cite the following: *Mississippi River Logging Co.* v. *Robson,* 69 Fed. 773; *Lewis* v. *Atlas Mutual Life Insurance Co.,* 61 Mo. 534; *Ford Hardwood Lumber Co.* v. *Clement,* 97 Ark. 522.

2. The next question we shall consider is whether or not the Walnut Lake Company was induced to make the contract by the fraudulent representations of the Bennett Company. To sustain the finding of the chancellor in behalf of the appellee, it is claimed that Bennett misrepresented his ability to sell cypress lumber. Concerning this matter, Ladd testified that

some time before the contract was entered into he met Mr. Bennett on the train, and they got into a conversation in regard to making a contract to give Bennett the exclusive sale of the output of the saw mill when it was erected and put in operation. Nothing definite was arranged about the contract at that time. Bennett explained to Ladd that his company had a large selling force, and that they understood the handling of cypress lumber to good purpose; that they could handle it to better advantage than the manufacturers of the lumber. Craft conducted the negotiations leading up to the making of the contract. In regard to this he testified as follows: "We were desirous of a line of credit, and I went to see Mr. Bennett, and he represented that he had special ability to sell our stock, for the reason that he had a large selling force, and had experience in selling cypress, and represented that he would be able to help us out to the extent that we would probably need money until such time as we could make other arrangements. We insisted on his going into the matter thoroughly, and he explained that he had had some four or five years' experience in selling cypress, and that, while he did not have any one in his office that had had more experience than he had, he would give the matter his personal attention. He related the experience he had had, and stated why he wished to make this contract with us; said that he had found our stock, that is, the stock that the old concern had turned out, to be a very superior grade; that he had found us hard competitors to get over, and for these reasons he specially desired the selling contract. In view of these representations and believing that he had the ability, we considered making the contract with Mr. Bennett, and Mr. Bennett and I went into the terms of the contract together. I made the contract with him under the representations made by him."

In addition it is shown that, after the Bennett Company began to sell the lumber for the Walnut Lake Company, Ladd and Craft at different times each went to St. Louis and assisted Bennett in making sales of some lumber. At none of these times, however, did they go to St. Louis for that purpose. They went there for the purpose of borrowing money with which to run the mill, and while there went with Bennett to some old customers of Ladd who had bought lumber from him

while he was engaged in the saw mill business prior to the time the Walnut Lake Compnay was organized. There is nothing in the testimony to indicate that Bennett's corporation was not competent to handle, as sales agent, the putput of the Walnut Lake Company's saw mill. The testimony shows that Alf Bennett, the president of the company, had had several years' experience in the sale of cypress lumber, and that he employed another person to take charge of a department of the company for the sale of cypress lumber, and that the man so employed had had several years' experience in selling cypress lumber. If it can be said that the representations made by Bennett amounted to anything more than a mere expression of opinion as to his company's ability to act as sales agent for the Walnut Lake Company in the sale of the output of its mill, certainly it can not be said that the testimony is sufficient to sustain the charge of false representations as to the ability of the Bennett Company to act as sales agent under the contract.

3. It is also claimed that the decision of the chancellor should be upheld because the appellant committed certain breaches of the contract. One of these is that it failed to make certain remittances of the proceeds of the sales within the time specified in the contract. Another is that a customer who had purchased lumber put in a claim for damages due to the fact that the lumber shipped to it did not correspond with the grade mentioned in the order. The Bennett Company allowed this customer a reduction, but the deduction was not not large enough according to the contention of the Walnut Lake Company. It claimed that the Bennett Company damaged its reputation for fair dealing by not allowing the claim in full. Another alleged breach of the contract is that the Bennett Company did not sell the lumber in all instances according to the grades of the Walnut Lake Company. The testimony shows that the Walnut Lake Company graded its lumber according to its own rules, and that its grading did not correspond with the grading rules of the Southern Cypress Manufacturers' Association, which were considered standard throughout the territory in which the Walnut Lake Company's stock was sold. To illustrate, the Walnut Lake Company's number three common was equivalent to the association's

grade of number two common. In other words, the Walnut Lake Company graded its lumber one grade higher than the association's corresponding grades. Old customers of Ladd understood this difference in the grading and purchased accordingly. New customers did not understand the difference in the grading, and on that account it was difficult to sell them. So in some cases the Bennett Company, in order to make sales to new companies, billed the lumber to them according to the grades of the association, but remitted the full amount of the proceeds, less its commission, to the Walnut Lake Company. Still another alleged breach of the contract is, that at one time the Bennett Company employed a sub-agent to sell some lumber and endeavored to charge up the Walnut Lake Company with his commission in addition to its own, but the testimony shows that when the Bennett Company's attention was called to the matter it rectified the mistake. In regard to these alleged breaches of the contract but little need be said, for the reason that, if it be conceded they were breaches of the contract, the Walnut Lake Company waived them. The testimony shows that in the latter part of September, 1908, Mr. Ladd made a trip to St. Louis for the purpose of inducing Mr. Bennett to cancel the contract. At that time Mr. Ladd was in possession of all of the facts and circumstances connected with these alleged breaches of the contract. He told Mr. Bennett that he had not been living up to his contract, and that he wanted him to cancel it. He told Bennett that they needed more money. Bennett refused to cancel the contract but offered to secure for the Walnut Lake Company five thousand dollars, in addition to the fifteen thousand already loaned it. Ladd told Bennett that they had to have the money, and that, if he would not release them from the contract, they would take that. Bennett afterwards did arrange it and raised the five thousand dollars for the Walnut Lake Company, as he had agreed to do.

Thus it will be seen that Ladd acted with the full knowledge of all the facts and circumstances connected with the alleged breaches of the contract, and will be deemed to have waived them. *Grayson-McLeod Lumber Co.* v. *Slack*, 102 Ark. 79; *Thomas-Huycke-Martin Co.* v. *Gray*, 94 Ark. 9.

4. Can the appellant recover its prospective profits as

damages? In the case of *Ford Hardwood Lumber Co.* v. *Clement*, 97 Ark. 523, it is held: "Where plaintiff agreed to perform certain work for defendant which he was prevented from doing by defendant's fault, he is entitled to recover the profits which the evidence makes it reasonably certain that he would have made, had defendant carried out its contract." See also *Singer Mfg. Co.* v. *W. D. Reeves Lumber Co.*, 95 Ark. 363; *Spencer Med. Co.* v. *Hall*, 78 Ark. 336.

The burden was on the appellant to prove the amount of its alleged damages. *Gay Oil Co.* v. *Muskogee Refining Co.*, 97 Ark. 502. In the present state of proof, as abstracted, the testimony for the appellant does not aid us in arriving at a correct conclusion as to the amount of damages suffered by appellant. It is true that Alf Bennett, the president of the company, testified as to the gross amount of profits his company would have earned, but, according to the terms of the contract, this would not be the compensation due it. In arriving at the prospective profits we must look principally to the testimony of Mr. Craft, who was the secretary of the Walnut Lake Company, and who was introduced as a witness by it. Section 7 of the contract is the one which provides for the amount of commissions to be paid. Craft testified that, considering the invoices, appellant would not have made more than a gross profit of eighty cents per thousand feet. He also testified that it would cost appellant fifty cents per thousand feet to sell the lumber. This would leave it a net profit of thirty cents per thousand feet. Under clause 11 of the contract, local sales of lumber in less than carload lots were exempt from the commission. Lumber used by the Walnut Lake Company in the erection of its building was also exempt. Then, too, it will be remembered that appellant had been paid for the lumber sold by it up to the time that the Walnut Lake Company refused to permit it to continue to act as sales agent. Again, Craft says that in sawing up lumber a certain amount of stock is always accumulated, which can not be shipped at a profit. When all of these matters are considered, he estimates that no more than thirteen million feet of lumber could have been shipped by the Walnut Lake Company after the time it cancelled the contract. The net profits that would have accumulated to appellant from

the sale of this lumber would be thirty cents per thousand feet on thirteen million feet, which amounts to $3,900, and this is the amount appellant is entitled to recover as damages in this case.

5. Section 958, Kirby's Digest, provides that when any corporation has surrendered its charter the chancery court shall have jurisdiction to pay its debts and to distribute its assets among the stockholders according to their several interests. Pursuant to this section of the Digest, a receiver was appointed for the Walnut Lake Company when it surrendered its charter. During the pendency of the proceedings to wind up its affairs appellant filed its intervention claiming damages for the breach of the contract with it.

Inasmuch as we have held that the Walnut Lake Company had no right to cancel the contract and that appellant was entitled to recover damages under it, it follows that the claim of appellant for damages was a debt of the corporation, and the assets of the corporation in the hands of the receiver are liable for the amount of this claim.

The decree of the chancellor will therefore be reversed, and judgment entered here for appellant in the sum of $3,900.

FULLERTON v. HENRY WRAPE COMPANY.

Opinion delivered December 2, 1912.

1. MASTER AND SERVANT—ASSUMED RISKS.—The rule that a servant is presumed to have assumed the ordinary risks incident to the employment in which he is engaged is subject to the limitation that he must have knowledge not only of defects but that the defects exposed him to danger. (Page 437.)
2. SAME—ASSUMED RISKS.—If the danger arising from defective appliances is so obvious as to be apparent to a person of ordinary intelligence, the law will charge the servant with the knowledge of the danger. (Page 437.)

Appeal from Greene Circuit Court; *W. J. Driver*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant brought this suit against appellee to recover damages for injuries sustained by her husband which resulted

in his death, and which were received while he was in the employment of appellee. The facts are as follows:

Appellee was a corporation engaged in manufacturing white oak heading in its factory at Paragould, Arkansas. As a part of its machinery therefor, appellee maintained and operated a circular ripsaw attached to a revolving shaft set in boxing made fast to a stationary frame. The saw was eighteen inches in diameter and about one-third of it extended upwards between two flat boards which constituted a table on top of the frame work. The saw revolved very rapidly, and was used to rip white oak heading, which is a piece of white oak twenty-two inches long, three quarters of an inch thick and from six to twelve inches wide. There was a knife or spreader made of iron or steel set right back of the saw to keep the boards from pinching the saw. Appellee operated a number of ripsaws, and it was its custom to shut down four times a day for each man to look at his saw and to change the saws when they became dull or out of set. It was the sawyer's duty to change the saws when they are dull or out of set. On the 18th day of August, 1911, Andy E. Fullerton was operating said ripsaw. He stood in front of the saw in the usual way and placed the piece of white oak heading against the saw, and after it had been cut for a distance of sixteen and one-half inches the back part of the saw became pinched in the piece of heading. This had the effect to draw the piece of heading to the top of the saw. It then flew back and struck Fullerton in the abdomen and caused the injuries from which he died about two days later. The saw in question was unguarded. The purpose of a guard on a saw of this kind is to prevent the piece of heading from flying back when the saw becomes pinched.

Appellant adduced evidence tending to show that the saw became pinched when it was dull or out of set. The evidence for the appellant also showed that the spreader on the saw-rig in question was thinner than the saw, and that on this account the saw might become pinched; that the purpose of the spreader was to keep that part of the heading which had been cut from coming together and pinching the saw. The saw-rig in question had been shut down one hour and fifteen minutes before the accident occurred, but the testimony does not disclose

whether the saw was changed by Fullerton at that time or not. The man who operated the saw just after Fullerton was struck by the piece of heading testified that the saw appeared to be dull, but that he could not tell whether it was out of set or not.

The decedent had worked in the factory of appellee for six or seven years according to the testimony of one witness. His son testified that he had worked there for about eleven years. For the last two years of his service he operated the saw in question, and from June 3, to August 18, the time of the accident, he operated it continuously. Appellee had other saw-rigs where the operator stood at the side of the machinery to operate them. They were so constructed in order to lessen the danger to the operator from the pieces of heading flying back when the saw became pinched. On the day of the accident Fullerton complained to the manager of the mill about the defective condition of the ripsaw and saw-rig. The manager told him to go ahead and run it, and he would have it fixed. The accident occurred two or three hours after this conversation.

The jury returned a verdict for appellee, and the case is here on appeal.

Johnson & Burr, for appellant.

A servant does not assume the risk unless he knows the defect or existing condition and also appreciates the danger arising therefrom. It does not necessarily follow from the mere fact that he knows the defect or existing condition that he appreciates the danger, but whether he did appreciate the danger arising therefrom is a question for the jury. 80 S. W. 292, 296; 145 S. W. 879; 141 S. W. 1176, 1178-9; 96 Ark. 206, 131 S. W. 960; 95 Ark. 291, 129 S. W. 88; 92 Ark. 102-108.

Block & Kirsch, for appellee; *C. L. Marsilliot*, of Memphis, Tenn., of counsel.

From the facts developed in evidence the court correctly instructed the jury that deceased "was an experienced servant in the use of the ripsaw machine complained of, and any risk, danger or hazard from the use of the same without a guard was open and obvious to his senses; and that when he under-

took to operate such ripsaw in its obviously unsafe condition, if it was unsafe in that condition, he assumed, as a matter of law, the risks, dangers and hazards flowing therefrom, and defendant would not be liable for an injury to Fullerton occasioned by its use." 95 Ark. 560; 97 Ark. 486; 1 Labatt, Master & Servant, § 259; *Id.* § 263; 67 Ark. 209; 79 Ark. 20; 82 Ark. 11; 90 Ark. 407.

If a hood or guard could be devised that would have prevented a "fly back," such as caused the death of deceased, yet there could be no recovery under the facts of the case, particularly the admitted fact that deceased was offered the choice of a machine with a guard or the machine without the guard, and chose the latter. He not only knowingly assented to occupying the place set apart for him by the master, but occupied it as a matter of preference. 56 Ark. 252; 81 Ark. 343; 55 Ark. 483; 86 Ark. 507; 90 Ark. 387.

HART, J., (after stating the facts). It is true, as contended by counsel for appellant, that the rule that an employee is presumed to have assumed the ordinary risks incident to the employment in which he is engaged is subject to the limitation that he must have knowledge not only of the existence of defects but must also be charged with knowledge that the defects exposed him to danger. It is equally well settled, however, that if the danger arising from the defects is so obvious as to be apparent to a person of ordinary intelligence the law will charge the servant with the knowledge of the danger. *Davis* v. *Railway*, 53 Ark. 117; *A. L. Clark Lumber Co.* v. *Northcutt*, 95 Ark. 291; *Asher* v. *Byrnes*, 101 Ark. 197; *St. Louis, I. M. & S. Ry. Co.* v. *Owens*, 103 Ark. 61.

The trial judge recognized the principle that the servant's knowledge of a defect is a bar to his action only when it was apparent that he understood the risks created by that defect, but considered that the danger arising from using the machinery in its alleged defective condition was unmistakably obvious to the decedent. For this reason the instructions given by the court limited appellant's right to recover to the sole issue of decedent's complaint about the defective condition of the machinery and the master's promise to repair. Upon this action of the court counsel for appellant assign error.

All of the witnesses testified that the saw revolved very

rapidly, and that when it became pinched for any reason the piece of heading which was being sawed would be forced to the top of the saw and would then fly back with considerable force. The purpose of the spreader was to keep the piece of heading from pinching the saw and the purpose of a guard was to keep the piece of heading from flying back and striking the operator when the saw became pinched. The decedent had worked at appellee's mill for a period of time variously estimated from seven to eleven years and had worked at the saw in question at intervals for two years just preceding the accident. He commenced regularly to operate the saw on the 3d of July preceding the accident and worked there up to the time of the accident which occurred on the 18th of August. It was the sawyer's duty to remove the saw when it became dull or out of set. The decedent was a sawyer of experience, and the fact that the saw was unguarded, and that the spreader was thinner than the saw, and on this account was likely to cause the saw to become pinched, are facts that were obvious to the decedent. This is conceded by counsel for appellant, but they contend that the decedent did not realize or appreciate the danger from using the saw in its defective condition; but it seems to us that the danger arising from the defective conditions as they are alleged to have existed was equally obvious to the decedent. As we have already seen, the testimony shows that they were known to all the other servants of the company who had no more experience in the use of the saws than had the decedent. If the danger was obvious and patent to them, it was equally so to the decedent, when his age and experience in the use of machinery is taken into consideration.

Moreover, the testimony of the appellant shows that the decedent made complaint about the defective condition of the machinery on the very day of the accident, and the master promised to repair it. The fact that he made the complaint is inconsistent with the idea that he did not realize the danger from using it in its alleged defective condition, and shows that he appreciated the danger which might result from a continued use of the machinery before the alleged defects had been remedied.

No other assignment of error are urged for a reversal of the judgment, and the judgment will be affirmed.

GARDNER v. MCAULEY.

Opinion delivered December 2, 1912.

PARTITION—TAXING SOLICITOR'S FEE.—In partition suits the court will not allow the fee of plaintiff's solicitor to be taxed against the estate where the proceedings were adversary, or where such services were not accepted and acquiesced in by the defendants, or where such services did not result in benefit to the whole subject-matter of the litigation.

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

Phillips, Hillhouse & Boyce, for appellants.

1. This was an adversary suit. Kirby's Dig., § § 6005-6; 75 Ark. 38; 74 Neb. 303.

2. Chancery courts in this State have no jurisdiction to assess the fees of attorneys as costs or expenses in adversary partition suits like this. 60 Ark. 195; 61 *Id.* 409; 25 *Id.* 235; 31 *Id.* 266; 30 Kan. 380; 13 N. J. Eq. 365; 111 S. W. 1129; 76 Ark. 151; 30 Cyc. 278; 75 Pac. 130; 33 N. W. 676; 53 S. E. 646.

Otis W. Scarborough, for appellees.

1. This was simply a suit for partition of lands, and in no sense an adversary suit. 95 Ind. 184; 43 Ark. 296; 33 *Id.* 429; 75 Md. 486; 63 Tex. 641; 76 Ark. 150; 47 *Id.* 175; 53 Fed. 872; 64 Ark. 353; 21 D. C. 74; 141 Pa. St. 93.

2. In such cases it is proper to tax an attorney's fee as part of the costs and expenses. 91 N. W. 987; 72 N. E. 1117; 84 Minn. 346; 15 R. I. 52; 52 Atl. 992; 74 Neb. 303; 111 S. W. 1129; 2 Story C. C. 553; 65 Ark. 549; 48 N. W. 616; Kirby's Digest, § 5793; 21 Oh. St. 657.

MCCULLOCH, C. J. The parties to this action were the owners, as tenants in common, of a tract of land in Jackson County, Arkansas, and appellees, who owned an undivided one-sixth interest in the land, commenced this action in the chancery court against appellants, who were the owners of

the other five-sixths, to have a partition according to their respective intersts. Robert C. McAuley, one of the appellees, claimed an interest, as tenant by the curtesy, in the undivided one-sixth interest owned by his co-appellees, and he joined as party plaintiff in the suit. Appellants employed attorneys to represent them in the cause, and promptly made their appearance and filed an answer, in which they disputed the rights of Robert C. McAuley as a tenant by the curtesy, and also alleged that the lands could not be partitioned in kind, and asked that the same be sold for partition. On final hearing of the cause, the court appointed commissioners to make partition, and on report of the commissioners the court rendered a decree for partition of the lands in accordance with the respective shares of the parties. Subsequently the court made an order allowing appellees the sum of $300 as a fee for their solicitor, and taxed the same as costs in the action. From this part of the decree an appeal has been prosecuted.

Therefore, the only question presented in the case is, whether or not, in a suit for the partition of lands, it is proper to allow the solicitor of the plaintiff a fee for his services, and tax the same against all the parties to the action.

The only statute in this State bearing even remotely on the question at issue is a section of the Civil Code relating to proceedings where lands are sold because not susceptible of division, and it provides that "the proceeds of every such sale, after deducting the costs and expenses of the proceedings, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises." Kirby's Digest, § 5793.

The Supreme Court of Michigan held that a somewhat similar statute authorized the allowance of attorney's fees in a partition suit where no sale of the land was made. *Greusel* v. *Smith*, 85 Mich. 574, 48 N. W. 616.

This does not seem to us, however, to be the proper construction of the statute, and in this view we are supported by decisions of other courts. *Swartzel* v. *Rogers*, 3 Kan. 380; *Lang* v. *Constance*, 20 Ky. Law Rep. 502, 46 S. W. 693.

This court, in *Cowling* v. *Nelson*, 76 Ark. 146, held that the chancery court was without jurisdiction to order a sale

of lands in a partition suit to pay costs and expenses, including attorney's fees.

So, if there be authority to tax attorney's fees against the parties in a partition suit, it must be found outside of the statutes of this State. That question has never before been here for decision. In *Cowling* v. *Nelson, supra,* we said:

"The utmost that can be said of the attorney's fees are that they were part of the costs; and as to whether the court has, in amicable suits, any right to tax them as costs is a question that the courts are divided upon, but all agree that in adversary proceedings they can not be so taxed."

Upon consideration of that question, it now appears to us that the weight of authority is against the taxation of attorneys' fees, even in amicable partition suits, unless the partition resulted solely from the services of the solicitors for one of the parties, and such services were accepted by the other parties. See 21 Am. & Eng. Enc. of Law, (2 ed.) pp. 1177-78; 30 Cyc. p. 298; *Jordan* v. *Farrow,* 130 Ala. 428; *Hutts* v. *Martin,* 134 Ind. 587; *Coles* v. *Coles,* 13 N. J. Eq. 365; *Butler* v. *Butler,* 73 S. C. 402; *Legg* v. *Legg,* 34 Wash. 132.

In adversary suits there is no ground for taxing the fees of the solicitor of one of the parties against the other parties, and the doctrine of allowance of attorney's fees in amicable suits of this character should, we think, be limited to those cases where the services of the plaintiff's solicitor not only result in benefit to the whole subject-matter of the litigation, but are accepted and acquiesced in by the other parties. The rule does not apply where all of the parties appear by their respective solicitors and the proceedings are conducted through their joint efforts. The true rule which should govern in these cases is, we think, stated by the New Jersey court as follows: "The order for the allowance is frequently based on the consent of parties or on the statement that the parties concur in the allowance. Where this is the case, or where the proceeding is in fact amicable and in behalf of all the parties interested, the propriety of the allowance is manifest. The aid of counsel is necessary to investigate title, to examine conflicting claims, and to conduct the cause. Where the defendant concurs in the proceeding, there is no reason why the complainant should be compelled to bear this part of the expense more

than any other. In such case the complainant's counsel represents the interests and protects the rights of all the parties. All are presumed to be equally benefited by the proceedings. But the complainant's claim to partition may be resisted. The proceedings may be hostile, or, if not hostile, the defendants may employ their own counsel, and by answer seek to protect their interests. If the plaintiff's title is disputed, or the partition opposed upon any ground unsuccessfully, the defendants will be compelled to pay costs. And if no opposition is made to the partition, and the defendants choose to employ their own counsel, why should they be compelled to pay the counsel of the complainant? If the complainant is entitled to an allowance for counsel fees, why not the defendants also? As the proceeding in this case is not amicable, and as the claim for counsel fees is resisted by the defendants, it must be denied." *Coles* v. *Coles*, 13 N. J. Eq. 365.

Now, either of the rules above stated excludes the right of the appellees to have their solicitor's fee taxed as a part of the expense of the proceeding. Appellants promptly appeared in the action with their own solicitors to represent them, and thereafter took part in the proceedings, the same becoming to some extent adversary. Up to the time of the appearance in the case it can not be said that the proceedings were amicable, for it could not be told, until the appearance day passed, whether the same would be amicable, or whether they would thereafter be adversary. As a matter of fact in this case, the proceedings did become to some extent adversary, for appellants denied the right of partition in kind, and asserted that the lands could not be equitably divided, and should be sold for division. Thereafter they were represented by their own counsel, and there is no reason why, in addition to this, they should be taxed with any portion of the fees of the solicitor of appellees. It can not be said under those circumstances that they ever accepted the benefit of the services of appellees' solicitor, for they were represented by their own solicitors in every step of the proceedings.

We are not to be understood as holding that, where one or more tenants in common brings suit against the other tenants in common for partition, and there is no appearance or resistance, the proceeedings resulting in an amicable parti-

tion of the property, the fees of the plaintiff's solicitors should not be taxed against all the parties. That question does not arise in this case under the facts as before related. But, even in that sort of a case, if the fees are taxable, they can only amount to such sum as the solicitor can appropriately charge his own client, and not the fee he might have charged if employed by all of them. *Bradshaw* v. *Bank of Little Rock*, 76 Ark. 501. "The object of the allowance," said this court in the above cited case, "is not to give the attorneys a larger fee than they might have recovered from their own clients but to shift the burden of the charge from them and place it upon the creditors of the bank generally. The inquiry then is, what would have been a reasonable charge against their own clients for the services performed?"

Our conclusion, therefore, is that it was improper to tax any attorney's fees against appellants, and the decree of the court in that respect is reversed, and the allowance stricken out. It is so ordered.

McCARROLL v. RED DIAMOND CLOTHING COMPANY.

Opinion delivered December 2, 1912.

1. GUARANTY—LIABILITY UNDER.—Where defendant, who was plaintiff's travelling salesman, upon being advised that plaintiff refused to ship goods to a customer on account of the latter's financial condition, wrote to plaintiff: "If my indorsement is worth anything, you can ship on that," whereupon plaintiff shipped the goods, this constituted a special guaranty, and defendant became absolutely bound with the principal on the contract of sale. (Page 445.)
2. SAME—NECESSITY OF NOTICE.—Where a guarantor directed the guarantee to ship certain goods upon the former's "indorsement" if his credit was regarded good for the amount, and the guarantor had notice that the goods were shipped accordingly, he became liable, although the guarantee never notified him that it would look to him for the payment. (Page 445.)

Appeal from Yell Circuit Court, Danville District; *Hugh Basham*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant, who was at the time a travelling salesman for appellee, receiving commissions on orders taken and accepted,

took an order from the Centerville Mercantile Company, in September, 1908, for a bill of goods amounting to $118.05. Appellee, upon receipt of the order, notified its salesman that it would not be filled, because of the financial condition of said company, whereupon he wrote to them, stating he knew the company had been slow in the payment of its bills and setting out the good financial condition of some of its officers and stockholders and its own worth, and, concluding, "if my indorsement is worth anything, you can ship on it. That is the way I feel about them. I am vice president of the McCarroll Brothers Company."

The bill of goods was then shipped to the Centerville Mercantile Company, under said direction and indorsement on September 30, 1908. Said company continued in bad financial condition and failed to pay for the goods when the bill became due, and their check for the price was protested for nonpayment and the account placed in the hands of an attorney for collection on December 7, 1908, and said company was later adjudged insolvent, placed in the hands of a receiver and its creditors realized nothing.

Appellant was absent from the State during the spring and summer of 1909, and demand for payment was made on him when he returned in the fall, and upon his refusal to pay this suit was brought against said mercantile company and him before a justice of the peace and appealed to the circuit court. On the hearing there, the court directed a verdict for appellee, from which this appeal comes.

Priddy & Chambers, for appellant.

1. There is no claim that appellant's liability is anything more than that of an endorser or guarantor. His liability and that of the Centerville Mercantile Company is several and not joint, and a joint action will not lie. 24 Ark. 511.

2. Appellant is not liable for want of notice from appellee that it relied on him to pay the account. 24 Ark 518; 22 Ark. 540; 64 Ark. 648; 71 Ark. 588; 14 Am & Eng. Enc. of L. 1156.

Appellee, pro se.

1. Appellant's motion to dismiss was properly overruled. Kirby's Dig., § 522.

2. Notice of acceptance was not required. 71 Ark. 588. As to effect of the agency on the guaranty, see 59 Ark. 86; 20 Cyc. 1397-8.

KIRBY, J., (after stating the facts). Appellant contends that he had no notice of the acceptance of his indorsement by the appellee company and the shipment of goods upon it, and on that account did not become liable thereon, and that appellee was negligent in proceeding to collect the debt from the insolvent company.

If appellee's letter be construed as but an offer of indorsement or a conditional guaranty, it would have been necessary to notify him of its acceptance, or the conditions must have been performed by appellee company in order to fix his liability thereon, but such is not the case. Upon being advised of the refusal to ship the bill of goods ordered, because of the bad financial condition of the company ordering them, he wrote, expressing the utmost confidence in their ability to pay, giving his reasons therefor and concluded by saying, "If my indorsement is worth anything, you can ship on that. * * * I am vice-president of the McCarroll Brothers Company." The appellee, upon the receipt of the letter, shipped the goods, upon said indorsement, charging them upon its books to the said company and John F. McCarroll, and relying absolutely upon the faith and credit of such indorsement, as the undisputed testimony shows.

This was not a continuing guaranty nor a conditional one, but a special guaranty or indorsement, directing the shipment of the good on the credit of the guarantor, if it was regarded good for the payment, and, being acted upon and the goods shipped in accordance therewith, appellant became absolutely bound with the principal on the contract of sale under which the liability of the failed company accrued. 20 Cyc. 1398-9; *Stewart* v. *Sharp County Bank*, 71 Ark. 588; *Friend* v. *Smith Gin Company*, 59 Ark. 91.

It is insisted that appellant should have been notified of the acceptance of his contract of guaranty or indorsement at the time of the shipment of the goods, and the failure of the company to pay for them, in order to bind him thereon.

If his letter had been but an offer to guaranty the payment of the account, this would be true, but it was a direction

to ship the goods upon his indorsement, if his credit was regarded good for the amount and needed only to be acted upon by the appellee and the goods shipped in accordance therewith to bind him.

Appellee made no proposition to its salesman that it would ship the goods upon his guaranty of the account, but he sent the direction and indorsement which was acted upon by them, and thereupon became binding upon him. He does not claim that he did not have notice that the goods were shipped, but only that he was not advised at the time that the company would look to him for the payment in accordance with his proposition. He did know that appellee had refused to ship the bill of goods because of the financial condition of the firm ordering them, and also that he had directed their shipment after being notified of such refusal upon his own indorsement, if it was regarded good, and that thereafter the goods were shipped. Nothing further was necessary to bind him to the payment therefor.

As these facts appeared from the undisputed testimony, the court did not err in directing the verdict.

The judgment is affirmed.

WALES-RIGGS PLANTATIONS *v.* DYE.

Opinion delivered December 2, 1912.

AGENCY—PROOF OF AUTHORITY.—The authority of an agent is never proved 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.

Appeal from Cross Circuit Court; *S. S. Simpson*, Special Judge; reversed.

Charles E. Robinson, for appellant.

Testimony as to one's acts is not admissible to establish his agency, unless such acts are shown to have been authorized or accepted by the person sought to be charged as principal. 26 S. W. 383; 72 Ark. 64; 40 S. W. 506; 19 Am. St. Rep. 795; 10 Enc. of Ev. 22.

Since Mrs. Cross did not assume to be acting for appellant in buying the goods, appellee could not recover, even if

he could show that appellant had confirmed the sale, unless he could show a consideration to support such confirmation. 55 Ark. 427; 66 Ark. 15.

S. M. Wassell, for appellee.

Agency, having been shown, is presumed to continue. Abbott, Trial Brief, § 24, p. 139 *et seq.*; 100 Ark. 240.

HART, J. Appellant commenced this suit in justice's court against appellee to recover upon two promissory notes. The appellee admitted liability on the notes, but filed a set-off, in which he claimed that appellant was due him an amount over and above that due by him upon the notes for goods and merchandise sold by him to Mrs. C. K. Cross for appellant. Appellee recovered judgment against appellant in the justice's court on his set-off, and the case was appealed to the circuit court. There appellee again recovered judgment, and the case is here on appeal. The facts are as follows:

C. W. Riggs testified: "I am president of the appellant corporation, and have been since its organization. The amount due appellant by appellee on the first note sued on was $5.25 on August 5, 1909, and on the second note, $50, was due on July 1, 1910. Both of these sums are due and unpaid. On November 18, 1909, appellant entered into a written agreement with Mrs. C. K. Cross, by which she became its agent in Cross County for certain specified purposes, which were set out in the contract. She had no power to make a contract for us, but could only talk over contemplated contracts and present them to us for our approval. She never had any authority to make any contract for us, and I never gave her any authority whatever to use our credit, and never agreed with her or any one else to pay her debts, except in one instance, when she was taken sick on the Love place, which she had rented from us. On that occasion we received a letter that she was sick and needed assistance. We wired back that we would pay any one for taking care of her during her sickness. We never knew that she bought goods from the appellee and had same charged to our account, and never gave her any authority to buy goods from appellee and charge them to us. Mrs. Cross never had any authority to collect money for our company except one time she was given authority

to collect ten dollars on a horse sold. At another time she collected twenty-five dollars and gave the company's receipt therefor. This was done without authority, but owing to the distress she was in at the time we ratified her action."

I. R. Dye, appellee, testified: "The plaintiff company owes me $149.17 for supplies furnished to Mrs. C. K. Cross bought from February to June, 1909, from me at my store in Parkin. I charged the goods to C. W. Riggs by Mrs. C. K. Cross. The plaintiff company never told me to furnish her goods, nor promised to pay for any she got, but Mrs. Cross came there and took an oversight over the affairs of the company, making contracts, buying feed, selling stock and selling land, and I just supposed she had the right to charge things to them.

"When Captain Riggs was in my town, Parkin, 1907 or 1908, this Mrs. Cross was with him and appeared to be treated as one of the family. He ran an account at my store which he finally paid by receipting one of this same series of notes, one of which is sued on. While he was there at that time, Mrs. Cross came to the store to get goods several times, sometimes with an order, sometimes without. The goods were furnished her just as they would be to the member of any other man's household, and they were charged to him. This is the reason when she came there again and wished to buy goods I sold them to her and charged them to C. W. Riggs by her. At the time Captain Riggs was in Parkin, when he ran a bill at my store, he was in the show business, and was in Parkin in winter quarters with his show. This account that I have filed as a counterclaim has never been paid and is past due. It amounts to $149.17. I never did send the company or Captain Riggs a statement of the account to let them know that the goods were being charged to him. After she had run quite a bill, she came and insisted on my taking her personal note for the goods bought, and I reluctantly took it. Later she gave me another note when she had bought more goods. I have these notes now at home. They have never been paid. I said to her that I was owing the company, and that we could settle it that way. I did not take the notes as a settlement releasing the Wales-Riggs Plantations Com-

pany from the debt due me. One of the series of notes to which the notes sued on belong fell due after I had furnished these goods to Mrs. Cross and charged them to Captain Riggs, and when the bank notified me the note was due I paid it. I did not then mention to the company the fact that I had anything against it, but paid the note in money."

J. H. Hammett testified: "I was levee tax collector in 1908, and Mrs. Cross paid the levee taxes that year for Wales-Riggs Plantations. The next I knew of her was in the fall of 1909, after I had moved from Wynne to Earle. She had desk room in my office. I had a letter from Captain Riggs, saying she was general agent of the plaintiff, and she acted like it in every way, making contracts, drawing them and signing them, renting land, selling stock, and so on."

On rebuttal Mrs. C. K. Cross testified: "In the spring of 1909 I was agent for appellant company to show its lands and stock and submit to the company any propositions or offer of rentals that might come up. I had no authority whatever to close up contracts. The goods I bought from Mr. Dye were to be charged to me, and were not for the appellant company. I was not the agent of the company at that time. I was farming land which I had rented from appellant. I executed my notes to appellee for the goods I bought from him."

It is not claimed that there was any express authority on the part of Mrs. Cross to bind appellant, and we think that the testimony falls short of showing that she had any apparent or ostensible authority to do so. The contract of agency between appellant and Mrs. Cross made in the fall of 1909 has no probative force in this case. In proving authority of an agent for the purpose of binding the principal by the former's transaction, there must be evidence of the agency at that time. The goods were purchased by Mrs. Cross from appellee in the spring of 1909 between February and June. The contract of agency between appellant and Mrs. Cross was not made until November, 1909. In the spring of 1909 Mrs. Cross was the tenant of appellant. The fact that Mrs. Cross collected money for appellant at one time by its permission, and that it ratified her act in collecting money at another time without its permission, coupled with the fact

that she also paid the levee taxes for it for one year, are not sufficient to show that she was the general agent of appellant, and as such had a right to buy goods and have the same charged to it.

The authority of an agent is never proved 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. *St. Louis, I. M. & S. Ry. Co.* v. *Bennett,* 53 Ark. 208.

Riggs, the president of the appellant company, and Mrs. Cross both testified that she had no authority to buy goods and charge them to the account of appellant, and Mrs. Cross testified that she did not do so.

Appellee testified that in 1907 Mrs. Cross lived with C. W. Riggs, the president of the appellant company, as a member of his family, and, like any other member of the family, came to his store for goods for him, and had same charged to his account, and that Riggs paid for them.

It is contended by counsel for appellee that the agency of Mrs. Cross as established during the winter of 1907 was presumed to continue. But it will be noted that there was no testimony that Mrs. Cross was the agent for appellant in the spring of 1909. Any presumption of that fact was overcome by the positive and direct testimony of both Riggs and Mrs. Cross to the effect that she had no authority in the spring of 1909 to bind the appellant for goods sold her by appellee. At that time she was only the tenant of appellant, and was working its land just as other tenants were doing.

It follows that the judgment must be reversed, and, inasmuch as the case has been fully developed, judgment will be entered here for appellant in the amount of the balance due on the two notes sued on.

SMITH, J., absent and not participating.

CLAY COUNTY v. BANK OF KNOBEL.

Opinion delivered December 9, 1912.

1. TAXATION—ERRONEOUS ASSESSMENTS—RELIEF.—The courts, whether of law or equity, are powerless to give relief against the erroneous

judgments of assessing bodies, unless they are especially empowered by law to do so. (Page 453.)

2. SAME—ERRONEOUS ASSESSMENT—RELIEF.—Under Acts 1911, p. 230, amending Kirby's Digest, § 7003, providing (§ 4) that "all appeals taken from the order of the board of equalization shall be taken to the October term of the county court," etc., an appeal to the county court after the October term of such court is too late. (Page 453.)

3. SAME—ERRONEOUS ASSESSMENT—RELIEF.—Under Acts 1911, p. 161, providing, among other things, for separate county courts for the Western District of Clay County, and that such courts shall meet on the third Monday in December and on the fourth Monday in March, June and September of each year, and that the county court for levying the taxes and making appropriations shall be held at Piggott, the county site, as now provided by law, *held*, that a taxpayer in the Western District of Clay County should apply to the October term of the county court which met at Piggott for relief against the action of the board of equalization. (Page 454.)

Appeal from Clay Circuit Court, Western District; *W. J. Driver*, Judge; reversed.

STATEMENT BY THE COURT.

At the March term, 1912, of the Clay County Court appellee presented its petition, alleging that its property in 1911, including its entire assets, personal and real, was assessed at the sum of $9,342.43, whereas it should have been assessed at one-half that sum. It prayed that the assessment be reduced.

The petition was overruled. Appellee took an appeal to the circuit court. In the circuit court appellant filed an answer, admitting that appellee's property had been assessed at the sum alleged, but denied that the property was doubly assessed, and set up that the court was without jurisdiction or power to grant the relief prayed for, and alleged that if the petitioner was entitled to any relief it had lost that right by failure to apply to the proper court within the time required by law.

A trial was had and evidence was adduced tending to show that appellee's property was assessed at its true value, the amount alleged in the complaint; and there was evidence to the effect that the board of equalization of Clay County had a rule to assess property at fifty cents on the dollar of its true value; that the board, in that respect, approved the rule of

the State Tax Commission to assess property at its real value, and then cut it half in two and put the valuation at one-half the real value. But this was not done as to the property of appellee.

The circuit court rendered judgment reducing the assessment to $4,696.25, as prayed in the petition. Appellant duly prosecutes this appeal.

G. B. Oliver, for appellant.

Appellee had a remedy provided by law whereby it could obtain relief. Not having pursued that remedy, the judgment was erroneous and should be reversed. Kirby's Dig., § 7180; Acts 1911, p. 230, § 1; 94 Ark. 217; 90 Ark. 417.

J. S. Jordan, for appellee.

By the amendment of 1911 (Acts, p. 161) to the act of February 22, 1881, establishing separate courts in Clay County, there was established a county court for the Western District of Clay County, and the terms of said court were fixed by section 2 of the amendment to be held on the third Monday in December and the fourth Mondays in March, June and September. There was therefore no October term of the court, and no board of equalization convened on the first Monday in September. Appellee could not have complied with the act of 1911, p. 230, unless its property were in the Eastern District of the county. See Kirby's Dig,. § 6993; *Id.* § 7180; 56 Ark. 173; 62 Ark. 461.

WOOD, J., (after stating the facts). Act 249, of the Acts of 1911, p. 230, which amends section 7003 of Kirby's Digest, provides that the board of equalization, when in session, "shall have power to examine witnesses with respect to any matter under investigation, to hear complaints with respect to the undervaluation or overvaluation of property, and to equalize the assessments of the county by adding to or taking from the valuation of any real or personal property, moneys and credits within the county, and to assess the property of any person omitted from the rolls by the assessor, and to correct the obvious errors that may have been made in the assessment of property by the assessor."

The second section specifies when the board of equalization shall meet, and then provides: "The board shall

have power to exercise its functions in the equalization of property until the fourth Wednesday of October."

The fourth section provides that "all appeals taken from the order of the board of equalization shall be taken to the October term of the county court, and such appeals, even if taken after the regular October term of the county court has convened, shall be heard and passed upon by said court before the fourth Wednesday in October."

And the fifth section, among other things, provides that "all appeals from the county court to the circuit court herein provided must be taken within thirty days of the day upon which the order from which the appeal is taken was made."

It will thus be seen that the statute furnishes a complete remedy, in case of overvaluation of property by the assessor, to have the same reduced by first applying to the board of equalization, and, if relief is not granted there, then by appeal to the county court, and then to the circuit court. The appellee did not pursue the remedy provided by statute.

We held, in *Clay County* v. *Brown Lumber Co.*, 90 Ark. 417, that in all cases of excessive valuation, where the assessor or the board acts within its jurisdiction, the taxpayer must pursue the remedy provided for his relief or abide by the finding of the board. And in *Bank of Jonesboro* v. *Hampton*, 92 Ark. 492, we said: "The taxpayer may apply to the county board of equalization for redress against the action of the county assessor; and, if the county board does not grant him the relief, he may appeal to the county court, and, if dissatisfied with its action, may in turn appeal from its decision."

In *State* v. *Little*, 94 Ark. 217, we said: "The courts, either of common law or equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they be especially impowered by law to do so."

It thus appears that appellee, not having pursued the remedy provided by law, was not entitled to the relief which the circuit court granted.

The appellee contends that under the act of May 4, 1911, *supra*, it was without a remedy because there was no October term of the county court of the Western District of Clay County to which it could appeal according to the provisions of that act.

Act 204, page 161, of the Acts of 1911 provides, among other things, for separate county courts for the Western District of Clay County and the time for the meeting of such courts, towit, on the third Monday in December and on the fourth Mondays in March, June and September of each years After fixing the time for holding these courts, the act provides that "the county court for levying the taxes and making appropriations shall be held at Piggott, the county site, as now provided by law."

At the time this act was passed the county court of Clay County was held at Piggott on the first Monday in April, July and October of each year (Kirby's Digest, § 1361, Acts 1895, p. 36), and the board of equalization met in September of each year. Kirby's Digest, § 6992.

Counsel for appellee states that there was only one board of equalization in Clay County, and there is no evidence in the record showing that there was any board for the Western District separate from that for the Eastern District. Since there is no specific provision in the act for the meeting of the equalization board and session of the county court in the Western District of Clay County for the purpose of correcting improper assessment of taxes, we must assume that the above general provision for the meeting of the equalization board and the session of the county court for Clay County applied to the Western District as well as to the Eastern District thereof.

When the county court met for the levying of taxes, it was necessarily in session for the purpose of correcting any errors that may have been made in the assessment of taxes, as the assessment of taxes necessarily preceded any proper levying thereof.

Therefore, if appellee's property was improperly assessed by overvaluation, it had a complete remedy as provided by statute, *supra*, by first making application to the board of equalization, and, if relief was not there granted, then by appeal to the county court, and then to the circuit court. Not having pursued this remedy, the circuit court erred in granting the relief in the petition. The judgment is therefore reversed, and the cause is dismissed.

HEARIN v. UNION SAWMILL COMPANY.

Opinion delivered December 9, 1912.

1. EVIDENCE—VARYING WRITING BY PAROL.—Parol evidence is inadmissible to show that a deed conveying "all the pine and oak timber ten inches and up" was intended to include virgin pine, but not old field pine. (Page 458.)
2. REFORMATION OF INSTRUMENTS—MISTAKE.—Where parties to a deed signed it of their own volition, they will not be heard to say that they did not know what it contained or that they did not understand the plain and ordinary meaning of the words used. (Page 459.)

Appeal from Union Chancery Court; *J. M. Barker*, Chancellor; affirmed.

J. B. Moore and *Warren & Smith*, for appellants.

1. The contract is controlled by the customs of trade. Parties are presumed to contract with reference to the known customs and usages of trade with reference to the subject-matter of the contract. 9 Cyc. 252; 69 Ark. 317; 10 L. R. A. 735; 80 U. S. 653; Jones on Ev. 576. Proof of custom is admissible to show that "timber" means merchantable timber. 51 So. (Miss.) 3; 138 S. W. 36; 12 Cyc. 1081 (e) and (b); 60 S. E. (Ga.) 297; 49 So. 248. See also 4 Cent. Rep. 689, 6 Atl. 48; 164 Pa. 51; 77 Ark. 120.

2. If it was the specific understanding of all parties that the old-field pine was not purchased, or if Curphey wilfully misled appellants to so believe for the purpose of fraudulently obtaining title to it, appellee can not establish title under either state of facts. 107 Ill. 302; 69 Tex. 509; 51 Minn. 300; 1 De G. M. & G. 710; 21 L. J. Ch. (N. S.) 663; 77 Wis. 430; 37 L. R. A. 593.

3. If the deed did not express the intention of the parties, it will be reformed. 5 L. R. A. 157 *et seq.*, foot notes.

Gaughan & Sifford and *Powell & Taylor*, for appellee.

1. Having admitted that they read the deed before executing and delivering it, Mr. and Mrs. Hearin are estopped to claim fraud. 71 Ark. 185; *Stewart* v. *Fleming*, *ante* p. 37.

2. The rule is thoroughly established in this State that the burden is on the person claiming mutual mistake to establish it by proof that is clear, decisive, unequivocal and beyond

all reasonable controversy. 14 Ark. 482; 66 Ark. 155; 71 Ark. 614; 72 Ark. 546; 75 Ark. 72; 79 Ark. 256; 81 Ark. 420; *Id.* 166; 82 Ark. 226; 83 Ark. 131; 85 Ark. 62; 84 Ark. 349; 89 Ark. 390; 90 Ark. 24; 124 S. W. 370.

HART, J. J. F. and J. C. Hearin were in 1905 the owners of a tract of land in Union County Arkansas, on which grew oak and pine timber. On the 27th day of March, 1905, they conveyed to the Summit Lumber Company, a corporation, "all the pine and oak timber ten inches and up" on said land. Eight years was given in the deed to remove the timber. Subsequently it was discovered by the parties that a mistake had been made in the description of the land, and a new deed was executed on the 19th day of June, 1906, and the timber was again described as "all the pine and oak timber ten inches and up."

The tract of land in question contained both virgin and old-field pine. Old-field pine is pine that grows on land that has been once farmed. In 1909 the Summit Lumber Company conveyed the timber so purchased by it to the Union Saw Mill Company, another corporation. All the deeds referred to were filed for record. The Summit Lumber Company began to cut and remove the old-field pine, as well as the virgin pine. The Hearins claimed that the old-field pine was not embraced in the timber deed given by them to the Summit Lumber Company, and in 1909 they conveyed "an undivided half interest in and to all the old-field pine timber ten inches and upwards at the stump" standing and growing on said land to T. W. Ramsey, J. W. Warren and C. W. Smith, upon consideration that their grantees should bear the expenses of litigation in a suit against the Summit Lumber Company to recover the old-field pine.

This suit was instituted in the chancery court by J. F. Hearin, J. C. Hearin, T. W. Ramsey, J. W. Warren and C. W. Smith against the Union Saw Mill Company and Summit Lumber Company. The plaintiffs alleged in their complaint that the old-field pine was not embraced in the grant of timber to the Summit Lumber Company, and also alleged that the language used in the deed was inserted by fraud or mistake, and that it was not intended by the parties that the old-field pine should be conveyed. The prayer of the complaint is that the

timber deeds be cancelled as a cloud upon plaintiff's title, and that they be reformed to conform to the intention of the parties and for damages.

The defendants deny the allegations of fraud and mistake, and aver that the old-field pine was conveyed under the timber deeds. Evidence was introduced by both parties to sustain their respective contentions. The chancellor found in favor of the defendants, and plaintiffs have appealed.

C. W. Curphey was the agent of the Summit Lumber Company in purchasing the lands from J. F. and J. C. Hearin. It appears that Mrs. J. C. Hearin owned a part of the land and her husband, J. F. Hearin, owned a part. Both testified it was understood between them and Curphey at the time the purchase of the timber was made and the deed to the same was executed that the old-field pine was not to be included. They said that at that time old-field pine had no market value, and that Curphey refused to purchase it; that there was no market value for old-field pine in that part of the country until in 1906 and 1907. Other evidence introduced by them tended to show that the mill operators did not begin to purchase old-field pine and saw it into lumber until the latter part of 1905. They said that the old-field pine had more knots in it than the virgin pine, and for that reason could not be profitably sawed into lumber at the time the timber in question was conveyed to the Summit Lumber Company in the spring of 1905. Afterwards they said that the price of lumber began to rise, and it was not until then that the saw mill operators began to purchase old-field pine. The Hearins also testified that one of the agents of the Summit Lumber Company began to estimate the old-field pine in question in 1907, and that they told him that the old-field pine was not embraced in the deed made by them to the Summit Lumber Company. The agent who made the estimate denied that they made any objection at the time, and denied that they contended that the old-field pine was not included in the deed during the time he was making the estimate.

The evidence on the part of the defendants tended to show that at the time the Summit Lumber Company purchased the timber from the Hearins it and other saw mill operators were purchasing old-field pine and sawing it into lumber.

Some of the witnesses said they began to purchase old-field pine and saw it into lumber as early as 1903, and some place the date in 1904.

It is first contended by counsel for the plaintiffs that old-field pine is not included in the description, "all the pine and oak timber ten inches and up." We think they are not correct in this contention. These general words aptly include every kind of pine on the lands. The language used is broad enough to cover the old-field pine. It does not make any difference whether or not it was profitable at that time to saw old-field pine, for, as we have already seen, the language of the deed is not merchantable timber, but is "all the pine and oak timber ten inches and up." Since the language of a deed is broad and comprehensive enough to cover all the pine timber that may be found on the land of a certain description, it is not material to the effect of the deed that the parties in fact contemplated at the time that a particular kind of pine timber found on the land should not be included under the terms of the deed. This is so because the natural and ordinary meaning of the language used in the deed is broad and comprehensive enough to include the old field, as well as the virgin, piné. To allow the plaintiffs to show by parol proof that it was not so intended would be to contradict or vary the written instrument, which is contrary to the settled rule in this State. *Cherokee Const. Co.* v. *Prairie Creek Coal Mining Co.*, 102 Ark. 428; *Boston Store* v. *Schleuter*, 88 Ark. 213; *Cox* v. *Smith*, 99 Ark. 218; *Delaney* v. *Jackson*, 95 Ark. 131; *Bradley Gin Co.* v. *J. L. Means Machinery Co.*, 94 Ark. 130.

It is next contended by counsel for the plaintiffs that the language "all the pine and oak timber ten inches and up" was placed in the deed through fraud or mistake on the part of C. W. Curphey, the agent of the defendant Summit Lumber Company, in purchasing the land. Curphey was not introduced as a witness, and it appears that he resided in another State at the time the depositions were taken. It also appears that Mrs. Hearin knew where he resided, and that the defendants did not. She refused on cross examination to disclose his address, but subsequently through her attorneys gave it to the defendants. Mrs. Hearin testified that she and her husband acted together in selling the timber, and that both were

present when the sale was made. She admits that she read over the deed they executed to the Summit Lumber Company, and also read it to her husbnd. Again, a year later, it was ascertained that a mistake had been made in the deed in the description of the land, and a new deed was executed to correct this mistake. This deed also described the timber as "all the pine and oak timber ten inches and up."

The deed was the final embodiment in writing of the agreement between the parties. The plaintiffs signed it of their own volition after having read it; and they will not now be heard to say they did not know what it contained, or that they did not understand the plain and ordinary meaning of the words used. *Stewart* v. *Fleming, ante* p. 37; and cases cited. In discussing a similar principle, in that case, the court said:

"There was no misrepresentation as to any matter of inducement to the making of the lease, which, from the relative position of the parties and their means of information, the one could be presumed to contract upon the faith and trust which he reposed in the representation of the agent of the other on account of his superior information and knowledge with respect to the subject of the contract, nor were there any fraudulent representations holding out inducements calculated to mislead the lessee and induce him to execute the lease on the faith and confidence of such representations, and, having signed it after opportunity to examine it, he will not be heard to say when he signed it that he did not know what it contained." (Citing authorities).

Testimony was introduced by the plaintiffs tending to show that the Union Saw Mill Company, one of the defendants in this case, made a contention similar to the one they are making now in a contest with another corporation as to similar language used in a deed. It is only necessary to say in regard to this that such action could in no event affect the rights of the Summit Lumber Company, which was not a party to that contention. Whatever rights the plaintiffs had resulted from a construction of their deed to the Summit Lumber Company. The Union Saw Mill Company was only made a party defendant because it had purchased the timber from the Summit Lumber Company. Hence the testimony referred

to could have no probative force whatever as affecting the right of the Summit Lumber Company.

The decree will be affirmed.

MEDLOCK v. OWEN.

Opinion delivered December 9, 1912.

1. HIGHWAY—ADVERSE POSSESSION—PRIVATE WAY.—In order that one may acquire a private right-of-way across another's land, the use must be under a claim of right and not permissive, and must be used openly, continuously and adversely for seven years. (Page 462.)
2. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDINGS.—A chancellor's findings of fact will not be disturbed on appeal unless it is clearly against the preponderance of the evidence. (Page 462.)

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

Callaway & Huie, for appellant.

A servitude was imposed across the land by appellant's grantor, thereby establishing a private road or way necessary to a reasonable enjoyment of the tract; and seven years' use, open, notorious and adverse, is a bar under our statutes and decisions. Kirby's Dig., § 623; 14 Cyc. 1166; 49 Am. Dec. 94; 13 *Id.* 747, note; 98 Mass. 50; 59 N. J. Eq. 46; 33 Atl. 802; 190 Pa. St. 536; 35 Am. Dec. 464, note; 128 Ind. 421; Bishop, Non-Cont. Law, § 872; 47 Ark. 66-72; 79 Ark. 5; 83 *Id.* 236.

McMillan & McMillan, for appellee.

This is a case of a simple or voluntary license, revocable at the pleasure of the grantor. The use was permissive merely. 19 Ark. 23; 59 *Id.* 35; 86 Am. St. 74, note; 89 Am. Dec. 755; 122 Am. St. 209; 86 Am. Dec. 74; 5 Am. St. 87; 102 *Id.* 109; 85 Am. Dec. 675; 47 Ark. 436.

HART, J. J. A. Hardage died intestate, owning the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 14, township 7 south, range 20 west, in Clark County, Arkansas. In the latter part of 1897 or 1898 J. A. Medlock entered into a contract with the executors of the estate of J. A. Hardage, deceased, to purchase the south half of the first mentioned forty-acre

tract. He immediately went into possession of the land, and in two years thereafter finished paying for it. On the 29th day of February, 1904, the executors of said estate executed to him a deed to said twenty acres of land. In 1901 or 1902 W. P. Owen purchased the last mentioned forty-acre tract of land from the estate of J. A. Hardage, deceased. It is adjoining and east of the twenty acres purchased from said estate by Medlock. Medlock owned forty acres of land immediately south of that purchased by W. P. Owens, and on this tract his residence was situated. At the time Medlock purchased the twenty acres of land from the Hardage estate there was a tenant house on it; a dim roadway wide enough for a wagon to travel ran from his tenant house across the forty acres of land purchased by Owens from the Hardage estate in a northerly direction to the public road from Arkadelphia to Mount Ida. There was a well-defined road running northward from Medlock's residence across the land purchased by Owens from the Hardage estate to the Arkadelphia and Mount Ida road. Owens cleared up his land and attempted to fence up the private road running from Medlock's tenant house to the public road. He left open the road running from Medlock's residence to the public road, and also left a road on the south side of his land running from Medlock's residence to his tenant house.

Medlock instituted this suit in the chancery court to enjoin Owens from fencing up the road from his tenant house to the public road.

The evidence introduced by him tended to show that he and his tenant had continuously used said private road as a passageway since he purchased the twenty acres of land from the Hardage estate and went into possession thereof, and that his use of the road was adverse and under a claim of right so open and notorious as to put Owens on notice thereof.

The evidence introdcued by Owens tended to show that he had resided near there since the purchase of the land by him in 1901 or 1902, and that the use of the private road in controversy was by his permission.

The chancellor found that the use of said road by the plaintiff Medlock was a permissive one, and that the road

in controversy was not necessary as a way to or from his land. The case is here on appeal.

The law applicable to cases of this sort is settled by the case of *Clay* v. *Penzel*, 79 Ark. 5. There Mr. Justice RIDDICK, speaking for the court, said:

"Whether these plaintiffs used this strips as a private passway or as a public alley is not very material, so far as this case is concerned, for a private way over the land of another may be acquired by adverse use in the same time that the public may acquire the right to a public highway by adverse user. In either case the use must be under a claim of right, and not permission. The way in either case must be used openly, continuously and adversely under a claim of right for the full period of the statute of limitations, which in this State is seven years." (Citing authorities).

As we have already stated, there was a direct conflict in the evidence, and the chancellor found in favor of the defendant.

We do not deem it useful or necessary to make a detailed statement of the facts or to go into a discussion of them. Under the settled rule of this court, the finding of facts made by a chancellor will not be disturbed on appeal unless it is clearly against the weight of the evidence. A careful consideration of the testimony leads us to the conclusion that the finding of the chancellor is not against the preponderance of the testimony, and this view is strengthened when we consider that the plaintiff had an almost equally accessible way to the public road by going along the road left open at the south end of the defendant's tract of land to the road leading from plaintiff's residence to the public road. Therefore, the decree will be affirmed.

BOBO v. STATE.

Opinion delivered December 2, 1912.

LIQUORS—AIDING IN UNLAWFUL SALE—LIABILITY.—One who aids another in the illegal sale of whiskey is guilty and punishable as principal.

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

Searcy & Parks, for appellant.

Under the evidence this case should be controlled by the case of *Whitmore* v. *State*, 72 Ark. 14.

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

The case is controlled by the case of *Josey* v. *State*, 88 Ark. 269.

HART, J. Henry Bobo was indicted and convicted of the offense of selling whiskey without license. The facts are as follows:

E. E. Mulkey went into a restaurant in Lafayette County. Arkansas, where the defendant, Henry Bobo, was employed, He told Bobo that he wanted a drink, and asked him if he knew where he could get any whiskey. He told Bobo that if he could get it he would pay for it. He gave Bobo $1.50 with which to get the whisky and Bobo left the restaurant and soon afterwards returned with a quart of whiskey, which he delivered to Mulkey. Bobo said that he got the whiskey down at the power house from a man by the name of George Russell and gave him the $1.50 for it. That he brought the whiskey back to the restaurant and delivered it to Mulkey, and that Mulkey gave him a drink out of the bottle. On cross examination, Bobo stated that two or three days before this Russell had come around to the restaurant and told him if he wanted any whiskey at any time that he had some for sale. Russell did not ask Bobo who the whiskey was for, and Bobo did not tell Mulkey from whom he got it. At the conclusion of the evidence the court directed a verdict of guilty, and the action of the court in so doing is assigned as error.

Counsel for the defendant rely upon the case of *Whitmore* v. *State*, 72 Ark. 14. In that case the State introduced evidence tending to prove the defendant sold whiskey without license. On the other hand, there was evidence which tended to show that the defendant did not sell the whiskey, but that he only made out an order for whiskey to persons in St. Louis dealing in liquors for the person to whom he was charged with selling the whiskey. The persons in St. Louis were licensed liquor dealers. The court held that if the defendant in that case did nothing more than order liquor for another person from this

firm he was not guilty. This was because the persons in St. Louis were authorized to sell liquors, and the law did not prohibit any one from buying from them. This was but an application of the well known rule of agency; that is to say, that which a man may legally do himself he may also do by an agent. The facts in this case are essentially different, and we think the present case is controlled by the principles of law announced in the case of *Foster* v. *State*, 45 Ark. 361. In that case Foster was indicted for selling liquor to a minor. The proof was that Foster took the money of the minor and purchased the liquor for him at a saloon in which he was not interested, and delivered the liquor to the minor. The court said that Foster was not the actor in making the sale to the minor, and to this extent was not within the language of the statute which prohibited the sale of whiskey to minors. The court held, however, that, following the rule of the common law, all persons concerned in the commission of a crime less than a felony, if guilty at all, are principals, and that Foster was guilty because he aided and abetted the liquor seller, which was the offense prohibited by the statute. The court said:

"However men combine, each one is criminally responsible for what he personally does, * * * for the whole of what he assists others in doing, and for all that the others do through his procurement. Bish. St. Cr. § 1024. The appellant had the evil design of procuring a sale of liquor to a minor, and his act directly and immediately led to the commission of the offense. This made him a principal in the offense."

In the application of this rule in the case of *Dale* v. *State*, 90 Ark. 579, the court said:

"It has often been ruled that one who aids another in the sale of whiskey contrary to law is guilty as a principal offender, no matter what subterfuge is resorted to, or what means are employed to accomplish the sale."

Again the court said:

"One might be interested in the sale and aiding the seller, and yet have no interest in the whiskey being sold. One might be employed by another to assist in making a sale, and act as his agent in making the sale of a commodity, and yet have no interest whatever in the thing being sold. He might be

interested in the proceeds of the sale, or interested in making the sale because of some pecuniary or other benefit that he expected to reap from it, and yet not have any interest in the thing that was being sold. The distinction is clear, and it is vital."

Under the facts of the present case the defendant Bobo aided Russell in making the sale of the whiskey to Mulkey, and thereby became a principal in the offense. Mulkey did not know that Russell was engaged in the illegal sale of whiskey. He came into the restaurant where Bobo was working and asked him if he could get him any whiskey and gave him money to pay for it with. Bobo went out and got the whiskey from Russell and came back and delivered it to Mulkey.

On cross examination he was asked, "How come you to know where to get that whiskey?" To which he answered, "The man that was selling it had been around there and told me that if I wanted any he had some for sale and told me where to find him at." We quote further from his cross examination as follows:

"Q. How come this man coming around up there telling you he had whiskey to sell and you could get some any time you wanted to?

"A. Well, I guess he knew that I was in a public place.

"Q. In fact, he asked you to turn everything you could his way?

"A. No, sir. I bought it for myself before.

"Q. Well, he told you that if anybody come around there that wanted whiskey you could get it, didn't he?

A. No, sir. He just told me I could get some if I wanted it."

While Bobo says he procured the liquor from Russell at the request of Mulkey with money furnished by him for the purpose, still he admits that Russell was not known to the buyer, and had told him that he had liquor for him whenever he wanted it. This shows that Bobo was a necessary factor in making the sale, and that he acted for the seller as well as the buyer, and as such intermediary he was interested in the sale of the liquor, within the rule announced in the case of *Dale* v. *State, supra,* and became thereby a principal offender.

The judgment will be affirmed.

McCULLOCH, C. J., (concurring). I concur in the judgment of affirmance, but upon grounds different from those stated by the majority. I do not think it is material whether or not Mulkey, the purchaser of the liquor, knew who the seller was. The fact that, according to his own admissions, he acted as messenger or agent for the purchaser made him a participant in the unlawful sale, and he was, therefore, guilty as a principal. That is the logical and necessary result of the decision in *Foster* v. *State*, 45 Ark. 361. There the defendant was charged with violating the statute against selling intoxicating liquor to minors. The defendant took the money of a minor, and, acting as the latter's agent, purchased for him liquor from a licensed dealer. The court decided that he was guilty of aiding in an unlawful sale to a minor. Chief Justice COCKRILL, speaking for the court, after pointing out that the buyer of liquor was guilty of no offense under the statute, said:

"As the minor was guilty of no offense, the appellant can not be punished for his complicity in the minor's act of purchase. If he had done nothing more than counsel and advise the minor in getting the whiskey, he would not have violated the terms of the statute, and could not be held to criminal responsibility. One can not be punished for violating only the spirit of a penal law. But he has done more. He aided and abetted the liquor-seller, and procured him to make the sale to the minor. This is the offense the statute is aimed at."

He goes on further to say that, if the liquor dealer had been apprised of the fact that the sale was to defendant as agent for a minor, the dealer and the defendant would both be guilty. The point of the case is that one who acts as the agent of the purchaser in bringing about an unlawful sale of liquor is guilty of aiding and abetting the unlawful sale, even though his principal is not guilty under the law. That fully covers this case. The following cases sustain this view, and I think they are sound: *Buchanan* v. *State*, 4 Okla. Cr. Rep. 645, 112 Pac. 32, 36 L. R. A. (N. S.) 83; *Wortham* v. *State*, 80 Miss. 212, 32 So. 50.

In *Buchanan* v. *State*, *supra*, the court cited with approval our case of *Foster* v. *State*, and held (quoting the syllabus) that "any person who acts as a messenger or agent of the buyer in going after, purchasing, and bringing back prohibited liquors

is thereby aiding and assisting in the sale of such liquors, and may be prosecuted and convicted for such sale."

My conclusion, therefore, is that the trial court properly held defendant's own testimony established his guilt, for the reason that it showed that he acted as messenger or agent in purchasing liquor from Russell, who was not a licensed dealer and violated the law in making the sale.

JENKINS v. QUICK

Opinion delivered December 2, 1912.

1. INSTRUCTION—SINGLING OUT TESTIMONY.—It was not error to refuse an instruction which singles out a particular class of testimony in the class and directs the jury to consider it in connection with the other evidence. (Page 469.)
2. APPEAL AND ERROR—REMARKS OF COURT—NECESSITY OF EXCEPTION.—A remark of the court, not excepted to, can not be insisted upon on appeal. (Page 470.)
3. WITNESSES—IMPEACHMENT—RELEVANCY OF AFFIDAVIT.—An affidavit in a replevin case made by the plaintiff is not relevant to impeach him where he does not deny making it and it does not contradict his testimony. (Page 470.)
4. INSTRUCTIONS—REPETITION.—It is not error to refuse to give an instruction which is fully covered by other instructions given. (Page 471.)
5. APPEAL AND ERROR—HARMLESS ERROR.—Appellee's counsel used the following language: "I want to say that any man that would commit the crime which I believe Harold Jenkins (appellant) has committed against Uncle Tom Quick (appellee), as shown by the testimony in this case, ought to be in the penitentiary." The court sustained an objection to the language, whereupon appellee's counsel apologized and withdrew the statement. *Held* sufficient to remove any prejudice that might otherwise have been created in the minds of the jury. (Page 471.)

Appeal from White Circuit Court; *Hance N. Hutton*, Judge; affirmed.

S. Brundidge, for appellant.

1. Instruction 1, for appellant, should have been given. Affidavits by either party to a suit concerning the subject-matter thereof are always admissible as evidence for the purpose of contradicting affiant when he testifies. 89 Ark. 487; 68 *Id.* 587; 93 *Id.* 2; 55 *Id.* 85.

2. The opening statement and closing argument of

plaintiff's attorney was improper and prejudicial. 58 Ark. 353; 61 *Id.* 138; 63 *Id.* 174; 65 *Id.* 626; 70 *Id.* 306.

3. The charge of the court, so far it refers to a conditional sale, was abstract and misleading. 77 Ark. 567; 63 *Id.* 177.

4. A trial court has no discretion to refuse instructions appropriate to any theory of the case sustained by competent evidence. 82 Ark. 503; 77 *Id.* 128; 50 *Id.* 545; 96 *Id.* 212; 69 *Id.* 632; 77 *Id.* 531.

J. N. Rachels and *John E. Miller,* for appellee.

1. No objection was made nor exceptions saved to the ruling of the court on the admission of the affidavit nor to the remarks of counsel. 97 Ark. 623; 77 *Id.* 27; *Ib.* 418.

2. Isolated facts should not be singled out for instructions. The charge of the court on the whole case properly stated the law. 62 Ark. 287; 57 *Id.* 512; 37 *Id.* 333.

3. The remarks of the attorney were neither improper nor harmful. 67 Ark. 368; 76 *Id.* 40; 74 *Id.* 256; 98 *Id.* 85; 93 *Id.* 75; 77 *Id.* 1.

4. It is unnecessary to repeat instructions where the court has already properly charged the jury on the same subject. 99 Ark. 597; 98 *Id.* 212.

WOOD, J. The appellee sued appellant in replevin to recover the possession of a horse. His affidavit set up the allegation of ownership and the usual statutory requirements. Appellant denied the allegations of the plaintiff, and set up that he had sold the horse obtained from the appellee, and that he was not in the possession thereof at the time the suit was brought.

The contention of the appellee was that he had traded horses with the appellant on condition that if the mare obtained from appellant in exchange for the horse of appellee did not possess certain qualities which appellant guaranteed her to possess, or if appellee was not satisfied with her, he should be permitted to rue the trade.

Appellee testified that the appellant, in making the trade, said to the appellee concerning the mare: "If you are not satisfied with her, and she don't do what I say, you come back, and I will give you the horse back." The testimony of appellee tended to prove that the mare was unsatisfactory

to him, and that he attempted to have appellant take her back, but that appellant refused.

On the other hand, it was contended by appellant, and the evidence in his behalf tended to prove, that he traded his mare for appellee's horse, and that the trade was in no manner a conditional one.

During the progress of the trial the court permitted the appellant to introduce an affidavit of the appellee, made before the justice of the peace before whom the suit was instituted, in which the appellee charged that the appellant "did obtain of affiant the possession of one horse of the value of $150 by false pretenses." When appellant offered the affidavit, the court remarked: "You can introduce the affidavit if you want to, but it will not have anything to do with the contract between these parties as to the horse trade." The appellant did not except to this remark of the court.

The appellant offered the following prayer for an instruction, which the court refused, towit:

"If you find from the testimony that after the consummation of the trade between the plaintiff and defendant, the plaintiff executed an affidavit in which he charged the defendant with having obtained a horse from the plaintiff under false pretenses, that this is a circumstance which the jury may take into consideration in determining the question as to whether or not the trade for the horse was conditional or unconditional; and if you believe from the testimony, both direct and circumstantial, that, at the time the trade was made, the only condition existing between the parties was included in the contract of sale, and that in the event the mare should not prove to be as represented, the defendant would make compensation to the plaintiff, then the plaintiff is not entitled to recover in this action, and you will find for the defendant."

The appellant contends that the refusal to give this prayer was error. In *Railway Co.* v. *Lyman*, 57 Ark. 512, we held that it was not error to refuse an instruction which singles out a particular class of testimony in the case and directed the jury to consider it in connection with the other evidence. See also *Winter* v. *Bandel*, 30 Ark. 362; *Newton* v. *State*, 37 Ark. 333; *Carpenter* v. *State*, 62 Ark. 287; *Western Coal & M. Co.* v. *Jones*, 75 Ark. 76; *Quertermous* v. *State*, 95 Ark. 48.

Appellant did not except to the remark of the court stating that the affidavit did not have anything to do with the contract between the parties, and therefore he can not complain of this language here. The affidavit was in evidence, and therefore must have been considered by the jury in connection with the other evidence; but the court did not err in refusing an instruction stating and emphasizing for what purpose the affidavit should be considered. The affidavit was not relevant evidence because the appellee did not deny that he made it, and there was nothing in the affidavit that tended to controvert the contention that the trade between appellant and appellee was a conditional one, as contended by the appellee.

The appellant presented the following prayer for instruction, which the court refused, towit: "You are instructed that, in determining the question as to whether or not the mare in fact came up to the representations of Mr. Jenkins, they must consider only the question as to whether she possessed certain desirable qualities as then mentioned, or whether she failed to possess certain undesirable qualities as then mentioned, and any captious objection would not be pertinent for them to consider."

In its oral charge the court instructed the jury in part as follows: "Mr. Jenkins contends that he guaranteed that this mare had certain qualities, was reliable, and that upon this guaranty he would have been responsible in damages, and, if that was the contract, this action is improperly brought, and should have been brought for damages, and not for the possession of the property; but if the contract was that it was only a conditional sale that Mr. Quick was to complete on trying the horse to see if it had certain qualities, then that would have been a conditional sale; if the horse had not come up to requirements or representations, then Mr. Quick could have demanded the return of his horse." And, while the court was delivering his oral charge, one of the attorneys for appellant interposed with the following language: "There is some testimony whether the mare in fact came up to the recommendations of Mr. Jenkins, and they must only consider as to whether or not the mare in fact possessed certain desirable qualities, as those mentioned, or whether she failed to possess

other undesirable qualities than mentioned, and any captious objection would not be pertinent for them to consider." Whereupon the court responded, "Yes," thereby virtually approving the above language of the attorney as a part of the oral charge.

Conceding that the prayer for instruction No. 2 was correct, it was fully covered by the instructions which the court gave, and to which appellant saved no exceptions. It is not error to refuse to grant prayers for instructions where such prayers are fully covered by other instructions. *Chicago Mill & Lumber Co.* v. *Ross*, 99 Ark. 597; *Williams* v. *State*, 100 Ark. 218; *St. Louis, I. M. & S. Ry. Co.* v. *Aiken*, 100 Ark. 437.

In the closing argument counsel for appellee used the following language: "I want to say that any man who would commit the crime which I believe Harold Jenkins has committed against Uncle Tom Quick, as shown by the testimony in this cause, ought to be in the penitentiary." Upon objection being made, the court sustained the objection, and directed the jury not to consider the statement. The attorney for the appellee thereupon apologized to the jury and withdrew the statement. The remarks, although only the expression of the opinion of counsel, were highly improper, and tended to reflect upon the integrity of one of the parties, who was also an important witness in the case. But the conduct of the court in sustaining the objection to the language, and in directing the jury not to consider it, and the conduct of offending counsel in apologizing and withdrawing the improper statement, was sufficient to remove any prejudice that might have otherwise been created in the minds of the jury.

Finding no reversible error, the judgment is affirmed.

VILLINES v. STATE.

Opinion delivered December 9, 1912.

1. CRIMINAL LAW—SENTENCE—AMENDMENT.—Where a judgment convicting the defendant of manslaughter omitted to provide that defendant should pay the costs of his conviction, the omission may be cured by a *nunc pro tunc* amendment made at a subsequent term. (Page 473.)

2. MOTIONS—NUNC PRO TUNC ORDERS—EFFECT.—A *nunc pro tunc* order relates back to the date as of which it should have been entered. (Page 476.)

3. PARDON—EFFECT UPON COSTS.—A general pardon extends to all the judgment in which the public are interested, but does not affect the defendant's liability for costs, which may be enforced as a civil obligation. (Page 476.)

Appeal from Searcy Circuit Court; *Geo. W. Reed,* Judge; affirmed.

STATEMENT BY THE COURT.

The defendant was convicted on the 6th day of October, 1911, at an adjourned term of the Searcy Circuit Court of the crime of voluntary manslaughter, and his punishment assessed by the jury at imprisonment in the penitentiary for a peried of two years. The judgment of the court, pronounced upon this verdict, sentenced the defendant to imprisonment in the penitentiary for that period of time, but it was silent upon the question of the costs of the conviction, and did not provide that these costs should be paid by the defendant, and that their payment should be enforced against him. Later, and at a subsequent term of the same court, a motion was filed by the prosecuting attorney for a *nunc pro tunc* order, amending the original judgment to provide that defendant should pay the costs of his conviction, and payment thereof should be enforced against him.

The defendant prayed an appeal from the judgment of the court sentencing him to the penitentiary, but before the appeal had been perfected the Governor of the State granted him a full perdon from this sentence. The petition for the *nunc pro tunc* order was heard and granted by the court after the pardon had been issued by the Governor. Evidence was offered at the hearing of the petition, the effect of which was to show that, upon pronouncing the sentence, the presiding judge made no order in regard to the costs; although, in explaining his action in amending the original judgment, he said it was his intention that a judgment for costs should be entered such as was usually entered in these cases.

Guy L. Trimble, for appellant.

1. There was no judgment rendered for costs. After the lapse of the term, the court has no authority to amend

the former judgment by *nunc pro tunc* entry except to cause the record to speak what it ought to have spoken, but did not speak. 93 Ark. 234-237.

If the court erred in failing to render judgment for costs, the proceeding by *nunc pro tunc* order does not lie to correct his judicial mistake. 100 Am. Dec. 366.

2. The pardon granted by the Governor fully satisfied the judgment as of the date the pardon was granted, the judgment as to the defendant was fully executed.

An executed judgment can not be set aside and a new judgment imposing additional punishment entered at a subsequent term. 63 Kan. 57; 122 Mass. 317; 11 Am. & Eng. Ann. Cases, 299, note; 74 Ill. 20; 29 Fed. 775.

Hal L. Norwood, Attorney General, and *William H. Rector*, Assistant, for appellee; *John P. Streepey*, of counsel.

1. This was an issue of fact tried before the court sitting as a jury. Its finding as to the judgment actually rendered is conclusive. 68 Ark. 83, 87.

The entry of a judgment for costs in case of conviction is not a matter of judicial discretion resting with the court, nor a matter of judicial determination. Under the statute the judgment for costs goes, whether mentioned by the court in its oral judgment or not. Kirby's Digest, § 2446. In this respect the case of *Railway* v. *Bratton*, 93 Ark. 234, is clearly distinguishable from this case. See 100 Ark. 286.

2. The Governor's pardon did not relieve defendant from payment of costs. 12 Ark. 123.

SMITH, J., (after stating the facts). Upon overruling the motion for a new trial, the law prescribed the judgment that should be entered as follows: "In judgments against the defendant, a judgment for costs, in addition to the other punishments, shall be rendered, which shall be taxed by the clerk for the benefit of officers rendering services, and in case of failure by defendant to pay said costs they shall be paid by the county where the conviction is had." (Kirby's Digest, § 2446). No other judgment can be entered up by the court, as no discretion is allowed under the law, and it is immaterial what the judge might have said or omitted to say in pronouncing sentence. The law imposes the burden of paying costs

as an incident to conviction, and the judgment is not properly entered of record until it is so provided. It is true here that this *nunc pro tunc* order was not made until after the expiration of the term at which the conviction was secured, but there is no objection to this being done. In the case of *Thurman* v. *State,* 54 Ark. 120, where the defendant had escaped, and was absent several years, and was recaptured and sentence formally pronounced by the court in which the conviction was had, Judge COCKRILL, speaking for the court, said: "The statute does not require that the sentence shall be pronounced and judgment entered at the same term at which a plea of guilty is entered; and the entering of the judgment at a subsequent term does not alter or conflict with anything done by the court at the previous term. There is, therefore, no lack of power in the court, and the judgment may be deferred until a subsequent term." The appellant insists that at the hearing of the petition for a *nunc pro tunc* order they made a showing, which was practically undisputed, that the presiding judge in pronouncing judgment made no order in regard to the costs, and that, in view of this omission, he could not, after the expiration of the term at which that judgment was pronounced, enlarge its scope by inserting a provision which it should have contained in the first instance; and in support of this contention quotes the following language used by Judge FRAUENTHAL in deciding the case of *St. Louis & N. A. Rd. Co.* v. *Bratton,* 93 Ark. 234.

"The entry in the record should correspond with the judgment which was actually pronounced, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry as to make it conform to the truth. But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority, after the expiration of the term, to enlarge or diminish it in matters of substance, or in any matter affecting the merits. Under the guise of an amendment, there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered. 'The authority of a court to amend its record by a

nunc pro tunc order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken;'" a part of the above language being quoted from the opinion by Judge COCKRILL in the case of *Hershy* v. *Baer*, 45 Ark. 240.

In the Bratton case, above cited, the administrator had recovered a judgment against the defendant railway company for killing his intestate, but the judgment entered did not recite that the sum recovered should be a lien against the railway and its equipment, and the plaintiff insisted that the judgment should be amended at the subsequent term of the court at which his motion was heard, to give him the benefit of the lien to which he was entitled upon the entry of his original judgment. The court made the order as prayed, and upon the appeal Judge FRAUENTHAL used the language above quoted, but the order and the action of the trial court in amending the judgment in the administrator's favor and awarding him a lien by a *nunc pro tunc* order was reversed, and it was further said in the same opinion: "In the case at bar, the plaintiff was entitled, upon a recovery of the damages for which he sued, to have a lien upon the property of defendant, and under certain circumstances of the case to have that lien mentioned in the judgment. But he was not entitled to have such lien under any and all circumstances of the case; he was not entitled to the lien in the event the suit had not not been brought within one year after the claim had accrued. He was therefore not entitled to the lien necessarily and as a matter of course. Section 6662 of Kirby's Digest provides that the lien mentioned in the preceding section shall not be effective unless suit is brought upon the claim within one year after said claim shall have accrued." Before, therefore, a judgment could have been declared for said lien, it must first be found that the suit was brought within the time specified in the above section. In order to declare and mention said lien in the judgment, it was necessary that the court itself should make a finding and then an adjudication; and if no such finding and adjudication was actually made by the court, the omission can not now be supplied by an amendment of the judgment. For such amendment did not speak the truth, but did speak what should have been done, but was not." This case is not like the Bratton case, for the reason that no finding is necessary to be made to

determine whether the defendant should be liable for the costs. The law fixes that liability as a consequence flowing necessarily and of course from his conviction.

In the case of In re *Jones*, 100 Ark. 231, which was a habeas corpus proceeding to take Eunice Jones from the custody of the county convict contractor because the judgment for the fine against him did not direct that, in default of its payment, the defendant be imprisoned until the fine and costs were paid, it being contended that he had never been committed to jail within the meaning of the law, because of that omission, the court said: "This contention is without merit. 'The law requires that where the punishment of an offense is by fine, the judgment shall direct that the defendant be imprisoned until the fine and costs are paid,' etc. (Kirby's Digest, § 2443). And such direction should have been included in said judgment against Jones, in default of payment of the fine levied. Its omission, however, did not render the judgment void, and was a clerical misprision which could have been corrected, even after the expiration of the term." See also the case of *Bobo* v. *State*, 40 Ark. 229.

It is also urged that the defendant had been pardoned at the time the *nunc pro tunc* order was made, and that there was no felony conviction out of which his obligation to pay costs could arise, and that the order was erroneous for that reason. But the *nunc pro tunc* order necessarily related back to the date as of which it should have been entered, and the pardon has the effect, and no other, that it would have had if the judgment with proper recitals had been entered at the time of the trial, and the pardon had been subsequently granted by the Governor. The effect of such a pardon is discussed in the case of *Edwards* v. *State*, 12 Ark. 123, where the defendant had been sentenced to the penitentiary for manslaughter, but had been granted an absolute pardon by the Governor. After an execution was issued to the sheriff for the costs of the prosecution, he applied to the circuit court to quash the execution, exhibiting his pardon and claiming that it released him from the payment of the costs. The court said: "Costs are neither fines nor forfeitures, nor are they imposed by way of punishment or as amercement at common law, but by way of sequence to every judgment, whether in

civil or criminal cases, as a matter of common justice to the parties complainant, witnesses, and officers of the court, although the judgment is in favor of the complainant alone. Costs then, partaking in no respect of the nature either of punishment or of guilt, are without the sphere of the legitimate legal operation of a pardon, however general in its terms."

In the case of Ex parte *Purcell*, 61 Ark. 17, which was a petition for a writ of habeas corpus where petitioner had been convicted of simple assault and fined $50, a pardon was granted, "absolving him from the payment of said sum of $50 of the said judgment and all the effect and consequences thereof." The clerk of the court issued execution for the collection of the costs, and defendant was placed in jail, and the chancellor, on hearing the petition, refused to order his release until the costs were discharged. Upon appeal the court held that the chancellor erred in refusing the relief prayed by the defendant, but in doing so quoted and approved the Edwards case above cited, and expressed these views upon the subject of civil liability for costs where pardon had been granted by the Governor: "It appears that one of the reasons why a general pardon can not exonerate the criminal from the payment of costs is that they go and belong to individuals, and not the public. Logically, then, a general pardon extends to all the judgment that the public has an interest in, but not to that part in which individuals only are interested. Upon reason, then, we think a general pardon exonerates from the payment of the fine proper, because that is a public concern, and for the same reason it takes away the criminal character of the judgment for the costs—the imprisonment part—leaving the civil obligation still resting upon the delinquent, to be enforced as other civil obligations."

Judgment affirmed.

ARKANSAS NATURAL GAS COMPANY v. MILLER.

Opinion delivered December 16, 1912.

1. MASTER AND SERVANT—NEGLIGENCE OF INDEPENDENT CONTRACTOR.—Where work is being done by independent contractors, the liability of the property owner depends upon whether it has retained control

and direction of the work; but neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily, nor the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the property owner liable. (Page 481.)

2. SAME—EFFECT OF LENDING SERVANT.—A general servant may be loaned by his master to another for some special service, so as to become as to that service the servant of the latter; the test being whether in the particular service he continues liable to the master's control or becomes subject to the party to whom he is lent. (Page 481.)

3. SAME—TRIAL—QUESTION FOR JURY.—In an action for personal injuries against one employing an independent contractor for acts of his servant, whether such servant was acting under the direction of the contractor or the one employing him was, under the evidence, for the jury. (Page 483.)

4. SAME—INSTRUCTION—INDEPENDENT CONTRACTOR.—An instruction that plaintiffs had the right to rely upon the assumption that the defendant would properly turn the gas into the pipes was erroneous where there was evidence to show that such duty devolved upon an independent contractor employed by defendant, and that defendant's servant who turned on the gas was doing so under the direction and control of such independent contractor. (Page 483.)

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

Moore, Smith & Moore, for appellant.

The gas company was not liable for the acts of its independent contractors, or its agents or employees, even if injury resulted from their negligence. Pitts was an employee of appellant, but in opening the gates of the gas main and failing to close them or shut off the gas he was acting under the orders of the contractors' agent, and was their agent. 54 Ark. 424; 77 *Id.* 552; 156 N. Y. 75; 60 N. E. 87; 166 Mass. 268; 35 N. E. 101; 20 Moak, Eng. Rep. 469. The test is who directs the movements of the person committing the injury. 156 N. Y. 75. Pitts was simply lent to independent contractors and doing their work, under their orders. L. R. 6 C. P. 24. Under these authorities the court erred in its charge to the jury.

Robertson & DeMers, for appellees.

1. Booth & Flinn were not independent contractors, as found by the jury upon a proper charge.

2. Pitts was the agent and employee of appellant on duty and subject to its orders. 62 N. Y. Supp. 1086; 46 Fed. 506; 63 Pac. 177; 10 N. Y. Supp. 927; 83 Ark. 302. The relation of master and servant never existed between Booth & Flinn and Pitts. 83 Ark. 302; 133 N. W. 888; 38 L. R. A. (N. S.) 973; 203 N. Y. 191; 38 L. R. A. (N. S.) 481. There is no error in the court's charge.

MCCULLOCH, C. J. Plaintiffs, Patrick Gallagher and Joe Miller, instituted separate actions against defendant, Arkansas Natural Gas Company, to recover damages for personal injuries caused by an explosion of gas during the construction of a pipe line from the Caddo fields to the city of Little Rock. The actions were consolidated and tried together, the trial resulting in verdicts in favor of each of the plaintiffs, awarding damages, and the defendant has appealed to this court.

The pipe line was laid by Booth & Flinn, a partnership, under a written contract with defendant, whereby the contractors agreed to furnish the material and do the work for a stipulated price. The contract provided that "all material furnished by the said contractor in the construction and laying of said pipe line, and all work done shall be subject to the inspection and approval of the company, or its duly authorized agent; and that the said inspection shall be made as work progresses, and that any defective material or workmanship shall be pointed out by it as soon as the same is discovered and the said defect shall be at once remedied by the said contractor." It further provided that the contractors should be responsible for the proper working of the entire pipe-line system for thirty days after the same should be completed and put into use, and that the line should remain in charge of the contractors after it was completed and put into use during the time that the contractors should be engaged in remedying defects pointed out by the company or its inspectors.

During the progress of constructing the pipe line, and after it had been laid as far north as Beirne, a town or village in Clark County, one of defendant's inspectors, in going over the line, discovered a leak near Beirne, and gave notice thereof to the defendants as well as to the superintendent of the contractors. The contractors sent a force of men to that place

to repair the leak, and in doing so it became necessary to strip the pipes to ascertain the precise location and extent of leaks, and also it became necessary to turn the gas into the pipe line for that purpose. The plaintiffs were both employees of the contractors in doing the work in and about repairing the line, and while eating their lunches about the noon hour an accumulation of gas in the pipes caused an explosion, which resulted in severe personal injuries to them. They alleged that negligence of servants of the defendant in turning in an excessive quantity or pressure of gas, and leaving it in the line too long, caused the explosion. The defendant denied that the injury was caused by any negligence of its servants, and contends that the negligence, if any, was that of the contractors and their servants. The evidence shows, as before stated, that it was customary for one of defendant's inspectors to go over the line for the purpose of inspecting for leaks, and when any were discovered they were marked and notice given to the contractors. In making inspections it was necessary to turn the gas into the line, which the inspector would do, and after he had marked the place of a leak he would again turn the gas off. When the contractors went about repairing leaks, it was necessary to again turn the gas into the pipes for their benefit in discovering the precise location of leaks, and for this purpose the inspectors were instructed by defendant to turn the gas into the pipes when requested to do so by the contractors, and to turn it off under their directions. No one but defendant's inspectors were permitted to turn the gas on or off. On this particular occasion, W. H. Pitts, one of the inspectors, after he had discovered the leak, and the contractors had sent a gang of workmen to repair it, was requested by the foreman or superintendent to turn in the gas. This was done between 10 and 11 o'clock in the morning. The men were thereafter engaged up to the noon hour in stripping the pipes so that the leak could be repaired, and the gas was allowed to remain in the pipes until nearly 1 o'clock, when the explosion occurred. At that time Pitts had left the line and had started to Beirne to get his lunch.

The contention of the plaintiffs is that the explosion was caused by the negligence of Pitts in handling the gas, either in turning it on or letting it remain too long in the pipes. They

insist that in doing this Pitts was the servant of the defendant, and that the latter is responsible for all of his negligent acts. On the other hand, the contention of defendant is that Pitts, though in its general employment, was doing the particular service as a servant of the contractors, and that the defendant is in no wise liable for his alleged negligence.

According to the undisputed evidence in the case Booth & Flinn were independent contractors, and the defendant was not responsible for their negligence or for that of their servants. *St. Louis, I. M. & S. Ry. Co.* v. *Gillihan,* 77 Ark. 551. In that case we quote with approval the following statement of the law from Elliott on Railroads (vol. 3, § 1063): "In general, it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work. But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the company liable." According to this well-settled principle of the law, the defendant was not liable for the negligent acts of the contractors or their servants merely because it furnished an inspector to see that the work was done according to the contract. The only question in the case is whether or not Pitts was the servant of the defendant at the time of his alleged negligent act, in the sense that the defendant is liable therefor under the doctrine of *respondeat superior.* The evidence shows that at the time the explosion occurred the pipe line was under the control and management of the contractors, and the work of repairing was being done by them. The defendant furnished the services of Pitts merely to turn the gas on and off at the request of the contractors, and there is evidence tending to show that in doing this he was under the entire control of the contractors. There is testimony to the effect that Pitts was to regulate the manner of turning in the gas, but that the foreman or superintendent of the contractors should be the sole judge as to when it should be turned on and when it should be turned off, Pitts being as to those matters entirely under their direction and control.

"It is well settled," says the Massachusetts court, "that

one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become as to that service the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." *Coughlan* v. *Cambridge,* 166 Mass. 268. The same principal is announced in many other cases. 1 Shearman & Redfield on Negligence, § § 160 and 161; 1 Dresser's Employer's Liability, p. 50; *Deloy* v. *Blodgett,* 185 Mass. 126; *Wyllie* v. *Palmer,* 137 N. Y. 248; *Higgins* v. *Western Union Tel. Co.,* 156 N. Y. 75; *Consolidated Fire Works Co.* v. *Koehl,* 190 Ill. 145, 60 N. E. 87; *Rourke* v. *White Moss Colliery Co.,* 20 Moak Rep. 469.

In *Higgins* v. *Western Union Tel. Co., supra,* the facts were quite similar, so far as application of the principles here announced was involved. The court, in disposing of the case, said:

"The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct, Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that, too, when their general employer is interested in the work."

In that case the defendant was the owner of a building in the city of New York which it was having repaired after injury caused by fire, and it was the duty of the contractor making the repairs, among other things, to place elevators in the building. The elevator had been turned over as complete by the contractor, but at the time of the accident the owner was using it for carrying passengers, and the contractor was also using it for the purpose of doing some plastering in the shaft. On the day of the accident one of defendant's servants employed to run the elevator suspended work about noon, while the contractor, during the rest of the day, used the elevator as a platform for the plasterer to stand upon, and the

same servant employed by defendant to run the elevator remained in charge for the special work being done by the contractor under the latter's direction and control. The court held that under those circumstances the servant at that particular time was engaged in the service, not of the owner of the building, but of the contractor, and that the latter was responsible for his neligent act.

The principle announced in those cases is, we think, controlling in the present one. To the extent that Pitts was working under the direction and control of the defendant, he remained the latter's servant, and it alone is responsible for his negligence. On the other hand, to the extent that the direction and control was surrendered to the contractors for work being done by them, Pitts was in their service, even though he was in the general employment of the defendant, and the contractors alone are liable. It was the peculiar province of the jury to determine from the testimony the extent to which Pitts was acting for the defendant and was carrying out its directions, and to what extent he was performing service for the benefit of the contractors and under their direction and control. If the services of Pitts were lent by the defendant to the contractors, and he was required to proceed in the performance of their work entirely under their control and direction in turning on the gas and in turning it off, then he must be treated as the servant of the contractors, and they alone are responsible for his negligence. On the other hand, if, in turning on or off the gas, he had any duty to perform for the defendant, in whose general employment he was at the time, and in the performance of that particular duty he was guilty of a negligent act, then the defendant is responsible. The fact that defendant was interested in the work as owner would not make it liable for the injuries if the work being done was that falling within the duty of the contractors, and Pitts was acting under their direction in the particular act or omission which it is alleged constituted the negligence.

The case was not correctly submitted to the jury in accordance with the principles here announced, and the judgment must on that account be reversed. In the first instruction given at the request of plaintiffs the jury were told broadly that if the inspector, Pitts, was "in the entire or partial charge

of the gate through which the gas was turned into and shut off from the pipes, and failed to exercise reasonable care and precaution for the safety of plaintiffs in negligently and improperly turning the gas into said pipes in such quantity and with such force, or negligently and improperly permitted said gas to remain turned into said pipes for an unnecessary length of time, or negligently failed to warn plaintiffs of the danger to which they were exposed by virtue of the gas being turned into and permitted to remain turned into said pipes," and that his negligent act caused plaintiffs' injuries, then the defendant would be liable.

This entirely ignored the proof adduced by plaintiffs tending to show that Pitts was not the servant of the defendant in the particulars named.

Again in instruction No. 2 the jury were told that plaintiffs "had the right to rely upon the assumption that the defendant, in the exercise of reasonable care and precaution for their safety, would properly turn the gas into the pipes, and would properly shut the same off, and would give them, timely warning of any danger to which they were exposed," etc.

This was wrong, because the proof on the part of the defendant tended to show that the business of repairing the leaks was altogether that of the contractors, and that the duties enumerated in the above instruction devolved upon them.

Other instructions along the same lines need not be discussed, for the errors contained in those mentioned are sufficient to call for a reversal.

Some of the instructions requested by the defendant were refused and some modified so as to eliminate the submission of the questions hereinbefore indicated which the defendant was entitled to have submitted to the jury. We have not critically examined all of the defendant's requested instructions for the purpose of determining whether they contain accurate statements of the law, and therefore do not mean to approve them all; but some of them, at least, contained proper submissions of the questions involved in this case, and should have been given.

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

BARRENTINE *v.* HENRY WRAPE COMPANY.

Opinion delivered December 16, 1912.

1. MASTER AND SERVANT—DUTY TO PROTECT SERVANT.—A master owes to his servant engaged in performing the master's service the duty to use ordinary care to free the premises from known dangers, including dangers from negligent or wilful acts of fellow-servants; but, while it is not necessary that the particular act of negligence should be committed by a fellow-servant while in the strict performance of his services, it is essential to the master's liability that he should have had control of such fellow-servant. (Page 487.)
2. SAME—NEGLIGENCE OF FELLOW-SERVANT—COMPLAINT.—A complaint by a servant alleging that, while plaintiff was returning to his work he was struck in the eye by a rock thrown by one of defendant's servants, without alleging either that the injury was received while plaintiff was on the master's premises, and that the injury resulted from a danger of which the master was aware and that failed to exercise ordinary care to prevent it, or that the other servants, while on the master's premises, were negligently throwing missiles and the employer knew of it and failed to exercise ordinary care to prevent injury, *held*, not to allege a cause of action. (Page 487.)

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

J. N. Rachels, for appellant.

1. A master must exercise ordinary care to furnish his servant a reasonably safe place to work. 98 Ark. 34; 97 Ark. 180; 95 Ark. 477; 92 Ark. 138; *Id.* 350.

It is also his duty to exercise the same care to furnish a reasonably safe place of entry and exit to and from his work, especially where this entry and exit is over the master's own premises. 98 Ark. 259; 85 Ark. 503.

2. If the master knows of habits and practices of his employees which are dangerous to others and fails to exercise reasonable care to prevent such practices, he will be guilty of negligence for failing to exercise such care. 199 N. Y. 388; 32 L. R. A. (N. S.) 1038; 168 U. S. 135; Shearman & Redfield, Negligence (5 ed.), § 141; 28 N. Y. Supp. 53; 148 N. Y. 752; 43 N. E. 990.

S. Brundidge, for appellee.

No cause of action is stated. The master is responsible only for such torts of his servants as are committed in the course of his employment and for the master's benefit. 77 Ark. 608; 33 Neb. 582; 96 Ark. 365; 58 Ark. 387; 75 Ark. 585; 67 Ark. 112; 131 Fed. 161.

McCULLOCH, C. J. Appellant instituted this action against appellee in the circuit court of White County to recover damages for personal injuries alleged to have been sustained while he was employed by appellee to work at its stave-mill near Searcy, Arkansas. He alleges that other employees were throwing stones and other missiles, and that, while he was returning from his home to his place of work during the noon hour, one of the missiles struck him in the eye and inflicted a serious injury. The paragraph of the complaint setting forth the alleged acts of negligence and the manner in which the injury was inflicted reads as follows:

"That on the 31st day of October, 1911, and for many days prior thereto the defendant company allowed its hands, servants, and employees to engage in throwing rocks, coal, sticks, chunks and other dangerous missiles about its plant and upon the yards, and that at the noon hour on the 31st day of October, 1911, while the plaintiff, James W. Barrentine, was returning from his home to re-engage at work, he, being one of the employees of the defendant, was struck by a rock thrown by one of the servants of the defendant company in the left eye. That the lick received upon the left eye by the rock from the hand of the servant of the defendant company was because of the wilful disregard of the plaintiff's rights and safety by the defendant company. That the defendant company had many times been warned that the throwing of rocks, coal, chunks, sticks and other missiles was dangerous, and that if they did not stop it some one would receive a severe and painful and probably fatal blow sooner or later. That the defendant company had many times promised to stop such conduct, and had expressed itself as knowing that such conduct was dangerous, and that it would sooner or later bring painful affliction to some member of its crew."

The court sustained a demurrer to the complaint on the ground that facts were not stated therein sufficient to consti-

tute a cause of action, and, appellant declining to plead further, the complaint was dismissed.

Appellant insists that he has set forth a cause of action in stating that he was injured by reason of the course of wilful or negligent conduct on the part of other employees which was known to appellee, and which it promised to restrain or prevent, but failed to do so. He invokes the rule established by some of the authorities that "the master may be considered in such case guilty, not of the wrongful act itself, but only of neglect to restrain his servants from doing it." Shearman & Redfield on Negligence, § 141; *Fletcher* v. *Baltimore & P. R. Ry. Co.*, 168 U. S. 135; *Hogle* v. *H. H. Franklin Mfg. Co.*, 199 N. Y. 388, 32 L. R. A. (N. S.) 1038; *Swinarton* v. *Le Boutellier*, 148 N. Y. 752; *Dean* v. *Depot Co.*, (Minn.) 43 N. W. 54.

In order to bring the case within the operation of this rule, it is not always essential that the particular act of negligence should have been committed by the servant while he is strictly performing the master's service; for, as said in the above quotation, even though the negligent act of the servant may not be permitted under such circumstances as would make it the act of the master, the latter is guilty of negligence if he fails to restrain the servant from doing it while under his control. The master owes to his servants, while on his premises to perform service, and also to strangers who rightfully come upon the premises, the duty of exercising ordinary care to free the premises from known dangers, all dangers of which the master is informed. This, of course, includes dangers arising from negligent or wilful acts of the servants. Though it is not essential to the master's liability that the negligent servant should be acting at the time within the scope of his authority, yet it is essential that the master should have control of him or the opportunity to control his actions before the liability attaches on account of his conduct. If the servant in committing the negligent act is not proceeding within the line of his duty, and is not at the time within the control of the master, then the latter is not liable. The difficulty with the case attempted to be made by appellant in his complaint is that he does not state either that the conduct of other servants in throwing the stones was done upon the premises of appellee or that it was done by the servants while

they were in a situation that appellee could have control of them; nor does it allege that appellant was upon the premises of his employer at the time he was injured. If he had stated in his complaint that, while he was on the premises of his employer, the injuries resulted from a danger of which the employer was aware, and failed to exercise ordinary care to prevent them, then a case would have been stated. Or, if he had stated that the other servants, while on the premises of the employer, were negligently or wilfully throwing missiles, and the employer knew of it and failed to exercise ordinary care to prevent it, a case would have been stated. But these facts were not alleged in the complaint. The allegation is that the other servants were on that day, and had been for several days, engaged in throwing rocks and other dangerous missiles about the plant and upon the yard, and that at the noon hour appellant was struck by a rock thrown by one of the servants. As before stated, it is not shown that he was on the premises at the time, or that the servants were on the premises. For aught that the complaint shows, the servants may have been out on the street, beyond the control of the employer, and the appellant himself somewhere on the street returning from his home. The complaint therefore utterly failed to state sufficient facts to make out a case of liability, and the circuit court was correct in sustaining the demurrer.

Judgment affirmed.

EDERHEIMER v. CARSON DRY GOODS COMPANY.

Opinion delivered December 16, 1912.

1. JUDGMENT—CONCLUSIVENESS—MATTERS THAT MIGHT HAVE BEEN ADJUDICATED.—The appearance of a defendant in a court of general jurisdiction, having jurisdiction of the subject-matter, for the purpose of moving to quash the return of service of summons gives that court jurisdiction of his person, not only upon that ground, but upon any other ground that he might have presented; and defendant, by failing to present such other ground, waives his right to allege them as reasons for quashing the service. (Page 492.)

2. SAME—FOREIGN JUDGMENT—CONCLUSIVENESS.—Where plaintiffs sued defendant, a resident of this State, in a court of general jurisdic-

tion in another State, and defendant appeared and moved to quash the service of summons, and the court overruled the motion to quash and rendered judgment in favor of the plaintiffs, such judgment is conclusive upon the question of jurisdiction of defendant's person on review by a court of another jurisdiction. (Page 493.)

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

STATEMENT BY THE COURT.

Appellant, a St. Louis firm of merchants, sued the appellee, an Arkansas corporation, on a judgment obtained by appellants against appellee in the circuit court of the city of St. Louis, Missouri. The defense was that the circuit court where the judgment was obtained was without jurisdiction. The appellee alleged "that no service of summons or process in said suit in the circuit court of the city of St. Louis, State of Missouri, has ever been had on this defendant; and that Ike Felsenthal, at the time he was served with summons in the suit on which the said plaintiffs attempted to recover a judgment, the same that is sued on herein, was in the city of St. Louis, not on business for this defendant."

The appellant filed a replication, in which it denied "that Ike Felsenthal at the time he was served with summons in the suit in which the plaintiffs recovered a judgment in the city of St. Louis, the same that is sued on herein, was not on business for defendant at the time in the city of St. Louis." And set up "that defendant should not now be permitted to deny the jurisdiction of the circuit court of the city of St. Louis, Missouri, of the person of the defendant, because the record of the suit in Missouri shows that citation to answer the plaintiffs' demand having been duly served on an agent of the defendant, pursuant to the laws of Missouri, and the defendant, having appeared as shown by the record, did then and there plead that it had not been legally cited, and that the person upon whom process was served was not such an agent of defendant as that such service of process would bind the defendant to bring it into court, which said matters and things were the same as are now pleaded here; and that thereupon the court in Missouri adjudged that the defendant had been legally cited, and that the person upon whom the process was served was such an agent as that such service of process would

bind said defendant to bring it into court; and that the defendant is bound and concluded by said judgment to plead here anew the matters and things passed upon and determined there."

The amended return to the summons on which the judgment in Missouri was obtained is as follows: "Served this writ in the city of St. Louis, Missouri, this 25th day of February, 1909, on the within named defendant, the Carson Dry Goods Company, a corporation organized under the laws of the State of Arkansas, by delivering a copy of said writ and petition, as furnished by the clerk, to Isaac Felsenthal, director, stockholder, agent and employee of said corporation, said corporation having no office or place of business in this State, the said Isaac Felsenthal being in the city of St. Louis on said date representing the said Carson Dry Goods Company in the purchase of goods for said company." (Signed by the sheriff.)

The appellee filed in the circuit court of St. Louis the following motion to quash: "Comes now the defendant in the above entitled cause, appearing for the purpose of this motion and for no other purpose, and especially limiting its appearance for the purpose of this motion, and moves the court to quash the sheriff's amended return of service of summons in this cause, and for ground for this motion this defendant says that it appears from the amended return made by the sheriff herein that the defendant had no office in the State of Missouri at the time of service; that the defendant is a nonresident corporation, organized under the laws of the State of Arkansas, and it does not appear from said return that defendant was doing business in the State of Missouri, but it does appear from said return that the person upon whom the sheriff served the copy of the writ and petition in this case was in the city of St. Louis buying goods for the defendant, but it does not appear from said return that said person upon whom the sheriff served the copy of the writ and petition was the proper agent of the defendant upon whom to make service." (Signed by the attorneys for the defendant).

The circuit court of Missouri overruled the motion to quash, and entered judgment in favor of the appellants by default "in the sum of $904.35, the aggregate sum found to

be due, together with the costs herein expended," etc. This is the judgment upon which the present suit was brought.

On the trial the court permitted the appellee, over the objection of appellents, to show that it was a nonresident of Missouri; that it was not doing business or authorized to do business in that State; that at the time of the service of the summons on Ike Felsenthal he was not transacting business for the appellee, and that he was such an agent of the appellee as that service of summons on him in St. Louis would bind appellee. The court below found that the Missouri court was without jurisdiction over the person of the defendant, and that its judgment was void, and therefore open to collateral attack. It dismissed the complaint of appellants and rendered judgment in favor of the appellee for costs. The appellants duly prosecute this appeal.

Patterson & Green, for appellants.

1. The judgment of a superior court of record, unless appealed from, is final and binding; and all questions of jurisdiction and liability and service are *res judicatae* and can not be attacked collaterally. Especially is this true where the court of record finally passes on the question of its own jurisdiction. Black on Judg., §§ 900-1; 23 Cyc. 1578, note 53, 1580, note 57; 11 How. 165, 13 L. Ed. 648; 11 How. 437; 9 Wall 812; 17 Wall. 521; 18 *Id.* 521; 18 *Id.* 457; 22 U. S. (L. Ed.) 70; 91 U. S. 160; 95 *Id.* 714; 195 U. S. 257; 11 Ark. 157; 13 *Id.* 33; 10 Fed. 696; 112 *Id.* 453; 70 *Id.* 808; 160 *Id.* 418; 12 L. R. A. (N. S.) 941; 103 S. W. 766; 91 Ala. 245; 9 So. 265; 87 Ala. 618; 6 So. 44; 91 Ga. 62.

2. If conclusive in the State where rendered, the judgment is conclusive everywhere. Story on Const., § 1313; 5 Wall. 290; 11 Ark. 162; Black on Judg., § 901; 12 Ark. 758; 19 *Id.* 422; 23 Cyc. 1556; 81 S. W. 1073; 124 Fed. 259; 21 Ia. 260; 7 Am. Rep. 129.

Gaughan & Sifford, for appellee.

1. In construing the "full faith and credit" clause, it is conceded that the jurisdiction of the court of a sister State rendering judgment, etc., is open to inquiry in the same court, notwithstanding the recitals in the judgment. 11 Ark. 157.

2. The appearance of defendant was special, to move to quash the return on the summons, and there is no *res judicata* nor estoppel in this case. 2 Am. St. 452. The motion to quash raised no issue as to proper service.

3. Before a court in Missouri could acquire jurisdiction, defendant must have been doing business in the State. 27 U. S. (L. Ed.) 123; 50 L. R. A. 577, and notes; 19 Cyc. 1328; 32 Fed. 802; 106 U. S. 359; 22 Fed. 635; 29 Fed. 37; 127 *Id.* 1008.

4. As to what constitutes "doing business in the State," see 90 Ark. 73; 29 Fed. 37; 106 U. S. 359; 32 Fed. 802.

WOOD, J., (after stating the facts). The record shows that the circuit court of St. Louis is a court of general jurisdiction, and had jurisdiction of the subject-matter, and the only question presented for our decision is whether or not the finding and judgment of the circuit court of Missouri, holding that it had obtained jurisdiction by a proper service upon appellee, is *res judicata.*

The appearance of the appellee in the Missouri circuit court for the purpose of quashing the sheriff's amended return of service of summons in that cause gave that court jurisdiction of the person of appellee for the purpose of quashing service, not only upon the ground stated in the motion, but upon any other ground that the appellee might have presented. The appellee, upon filing the motion to quash the service of summons, could have brought forward any grounds that it saw fit to allege other than that set up in the motion as a reason why the service should be quashed. The issue raised by the motion to quash was whether or not the service of summons should be quashed.

The appellee, having appeared in the circuit court of Missouri for the purpose of quashing the service, is estopped not only from setting up the reason for quashing the service alleged in the motion, but also any reasons that it might have set up as grounds for quashing such service. The issue raised by the motion was, whether or not the Missouri circuit court had jurisdiction of the person of appellee, and it was the duty of the appellee, when it questioned that jurisdiction, to bring forward any cause that might have existed showing that the court did not have jurisdiction of the person of appellee.

Not having brought forward such matters then, it is estopped from taking advantage of them in a subsequent proceeding to test the jurisdiction, and the judgment of the court on that question, whether right or wrong, is not subject to collateral attack on review by the circuit court of another jurisdiction.

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

The doctrine of *res judicata* is correctly announced in 23 Cyc. pp. 1295-6; *Cromwell* v. *Sac County*, 94 U. S. 351-2.

"The rule is often stated in general terms that a judgment is conclusive, not only upon the question actually determined, but upon all matters which might have been litigated and decided in that suit; and this is undoubtedly true as to all matters properly belonging to the controversy and within the scope of the issues, so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons, or evidence in support of it, on pain of being barred from showing such omitted matters in a subsequent suit." See cases cited in note, 23 Cyc. pp. 1295-6, *supra*.

Until the appearance of the appellee in the Missouri court to quash the service of summons, no issue was raised by it. It was not before the court at all for any purpose, unless it had been properly served with process; and while it was the duty of the circuit court of Missouri to examine the service to determine whether it had jurisdiction of the person of appellee, there was no issue on that question raised by the appellee. But when appellee appeared and moved to quash, it distinctly raised that issue, with all the reasons that were, or could have been, urged as to why the circuit court had not acquired jurisdiction of the person of appellee.

In *Hubbard* v. *American Investment Co.*, 70 Fed. 808, the court said: "The question of the jurisdiction of that court (a State court of Colorado) was raised and presented to that court for decision. It thereupon became the duty of that court to hear and decide the question of its jurisidction, and it was open to the defendant to then and there present every question of law and fact upon which it relied to show that the court was without jurisdiction."

Appellee, having elected to submit the issue as to whether the circuit court of Missouri had jurisdiction of its person to render the judgment sued on herein, is bound by the judgment of that court on that issue, so long as same stands unreversed by the courts of Missouri.

As was said in *Newcomb* v. *New York Cent. & H R. R. Co.*, 81 S. W. 1069: "If the defendant was of the opinion that the return was not sufficient to bring it into court, and had confidence in its own opinion, it could have remained away and let the plaintiff take his course. That was a station in the progress of the case where the law requires the party to rely on his own judgment and take the risk of being sustained in the end." See also other authorities cited in appellant's brief.

It follows that the court erred in admitting the testimony of Ike Felsenthal. For this error the judgment is reversed, and the cause is remanded for a new trial.

FRED v. ASBURY.

Opinion delivered December 16, 1912.

1. ADMINISTRATION—STATUTE OF NONCLAIM—APPLICATION.—The statute of nonclaim, providing that all claims against estates of deceased persons shall be barred unless they are properly authenticated and presented to the executor or administrator within one year after the grant of letters, does not refer to claims of title or for the recovery of property, as claims of such a character are not claims against the estate of the deceased. (Page 499.)
2. FRAUDS, STATUTE OF—EFFECT OF PERFORMANCE.—Where intestate verbally agreed that, if plaintiffs would give up their employment, change their residence and take care of him for the rest of his life, he would leave them all of his property, real and personal, at his death, and plaintiffs complied therewith, their conduct was such a performance as would take the contract out of the statute of frauds. (Page 499.)

Appeal from Greene Chancery Court; *Charles D. Frierson* Chancellor; affirmed.

STATEMENT BY THE COURT.

On March 9, 1911, Chas. E. Asbury and Inza V. Asbury, his wife, instituted this action in the chancery court against Anson E. Randol, administrator of the estate of Jacob Fred,

deceased, and the brothers and sisters of Jacob Fred, whose names are, George W. Fred, John W. Fred, Elizabeth Pickering and Becky Ann Apple. The plaintiffs in their complaint alleged that in October, 1905, in the State of Indiana, Jacob Fred contracted and agreed with them that if they would move with him from their old home in Lawrence, Indiana, to Greene County, Arkansas, and live with him and take care of him in sickness and health as long as he should live, he would give them all of the property which he owned at the time of his death; that pursuant to this contract on November 13, 1905, they and Jacob Fred moved from their old home in Indiana to Greene County, Arkansas; that they established and provided a home for Jacob Fred with themselves and continuously took care of him in sickness and in health until his death on December 1, 1910. The prayer of the complaint is that the plaintiffs be decreed to be the owners of the entire estate of the said Jacob Fred, deceased.

The defendants, George W. Fred, John W. Fred and Elizabeth Pickering, answered and averred that Jacob Fred died, intestate, in Greene County, Arkansas, in the year 1910, and that letters of administration were granted upon his estate on December 14, 1910, to Anson E. Randol, who qualified as such administrator and took charge of the estate. Defendants further averred that if plaintiffs had any claim against said estate they have failed to present the same to the administrator within one year after the grant of letters of administration, and pleaded the statute of nonclaim of one year in bar of the plaintiff's right to recover.

The defendants also plead the statute of frauds in bar of the alleged sale or gift of the property to the plaintiffs.

There was an agreed statement of facts, which in substance is as follows: Jacob Fred owned certain real estate and a short time prior to his death contracted orally to sell the same to Geo. W. Fred for the consideration of three thousand dollars. In pursuance of the oral contract, Geo. W. Fred paid to Jacob Fred five hundred dollars of the purchase money. Jacob Fred died in the possession of his property, and Geo. W. Fred at the time lived in the State of Indiana. After the death of Jacob Fred the brothers and sisters of Geo. W. Fred, who were the legal heirs of the said Jacob Fred, made deeds

to Geo. W. Fred to their interest in said lands. Geo. W. Fred paid twenty-five hundred dollars, the balance of the purchase money, to Anson E. Randol, the administrator of the estate of Jacob Fred, deceased. At the time these deeds were executed none of the defendants who have answered in this case knew of the plaintiffs' claim.

Inza V. Asbury, one of the plaintiffs, testified: "I lived with Jacob Fred nearly four years in Indiana before coming to Arkansas. I married Chas. Asbury, July 17, 1905, in Indianapolis, Indiana. Jacob Fred (my uncle) was present. I was eighteen years old when I married. Two days after our marriage Jacob Fred proposed to us that, if we would come and live with him, he would bear one-half of the expenses of what we all ate, and would leave us all the property that he owned at the time of his death. Jacob Fred was unmarried and was a cripple. He had rheumatism sometimes, and had to walk with a crutch, and sometimes with two crutches. We lived with him in Indiana until we came to Arkansas. Some time about the last of October or the first of November, 1905, Jacob Fred, told us that, if we would come to Arkansas and take care of him and give him a home as long as he lived, he would furnish one-half the provisions and would give us all he had when he died. In pursuance of this agreement, we all came together to Greene County, Arkansas, and lived together in one house nearly five years until Jacob Fred died. He died December 1, 1910, at our house. During the time we lived in Arkansas Jacob Fred bought a store in Marmaduke and boarded at Anna Asbury's about three weeks. During all the rest of the time he lived at our house, and we did everything for him we possibly could and always treated him kindly. He was a cripple, having had his left hip put out of place when he was fourteen years of age. During the time we lived in Arkansas he had dropsy, rheumatism and heart trouble. In fact, he was sick most of the time, and in addition to providing him with a home I nursed and took care of him. He became old and childish at times, but we just let him have his own way about everything."

Chas. E. Asbury testified to practically the same state of facts, and in addition stated that he had a good job in Indiana, and did not care about coming to Arkansas; that he

only came in pursuance of the promises and agreement made with the said Jacob Fred.

Several of the near neighbors of Jacob Fred in Indiana testified that Jacob Fred told them that he had made an agreement with the plaintiffs to move to Greene County, Arkansas, with him and there provide a home and nurse and care for him until he died, and that in consideration therefor he was to leave them all the property he owned at the time of his death. Among the others who testified to this effect was Becky Ann Apple, the sister of Jacob Fred. She testified that she had heard Jacob Fred tell the plaintiffs that, if they would move to Arkansas with him, provide a home and take care of him as long as he lived, he would give them all the property he owned at the time of his death. She said that this agreement was made between Jacob Fred and the plaintiffs. O. E. Apple and Ann I. Apple, the son and daughter of Rebecca Ann Apple, testified to the same effect. Ann I. Apple testified in addition that she lived with them about six weeks before they moved to Arkansas, and heard Jacob Fred say a number of times that he had made this agreement. She said she lived with plaintiffs in Arkansas from November 13, 1905, until October 22, 1906, and that Jacob Fred made his home with them during this time; that while she was there she heard him say several times that he had made this contract with the plaintiffs.

Other testimony was introduced which tended to show that Jacob Fred was never married, and that the plaintiff Inza V. Asbury was his illegitimate daughter.

The defendants introduced testimony to substantially the following effect: Jacob Fred was on good terms with his brothers and sisters, and never had any quarrel with any of them. He furnished something more than one-half of the table expenses during a part of the time he lived with the plaintiffs. During his last illness he endeavored to make a will. He said that he wanted his brothers and sisters to have two hundred and fifty dollars each, and the plaintiffs to have his household goods and what Chas. E. Asbury owed him and enough more to make out one thousand dollars. He said he wanted the rest of his property to go to some old men's home in Indiana. The plaintiff Inza Asbury objected to his making the will,

and said: "Uncle Jake, you are not going to treat us that way, are you?" She said: "You promised mother on her deathbed that you would give us all your property if we would live with you and keep house for you and take care of you during your lifetime." Jacob Fred had chronic Bright's disease and rheumatism; he soon became unconscious, and the will was never executed.

The chancellor found for the plaintiffs, and a decree was entered in their favor for the assets in the hands of the administrator. The defendants have appealed.

Block & Kirsch, M. P. Huddleston and *R. P. Taylor*, for appellants.

All demands subsisting at the time of the death of the testator or intestate, capable of being asserted in a court of justice, must be authenticated and exhibited within the time prescribed by the statute of nonclaim. 18 Ark. 334; 14 Ark. 248. This rule applies not only to ordinary contractual demands but also to those arising out of trusts, whether expressed or implied. 66 Ark. 327; 25 Ark. 318.

A claim may be asserted against the estate of a decedent either by presentation in the probate court or by action brought in a court of law or equity. Kirby's Dig., § 112; 7 Ark. 78; 97 Ark. 276. In either case it is an indispensable prerequisite to the presentation of the claim that it be authenticated in accordance with the requirements of the statute. Kirby's Dig., § § 114, 119.

Objection for failure to authenticate may be made at any time before judgment, by motion, plea or objection to introduction of testimony. 14 Ark. 248; Kirby's Dig., § 119; 14 Ark. 237; 48 Ark. 304; 66 Ark. 327.

Johnson & Burr, for appellees.

1. The contract was fully performed by appellees, and deceased accepted and enjoyed the benefits of such performance. The contract is not within the statute of frauds. 93 Ark. 606, 125 S. W. 1010; 199 Mo. 416; 97 S. W. 901; 77 Me. 70; 62 Mo. 114; 121 Tenn. 330; 1 C. C. A. 24.

2. Appellees are not barred by the statute of nonclaim. This is a suit involving the distribution, and not the corpus,

of the estate, and the statute of nonclaim does not apply. 127 N. W. 11, and authorities cited.

Block & Kirsch, M. P. Huddleston and *R. P. Taylor,* for appellants in reply.

Where there is a contract to devise real estate, or all of an estate of which part is land, such a contract is within the statute of frauds. 23 N. E. 1018; 5 N. E. 66; 59 N. W. 129; 26 N. E. 222; 72 N. W. 400; 45 N. E. 134; 22 N. E. 777; 61 N. E. 148; 87 S. W. 844; 48 Atl. 409; 64 N. W. 490; 19 S. E. 739; 103 Ill. 229.

HART, J., (after stating the facts). The statute of nonclaim is urged as a bar to the relief sought. This statute provides that all claims against estates of deceased persons shall be barred unless they are properly authenticated and presented to the executor or administrator within one year after the grant of letters; but this is not a proceeding to enforce a claim or demand against the estate of Jacob Fred, deceased, but is one to determine the rights of the parties to this suit to the property in question. The statute of nonclaim does not refer to claims of title or for the recovery of property for the reason that claims of such a character can not in any just sense be said to be claims against the estate of the deceased. On the contrary, the right to recover is based upon the fact that the property claimed does not belong to the estate, but belongs to the party asserting title to it. 18 Cyc. 456; *Krutsen* v. *Krock,* 127 N. W. (Minn.) 11; *Haven* v. *Haven,* 64 N. E. (Mass.) 410.

It is also contended that the statute of frauds is a bar to the right of recovery by the plaintiffs. Mr. Pomeroy, in discussing the subject of specific performance of parol contracts, recognizes the general rule that payments in money is not a part performance because the remedy at law is adequate for its recovery and there has been no irrevocable change of position, but in discussing the question of whether personal services is a sufficient act of part performance to take the case out of the statute said: "Where the consideration is paid, not in the form of money, but in the form of personal services of a character such that they do not readily admit of a pecuniary estimate or recompense, shall this be considered an act of part

performance? On this question the American jurisdictions are very evenly divided; the answer must depend on the theory which is adopted as the basis of the whole doctrine. On the first theory stated in a former paragraph, payment in services no more points to a contract concerning specific land than does payment in money; in fact, in the ordinary case—domestic services by a relative or by an adopted child—the fact of the services rendered gives rise to no inference of any contract whatever. On the other hand, if equitable fraud be taken as the basis of the doctrine, and the impossibility of restoring the complainant to the situation in which he was before the contract was made, the rendering of services, for a long term of years, the value of which can not be estimated by any pecuniary standard, must be considered an act of part performance of the highest character; the fraud upon the complainant is often greater than that resulting from either the taking of possession or the making of improvements. The promise, in these cases, has nearly always been to make a will devising lands to plaintiff; the services rendered, the care of an aged or invalid relative, often coupled with an abandonment of the plaintiff's previous home or occupation; or, in a large group of cases, the entire change of situation resulting from a virtual adoption of the plaintiff, when a minor, into the promisor's family, and the discharge of the domestic duties and obligations of affection flowing from such relation."

The learned author cites the authorities on both sides of the question, but we do not deem it necessary to enter into a discussion of them here for the reason that our court has adopted the latter theory. In the case of *Hinkle* v. *Hinkle*, 55 Ark. 583, Mr. Justice HEMINGWAY, in discussing the question, said:

"But the defendant pleads the statute of frauds, and the question is, if the statute applies, whether there has been such performance as to take the case out of its operation. Martin did everything he agreed to do. He gave up his employment, changed his residence, assisted in caring for his mother and in managing and conducting the business, moved upon the land and expended money in improving it. If the statute could defeat his claim, it would become a means of

fraud, not of its prevention. He did more than pay for, move on, and improve the land; he surrendered his employment and changed his home and avocation, and no return of the money expended would compensate him for annulling the contract."

What was said in that case applies with equal force here. The parol contract under consideration was not only mutual but was definite and certain, both in its terms and as to its subject-matter. It was clearly proved, and the services performed were referable to the contract alone, and were done for the purpose of carrying it into effect. Chas. Asbury was a young man, and had a good position in Indiana when the contract was entered into. He did not wish to leave that State and come to Arkansas. In pursuance of the contract between Jacob Fred and his wife and himself, he left that State and came to Arkansas with Jacob Fred. He and his wife provided a home for Fred, and nursed and cared for him during the remainder of his life. Although Fred was a cripple and an invalid during all this time, they tenderly nursed and cared for him and provided him with all the comforts they were able to furnish. Their testimony, both in regard to the terms of the contract and the services they performed in carrying it out, is clear and explicit, and is corroborated by the testimony of their neighbors, as well as by the testimony of some of the relatives of Jacob Fred. It is not contradicted in any material point by any witness. They assumed a peculiar and personal relation to Jacob Fred, and, according to their testimony, which is not disputed, rendered him services of such character that it is practically impossible to ascertain their value by any pecuniary standard. By entering into the contract with Jacob Fred, they changed the whole course of their life and devoted themselves to making his last days comfortable and pleasant, and, as said in the Hinkle case, if the statute could defeat their claim, it would become a means of fraud, and not of its prevention.

The decree will be affirmed.

MOULTON v. STATE.

Opinion delivered December 16, 1912.

1. FORGERY—PASSING FORGED INSTRUMENT—INSTRUCTION.—In an indictment for uttering a forged check an instruction to the effect that if defendant uttered the check with intent to defraud, and if said check was forged by defendant or by any other person, and defendant at the time of passing the check knew the same to have been forged, then he is guilty of uttering a forged instrument, was not open to a general objection upon the ground that there was no proof that defendant forged the check. (Page 504.)
2. SAME—ELEMENTS OF OFFENSE.—One who, with intent to defraud, passes a check known to him to have been forged is guilty of forgery, though the forgery is not his handiwork. (Page 505.)
3. INSTRUCTIONS—REPETITION.—It is not error to refuse a correct instruction if other correct instructions charge the law upon the question involved. (Page 505.)

Appeal from Franklin Circuit Court, Ozark District; *Jeptha H. Evans*, Judge; affirmed.

Sam R. Chew, for appellant.

Before appellant could be legally held guilty of having uttered the alleged forged instrument, the proof must not only show beyond a reasonable doubt that the instrument was in fact a forgery, but also must show beyond a reasonable doubt that he in fact uttered the instrument, knowing, at the time he uttered it, that it was a forgery. The fact that appellant signed the name of E. E. Jones on the back of the check at the time he offered it to the cashier of the bank is not alone sufficient to bring knowledge to the appellant that the check was a forgery. 68 Ark. 529.

Appellant was entitled to an instruction covering this point, and the court therefore erred in refusing instruction 2 requested by appellant. 67 Ark. 594.

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

1. There is no controverting the fact that the appellant *uttered* the instrument, and the facts and circumstances in evidence, his failure to explain his possession of the instrument, his denial of the fact of having cashed it, his flight and attempt to escape after arrest, his signing Jones's name on the back of the check when he might just as well have signed his own,

point so unerringly to his guilty knowledge that it was a forgery, that the verdict could not reasonably have been different.

2. The court was justified in refusing instruction 2 requested by appellant. A trial court is not required to multiply instructions covering the same point.

SMITH, J. Appellant was indicted at the September, 1912, term of the Franklin Circuit Court, in the Charleston District thereof, and, upon his motion, the venue was changed to the Ozark District of that county, where he was tried and convicted upon a charge of uttering a forged instrument, and he appeals from the judgment of the court sentencing him to two years' imprisonment in the penitentiary.

Omitting its formal parts, the indictment alleges that "the said Elmer Moulton on the 13th day of November, 1911, in the county and district aforesaid, unlawfully, wilfully, feloniously, and designedly did utter and publish as true to one H. E. Council, cashier of the Bank of Branch, a corporation, a certain forged, altered, and counterfeited writing on paper purporting to be a bank check and in the words and figures as follows: 'Charleston, Ark., November 8, 1911. No..... Pay to C. H. Moore or order $23.00, Twenty-three dollars. Claud Mainard. Burke Prtg. Co., Fredonia, Ks. Indorsed on the back as follows: 'C. H. Moore,' 'E. E. Jones.'

"The said forged and altered writing as aforesaid being then and there passed, uttered and published as aforesaid by the said Elmer Moulton to the said H. E. Council, cashier of the Bank of Branch, a corporation, with the intent then and there unlawfully and feloniously to obtain possession of the property of the Bank of Branch, a corporation, one H. E. Council and one Claud Mainard. He, the said Elmer Moulton, then and there well knowing the said paper writing as aforesaid to be forged and counterfeited as aforesaid. Against the peace and dignity of the State of Arkansas.

"John D. Arbuckle,
"Prosecuting Attorney of the Fifteenth Judicial District."

In apt time, defendant filed a motion for a new trial, alleging various grounds therefor, but the ones here relied upon are: (1) the insufficiency of the evidence; (2) error of the court in its instruction numbered 1; (3) error of the court

in refusing to give the defendant's instruction numbered 2. These points will be discussed in their order.

The jury has found upon evidence, which is legally sufficient to support their finding that the defendant is guilty, and, in accordance with many decisions of this court, we will not disturb that finding. The proof is undisputed that Claud Mainard did not execute the check, and the most significant and convincing single circumstance in the proof is the fact that defendant swore positively he did not cash the check at the bank, while the cashier identified him and swore unequivocally that he had done so, and that he saw defendant indorse the name E. E. Jones on the back of the check. *Gilchrist* v. *State*, 100 Ark. 338.

The defendant complains of the instruction of the court numbered 1, which was as follows:

"1. If defendant passed to H. E. Council, cashier of the Bank of Branch, the check mentioned in the indictment and given in the evidence with intent to cheat and defraud said Council or bank, and if said check was forged by defendant or by any other person, and defendant at the time of so passing said check knew the same to have been forged, then defendant is guilty of uttering a forged instrument, and should be convicted, and his punishment fixed at from two to ten years in the penitentiary."

The objection to this instruction is that by saying "if said check was forged by defendant or by any other person," left the jury to conjecture whether defendant had himself forged the check when there was no proof that he had done so. No specific objection to this effect was made to the instruction; and, as it is a correct declaration of the law as written, defendant is in no position to complain. Besides, under the facts of this case, it was not error to give it, even though specific objection had been made. It was undisputed before the jury that the check was forged, but the proof did not show who the author of the forgery was. It might not have been the handiwork of the defendant, but it was immaterial whether it was or not, if he knew that the check had been forged, and with such knowledge cashed it at the bank with the intent to cheat and defraud.

Defendant assigns as error the action of the court in refus-

ing to give his instruction numbered 2, which is as follows:

"Should you believe from the evidence beyond a reasonable doubt that the instrument in writing offered in evidence was in fact a forgery, yet this would not be sufficient to authorize you to convict the defendant upon the charge brought against him by the indictment, but the proof must go further and show to the satisfaction of your minds beyond a reasonable doubt that the defendant knew, at the time he offered the instrument in writing to the Bank of Branch, that the same was a forgery."

This instruction was a correct declaration of the law, and might very well have been given by the court, and the refusal to give it would be error calling for the reversal of the case, if the points there presented were not fully covered and correctly declared by other instructions. But, in addition to the court's instruction numbered 1, *supra*, the court gave, at the defendant's request, defendant's instruction numbered 1, which is as follows:

"Before you can convict the defendant of uttering a forged instrument, you must find from the evidence beyond a reasonable doubt that the instrument in writing was in fact a forgery; that the defendant uttered it or offered to pass it upon the Bank of Branch; and that he knew at the time that it was so uttered or offered to the Bank of Branch that the instrument was a forgery. If these elements are not made to appear by the evidence, direct or circumstantial, to the satisfaction of your minds beyond a reasonable doubt, then you should return a verdict of not guilty."

The instructions given are clear, and correctly declare the law, and cover the point raised in the defendant's instruction, which was refused.

This court has frequently held that the refusal to give a correct instruction is not error, if other correct instructions charge the law upon the question involved. *St. Louis, I. M. & S. Ry. Co.* v. *Aiken,* 100 Ark. 441; *Williams* v. *State,* 100 Ark. 218; *Turner* v. *State,* 100 Ark. 199; *Striplin* v. *State,* 100 Ark. 132.

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

OGLESBY v. FORT SMITH.

Opinion delivered December 16, 1912.

1. MUNICIPAL CORPORATIONS—RESOLUTION—CONTRACTS.—The requirement of Kirby's Digest, § 5473, that on the passage of a resolution the years and nays shall be recorded is met where a resolution is adopted by a yea and nay vote that a committee be authorized to employ an attorney. (Page 511.)
2. SAME—CONTRACT—DELEGATED POWER.—Where a city council delegated to a committee the power to employ counsel to represent the city in employing an attorney, such committee was not impowered to delegate to another the authority to agree upon the amount of the attorney's fee, as, for instance, to agree that he should receive the same fee as would be paid to opposing counsel. (Page 511.)
3. SAME—UNAUTHORIZED CONTRACT—RATIFICATION.—Before a municipal corporation can be said to have ratified the unauthorized act of a committee in agreeing to pay special counsel the same fee as would be paid the opposing counsel, it must be by the doing some act or accepting some benefit with knowledge of the facts concerning the transaction. (Page 512.)
4. SAME—CONTRACT—RATIFICATION.—Where a committee employed plaintiff as an attorney and agreed to pay him the same fee that the adverse party would pay their attorney, which fee was not fixed by the adverse party until the end of the litigation, in the absence of information whether the value of plaintiff's services would be the same as that of the other attorney, the council could not have ratified the agreement further than by agreeing to pay a reasonable fee. (Page 512.)
5. SAME—MUTUALITY OF CONTRACT.—An attorney employed by a city may, by agreeing to accept the same fee as the one to be paid by the adverse party to his attorney, legally bind himself, though the city would not be bound except for a reasonable fee, on the ground that no one was authorized to enter into the contract on its behalf. (Page 513.)

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

Ira D. Oglesby, pro se; W. B. Cravens, of counsel.

1. Section 5473 of Kirby's Digest does not prevent the city counsel from authorizing, without a yea and nay vote, a committee to employ an attorney, and such authority carries with it the power to agree with him as to his fee. Such agreement, if made, is binding upon the city. Dillon, Mun. Corp.,

§ 82; *Id.* p. 1199, § 802; 60 Tex. 522; 13 Cal. 531; 88 N. W. 981; 29 S. W. 880; 12 Kan. 426; 29 Ia. 282; Dillon, p. 1203, § 802; 17 N. Y. 584; 63 Pac. 804; 116 Ind. 15; 22 Mich. 104; 66 Ind. 396; 102 Ind. 372; 7 Cranch 299; 11 Ia. 506.

Where a contract is one which the corporation has the incidental power to make, independently of any statute, in order that it may execute powers expressly conferred, and carry out the purposes of its being, the rule that such contracts are not void merely because there is no written evidence of them, or because of the absence of some mere formality, is too firmly established to be shaken. 1 Ind. 281, 48 Am. Dec. 361; 61 Ind. 187; 63 Ind. 155, 182; 46 Ind. 380; 94 Ind. 305; 69 Ind. 273; 64 Ind. 319; 30 Vt. 285; 1 Dillon, Mun. Corp., § § 479, 463.

2. If the committee had no authority to agree with plaintiff that his fee should be the same as that paid by the water company to its attorneys, yet, if it made such agreement, and it was reported to or brought to the knowledge of the city council by the committee or by the attorney, and the council, without objection to such agreement, continued the attorney's services and received and accepted the benefits thereof, this constituted a ratification of the agreement, and is as binding as if made by the council. 103 Ind. 196, 53 Am. Rep. 504; 1 Dillon, Mun. Corp., § § 463, 464; 115 Ind. 234; 106 Ind. 129; 40 Tex. 170; 42 N. H. 125.

3. The adoption of the resolution of October 7, 1907, after appellant informed the council his fee would be the same as that paid by the water company to its attorneys, constituted, if not an express agreement, then an implied agreement to pay such fee, binding upon appellee, and under the testimony it is estopped from denying such liability. 17 N. Y. 450; 28 Cyc. 642; *Id.* 667; Smith on Contracts, § 228; 61 Atl. 471; 107 Fed. 349; 1 Dillon, Mun. Corp., § § 451-459; 42 N. H. 125; 63 Pac. 804; 12 Kan. 426; 31 S. W. 946; 73 N. W. 811; 101 Ill. App. 150.

Vincent M. Miles, for appellee.

In the case of a municipal corporation the statute with regard to contracts must be strictly construed. Such statute is its enabling act, and the only power to contract it has. 2

Cranch, 27; 157 Mass. 177; 26 N. J. L. 594; 41 N. J. L. 90; 77 N. Y. 130; 9 Neb. 358; 4 Neb. 350; 85 Pa. St. 379; 53 Cal. 247; 8 Col. 857; 110 Cal. 543; 179 Mass. 496; 82 Mo. App. 352; 219 Pa. St. 29; 20 Col. 33; 68 Tex. 565; 73 Mass. 12. There was never at any time any resolution passed by the city authorizing a committee to enter into any contract with appellant whereby appellee's opponent in the litigation should fix the amount of the compensation. So when, after his work for the city began, appellant made statements to the city council that he would charge such a fee, before the city could be bound by such a statement, some actions must have been taken by the council upon which a yea and nay vote was called. 40 Ark. 105; Dillon, Mun. Corp., § 291; 82 Ark. 531.

McCULLOCH, C. J. Many years ago the city of Fort Smith granted a franchise to a foreign corporation called the Municipal Waterworks Company, to establish and operate waterworks in the city for the purpose of furnishing water to the inhabitants. The contract contained a provision that the city should have an option to purchase the plant at the expiration of a stipulated period. Near the exp ration of that period the city council decided to exercise the option and purchase the plant; but a dispute arose between the city and the water company concerning the price to be paid, and it became necessary, as it was thought, to employ special counsel to assist the city attorney in the negotiations for the purchase and the litigation which might follow. Litigation did arise, and appellant, in association with the city attorney, acted as attorney for the city, both in the preliminary negotiations and in the litigation. He claims to have been regularly employed by an authorized committee of the city council, and that a verbal contract was entered into whereby he was to receive as compensation for his services the same fee which the water company should thereafter agree upon and pay to its attorneys representing it in the litigation. At the end of the litigation the water company and its attorneys agreed upon a fee of $25,000 for the latter's services, and that sum was paid. Appellant claimed that sum as his fee in the matter, and the city refused to pay it. This action was instituted by appellant against the city to recover the amount claimed. He alleged

in his complaint that he was employed by a committee of the city council duly authorized so to do; that the aforesaid basis for fixing the fee was agreed upon; that he performed the service as agreed; and that the city council, during the period of the negotiations and litigation with the water company, ratified the contract made with him by the committee. The city in its answer denied the employment of appellant; denied that the committee was authorized to employ him; and denied that the council ratified such employment or agreed in any way that appellent should be paid the same fee agreed on between the water company and its attorneys. It admitted that appellant acted as counsel for the city in the litigation, but alleged that the amount of the fee charged was unreasonable.

It appears from the testimony adduced at the trial that when the city council decided to exercise the option and purchase the water plant, a resolution was adopted, at the request of the special committee having the matter in charge, authorizing said committee "to employ an attorney to assist them in matters connected with the water company." The aye and nay vote on the adoption of the resolution was not taken and recorded. Subsequently, when the controversy with the water company arose concerning the matter of taking over the plant, a resolution was adopted by the city council, by an aye and nay vote duly recorded, providing that said special committee "be and it is hereby authorized, empowered and directed to contract with the said Municipal Water Works Company for the purchase of said plant, with full power, if the purchase price and terms of sale can not be agreed upon by said committee and said water company, to appoint arbiters as provided by ordinances and contracts now existing, and if said company declined to submit to arbitration the question involved, then to take such action in the courts or otherwise as may be necessary to purchase said plant, and to do any and everything incidental thereto as may be necessary to accomplish the purchase of and paying for said water works plant, and said committee are further authorized and empowered to employ, if in its judgment the interest of the city will be better protected and promoted, an attorney to assist the city attorney in the performance of the duties imposed by this resolution, including representing the city in all negotiations and con-

troversies which may arise in purchasing or attempting to purchase said plant, until same is fully and finally disposed of." The testimony further tends to establish the fact that said committee entered into a verbal contract with appellant to represent the city, and agreed that his fee should be the same as that agreed upon by the water company and its attorneys for their services in the same matter. During the progress of the litigation another resolution was adopted by the city council reciting the employment of appellant as attorney for the city and appropriating the sum of a thousand dollars "to pay the necessary expenses to be incurred in said suit and in taking the testimony for and against the city in said proceedings." Appellant and other witnesses testified that he was present when that resolution was adopted, and that, during the discussion upon its adoption, he stated to the members of the council that he would charge the same fee that the attorneys for the water company charged it for their services in the matter. The testimony tends to show that at other times during the progress of the litigation he informed the city council that he would charge the same fee that the water company and its attorneys might agree upon as to the latter's fee. He wrote a letter to the mayor, which was read in open council meeting, and in which he stated that "there is no agreement between the city and myself as to the fee to be paid me, further than that I am to receive the same amount as the water company pays its counsel."

Each party introduced testimony to show what was a reasonable amount of fee for appellant's services. The witnesses varied in their opinions as to the amount—some putting it as low as $7,500, and some as high as $30,000.

Appellant requested the court to give instructions submitting to the jury the issues as to the alleged agreement to pay the same amount of fee paid by the water company to its attorneys; but the court refused to so instruct the jury, and on its own motion gave instructions which in effect allowed the jury to return a verdict in appellant's favor only for an amount found under the evidence to be a reasonable and customary charge for the services rendered. The jury returned a verdict in appellant's favor for the sum of $17,500 and he appealed to this court. The city has not appealed.

Counsel on both sides have devoted much time in the argument to the effect to be given to the provision of the statute that "on the passage of every by-law or ordinance, resolution or order, to enter into a contract, by any municipal corporation, the yeas and nays shall be called and recorded; and to pass any by-law or ordinance, resolution or order, a concurrence of a majority of a whole number of members elected to the council shall be required." Kirby's Digest, § 5473. This court has held that provision to be mandatory. *Cutler* v. *Russellville,* 40 Ark. 105. But the view we take of the case renders it unnecessary for us to follow counsel through the argument as to the full effect of that statute on the issues presented. The city council, by an aye and nay vote duly recorded, adopted a resolution authorizing the committee to employ appellant; the committee employed him; he performed the service; and the city accepted it and received the benefits thereof. The trial court instructed the jury, without objection from the city's counsel in this case, that appellant was entitled to a reasonable fee for his services. The only controversy is, whether appellant is entitled to recover the same fee charged by the attorneys for the water company. It is not contended that the city made a contract with appellant fixing the fee or prescribing the basis for fixing it except through the special committee pursuant to the resolution hereinbefore set forth, or by ratification. The contention of appellant is that said resolution authorizing the committee to employ counsel included, by necessary implication, the authority to agree upon the amount of the fee to be charged, or to agree upon a basis for fixing the amount; and that, even if the committee exceeded its authority in that respect, the city, with full knowledge of the facts, ratified the contract made by the committee. The fallacy of the first contention lies in the assumption that the amount of the fee, or a basis for fixing the amount, was embraced in the alleged agreement. The effect of the agreement was, not to prescribe the amount of the fee or a basis for fixing it, but to make the amount of the fee depend upon another agreement thereafter to be made between the water company and its attorneys concerning the amount of their fee, and thus to delegate to the water company and its attorneys the power to fix the fee to be paid

by the city. The authority conferred by the city council could not be delegated by the committee to another. Conceding that the resolution adopted by the council included, by implication, the power to agree upon the amount of fee, the committee did not agree with appellant upon the amount of fee. It merely left the fee dependent upon the amount of fee to be charged by the attorneys for the water company. Citation of precedents is hardly necessary to sustain the proposition that such a power can not be delegated by the defendant in the absence of special authority to do so. That principle has been often announced and reiterated in decisions of this court. In the case of *Cheatham* v. *Phillips*, 23 Ark. 80, Judge ENGLISH gave it application to a public agent in the discharge of his duties.

Now, as to the alleged ratification by the city council. It is not shown that the amount of fee fixed by the water company and its attorneys was brought to the attention of the members of the council. The undisputed fact is, that the fee was not agreed upon until after the end of the litigation, and the members of the council could not have known what it would be. Nor is it shown that they knew whether or not the value of appellant's services would be the same as that of the other attorneys. In the absence of the information on that subject, the city council can not be deemed to have ratified the alleged agreement as to the method of fixing the amount of the fee. Before an individual, much less a public corporation, can be said to have ratified the unauthorized act of another, it must be by the doing of some act or the acceptance of some benefit with knowledge of the facts concerning the transaction. *Martin* v. *Hickman*, 64 Ark. 217; 2 Dillon's Municipal Corporations (5 ed.) § 797. At most, the council can be held only to have ratified the agreement as to a reasonable fee for appellant's services, and the jury, under instructions not objected to, have determined what the amount of a reasonable fee is, and have given appellant a verdict for that amount. In a well considered opinion by Judge FIELD, then Chief Justice of the Supreme Court of California, it was held that "a ratification is equivalent to a previous authority," and that "where an authority to do any particular act on the part of a corporation can only be conferred by ordinance,

a ratification can only be by ordinance." *McCracken* v. *San Francisco,* 16 Cal. 591.

If that doctrine be applied here, it would render invalid the alleged ratification by the city council except as to the obligation to pay appellant a reasonable fee for his services which the city had accepted.

It is contended that appellant would have been bound by the alleged agreement, even though the water company and its attorneys had fixed the amount at less than a reasonable fee, and that as the obligation was mutual the city was also bound. That does not necessarily follow. Appellant might, by his express promise, have legally bound himself not to charge more than the water company's attorneys charged their client, and yet the city not be bound except for a reasonable fee, on the ground that no one was authorized to enter into the contract.

We are of the opinion that, according to the undisputed facts in the case, the verdict of the jury fixing the amount of a reasonable fee, is decisive of the whole case, and that the judgment should be affirmed. It is so ordered.

SKEEN *v.* ELLIS.

Opinion delivered December 16, 1912.

1. CONTRACT—WHEN BINDING.—Where the parties to a contract agree upon its terms and intend to become immediately bound by it, there is a complete contract although they intend to embody its terms in a written instrument to be subsequently executed by them. (Page 516.)
2. CONTRACTS—FORMALITY—LETTERS.—A contract may be made by letters; and a mere reference in them to a future formal contract will not prevent their constituting a binding agreement. (Page 516.)
3. SALES OF LAND—WHEN CONTRACT NOT BINDING.—A contract for the sale or exchange of land is not binding where it was agreed that it was not to be consummated until the title was accepted and the deeds delivered. (Page 516.)

Appeal from Craighead Circuit Court, Jonesboro District; *W. J. Driver,* Judge; affirmed.

Hawthorne & Hawthorne and *Robert C. Powell,* of St. Louis, Mo., for appellant.

The general rule is that the purchaser must bear the loss due to an accidental injury to the property, between the time of the contract and the delivery of the deeds. The purchaser is in equity the owner, entitled to all benefits and increase in value, and must bear any loss or depreciation in the property. 85 Ark. 208; 140 S. W. 582; 32 Ark. 377; 52 Ark. 381; 66 Ark. 167; 13 Ind. 497; 14 Ind. 187; 1 S. W. 199; 4 S. W. 225; 27 L. R. A. (N. S.) 233; 22 N. E. 259; 45 N. Y. 454; 37 L. R. A. 150; 36 Am. St. Rep. 22; 12 L. R. A. 178; 26 Pa. 51; 3 Tenn. 289; 11 Ia. 360; 111 N. W. 623; 61 Pac. 926; 57 Atl. 242; 48 Atl. 85; 55 S. E. 844; 99 S. W. 1095.

Lamb & Caraway, for appellees.

The rule attempted to be invoked by appellant can not be invoked in this case because (1) there was no contract binding and absolute between the parties until the deeds were exchanged, July 26, and (2) the rule is applicable only in equity. 64 Ill. 477; 20 Pick. (Mass.) 134; 8 Pac. 544; Pomeroy's Equity Jur., § § 367, 368; 85 Ark. 208-211-12. But even in equity appellant would be in no better position for the reason (1) stated above. 67 Ark. 553; 64 Ill. 477; 38 N. W. 816, 818; 36 S. E. 796; 136 S. W. 843; 84 S. W. 1000; 94 Ark. 263.

HART, J. This is an action for damages for breach of a contract by appellees against appellant. There was a verdict and judgment for appellees, and the case is here on appeal.

The appellees, T. J. Ellis and Geo. C. Peters, owned a tract of land comprising four hundred and forty acres in Craighead County, Arkansas, and the appellant, T. C. Skeen, of St. Louis, Missouri, owned a town lot ninety by ninety feet in Hattiesburg, Mississippi, on which was located three small dwelling houses. T. H. Watson was a real estate agent at Jonesboro, Arkansas, and desired to bring about an exchange of the property between the parties. On May 30, 1911, appellees wrote to Watson at Jonesboro, as follows:

"Confirming our conversation with you, we hereby give you option until June 10, 1911, to purchase or sell for us all the land we own (440 acres) in section 36, township 14 north, range 2 east, Craighead County, Arkansas, at a price of $23 per acre, and agree that we will take one town lot 90x90

feet in Hattiesburg, Miss., on which is located three small dwellings. This property is now controlled by Mr. T. C. Skeen, of St. Louis, Mo., and the same is to be taken in exchange at a value of $5,000. The remainder of the purchase price of the 440 acres to be paid as follows: $2,000 cash down, and the balance in four equal semi-annual payments with interest at 6 per cent. The title to the Mississippi property must be approved by us."

On the same day F. H. Watson wrote to the appellant, T. C. Skeen, at St. Louis, as follows:

"Complying with your request, I have secured the foregoing option from the owners of the land we have under consideration (440 acres near Gilkerson) and hereby transfer the same to you with the same price, terms, etc., mentioned therein."

F. H. Watson testified: "I became acquainted with appellant about the 1st day of June, 1911. The terms of the option I received from appellees were verbally changed as follows: The appellant was to take three hundred and twenty acres of land in Craighead County, instead of four hundred and forty acres at the same price, and the appellees were to take the Mississippi property. Under the changed terms the appellant was to pay one-third of the Mississippi property in cash and execute his two notes for $786.66 each, payable one and two years after date, with interest. This agreement was reached on June 10, 1911."

Ellis and Peters executed a deed to Skeen, and sent it through the Bank of Jonesboro to Kirkwood Trust Company, at Kirkwood, Missouri, to be delivered to appellant when they so ordered. The appellant executed a deed to the Mississippi property and sent it to the Bank of Jonesboro to be delivered to Ellis and Peters upon his direction. Appellant says that he received the deed of the appellees from the Kirkwood Trust Company on July 26, 1911. The appellees received the deed from the Bank of Jonesboro on July 26, or 27, 1911. On the 21st day of July, 1911, one of the houses on the Hattiesburg property was accidentally destroyed by fire, and another one was damaged by fire. Neither of the parties took possession of the property respectively conveyed until after the delivery of the deeds. Appellees did not know of

the fire until after the deed was delivered to them. The appellant testified that he did not know of the fire before his deed was delivered by the Bank of Jonesboro. On the other hand, appellees adduced evidence tending to show that appellant did know of the fire before his deed was delivered to appellees. The court, upon the suggestion of appellees, propounded special interrogatories to the jury in regard to this. The special interrogatories and the finding of the jury are as follows:

"1. Do you find the defendant Skeen knew of the fire before his deed was delivered by Bank of Jonesboro to the plaintiffs?" Answer: "Yes."

"2. Do you find that plaintiffs, Ellis and Peters, or either of them or their agent, Watson, knew of the fire before the delivery of defendant's deed by the Bank of Jonesboro?" Answer: "No."

Numerous letters and telegrams in regard to the negotiations between the parties are copied in appellant's abstract. To set out this correspondence, here would unduly extend this opinion. Sufficient reference and discussion of the letters, telegrams and conversations between the parties and Watson will be made later.

It is contended by counsel for appellant that the rule is that where houses situated on lots under a contract of sale are accidentally destroyed by fire before the deed is delivered the loss must fall on the vendee. We do not deem it necessary to determine this question for the reason hereinafter given. The authorities on both sides of the question are cited in the case note in *Hawkes* v. *Kehoe*, 9 Am. & Eng. Ann. Cases, 1053. See also 6 Pomeroy, Equity Jurisprudence, § 859.

In a recent case we in effect held that if the parties finally agree upon all the terms of a contract and intend to become immediately bound there is a complete contract, although they intend to embody the terms of the agreement in a written instrument to be subsequently executed by them. *Friedman* v. *Schleuter*, *post* p. 580.

It is the settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain.

A written contract for the sale of land, however, is not

complete if the vendor has an option to put an end to the contract. We think the undisputed evidence shows that the parties to the contract did not intend for it to be a complete and binding contract until the deeds were delivered. All through their correspondence the parties speak of closing up the contract when they become satisfied with the abstracts of title. We do not think they proceeded upon the theory that the contract compelled them to accept the abstract of title if they should prove correct. On the contrary, they proceeded upon the understanding that they could not be compelled to take the property until they accepted the title, and that the contract was not to be consummated until the deeds were delivered to the respective parties. It is certain that the appellant did not consider the contract for the exchange of the lands to be a complete and binding one until the deeds were delivered. Each of the parties prepared his own deed and deposited it with the bank or trust company to be delivered to the other party when he should so direct.

On the 25th day of July appellant called up Watson and stated to him that the matters had not been wound up, and that he wanted to leave that night, and that before he closed up the contract he wanted to know the condition of affairs. Watson told him that there were some objections to the abstract of title of Ellis and Peters that had not been met. Appellant stated to him that he had waited about as long as he could on them, and that they were so slow he felt like calling the deal off. Watson then told him that he would personally guaranty the abstract and meet all objections. Appellant then requested him to wire him to that effect, and that he would close the transaction that day and make a payment on the land. This conversation over the telephone is not denied by appellant, and he is in no position now to claim that the contract was a binding one on the 10th day of June, 1911. It is true that the notes executed by appellant were dated June 10, 1911, but Watson states that this was done for the sake of convenience. The papers on each side were prepared at different places and at different times, and the parties only agreed upon this date so that the papers would bear a uniform date of execution. The appellant had an insurance policy on the Hattiesburg property, and by agreement transferred

this policy to the appellees, but he retained the policy in his possession, and the parties did not intend that it should become binding until the trade between them for the lands should be completed. We think it is evident from the whole course of conduct of the parties that they did not intend the contract to be completed and binding until the deeds were delivered. As above stated, certainly the appellant can not so contend, for by his own construction he had the right to call the deal off at any time before the deeds were delivered. We think that the undisputed testimony shows that both parties recognized the fact that the letters were simply an offer by the one to the other, and that the lands were to be exchanged at some time in the future when the deeds were made and delivered. Before that time came both parties recognized that the contract was not a binding and enforceable one. *Ark. Fire Ins. Co.* v. *Wilson,* 67 Ark. 553.

Consequently, the court did not err in instructing the jury that the title to the property did not pass until the date of the delivery of the deeds. Some correspondence was had between the parties themselves, and between them and the insurance company, looking to the adjustment of the loss after the fire occurred; but there is nothing in the correspondence to indicate that the parties regarded the contract as completed prior to the time of the fire. They both seem to have had in view an adjustment of the matter with the insurance company. The jury, in answer to the special interrogatories propounded to it, found that appellant knew of the fire before his deed was delivered to appellees, and that neither of appellees, nor their agent, Watson, knew of the fire before the delivery of the deed.

The verdict of the jury upon this disputed question of fact is binding on us, and establishes the liability of appellant. The judgment will be affirmed.

TAYLOR v. UNION SAWMILL COMPANY.

Opinion delivered December 16, 1912.

1. EVIDENCE—AMBIGUITY IN DEED—PAROL EVIDENCE.—A deed conveying "white oak timber" is ambiguous, and parol evidence is admissible to show the sense in which the parties used the term. (Page 521.)

2. CONTRACTS—CONSTRUCTION.—In interpreting a contract, ordinary words must be taken in their ordinary sense unless a technical sense is established by a preponderance of the evidence, and this use is shown to be of such generality among the class of persons concerned that the party using them may be inferred to have used them in that sense. (Page 522.)
3. SAME—CONSTRUCTION.—Where the interest of the parties to a contract conflict under a clause of doubtful import, it should be construed most strongly against the party who prepared the contract. (Page 524.)
4. CUSTOM AND USAGE—WHEN BINDING.—A local custom to include overcup oak, cow oak and post oak under the term "white oak" must be uniform, reasonable and well established before it can be held to govern the terms of a contract. (Page 524.)

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

STATEMENT BY THE COURT.

This suit was instituted by appellee against appellant to enjoin the latter from cutting and removing certain species of oak timber from certain lands in Union County, described in the petition, and also for the purpose of reforming a deed of conveyance made by J. R. Taylor, appellant's ancestor, to appellee on the 16th day of May, 1905.

The appellee alleged that the appellant, without right or authority, entered upon and commenced to cut and remove a lot of timber coming under the term of "white oak timber;" that said timber had been sold by the appellant's ancestor to the appellee. Appellee also alleged the insolvency of appellant, and prayed that he be restrained from cutting "the white oak timber on said lands, including forked leaf, cow oak, overcup, and post oak, and that its title thereto be quieted, and its deed reformed and corrected so as to clearly include in the description therein all the species of oak above named."

The appellant, in answer, set up that he was the owner of the land on which the timber was situated, having received the same by settlement with the estate of his ancestor, J. R. Taylor. He set up that by virtue of his purchase from the estate of J. R. Taylor he became the owner of the pine timber ten inches in diameter and over at the stump on said lands, as well as the timber known as white oak timber of said dimensions. He denied that the plaintiffs were the owners of any

cow oak, post oak or overcup oak timber on the land described, and denied that his ancestor, J. R. Taylor, intended to convey to the plaintiff any title to such timber. He admitted that he was insolvent. He set up damages by reason of a restraining order that had been issued, and prayed that plaintiff be decreed to have no interest in the cow oak, post oak and overcup oak under their timber deed from his ancestor, J. R. Taylor, and asked that title "to said cow oak, post oak and overcup oak be quieted as against said plaintiff."

The timber deed from appellant's ancestor, J. R. Taylor, to the appellee, after describing the lands, conveyed to appellee for a consideration of $3,000 in cash, recited "all the pine and white oak timber ten inches in diameter and over at the stump on said lands."

The court below found that "the word 'white oak,' as used in said deed of conveyance, includes within its meaning the various species of white oak commonly called forked leaf oak, overcup, cow oak, and post oak," and entered judgment in favor of the plaintiff for the possession of each of said species of oak above named, and perpetually restraining the appellant from cutting, manufacturing or removing said species of oak from the land. The appellant duly prosecutes this appeal.

R. G. Harper and *Pat McNally*, for appellant.

1. The term "white oak," having a common well known popular meaning in Union and adjoining counties, should be construed according to that popular and well-understood meaning in timber sales, especially between the parties affected. "White oak," as so construed, does not include post, cow nor overcup oak. The grantor so understood it, and it was his intention only to sell the white (forked leaf) oak, and knew nothing of the technical, arbitrary and mercantile meaning attached by scientists and lumber associations. Deeds must be construed so as to effectuate the intention of the grantor. 22 Ala. 435; 29 Me. 169; 52 Mo. 318; 51 W. Va. 106; 13 Cyc. 601; par (p.) and (C. C.) 107 Ill. 141; 117 *Id.* 379; 49 N. Y. 464-9; Starkie on Ev., § § 292-4; Parsons on Contracts, § 541.

2. A knowledge, express or implied, of a particular usage or technical meaning must be brought home to the party to be affected by it. 4 Mass. 245; 9 *Id.* 155; 17 *Id.* 449;

3 Pick. 414; 22 U. S. (9 Wheat.) 581; 26 U. S. (1 Pet.) 89; 20 Fed. 240; 79 Ia. 603.

3. A party who takes an agreement prepared by another, and upon its faith parts with something of value, should have a construction most favorable to himself. 97 Ark. 522, 531; 90 *Id.* 256; 76 U. S. 394-407. Evidence of the secret motives and intention of one of the parties is immaterial. 68 Ia. 330.

4. The acts of parties under a contract shows the construction placed upon it. 108 Ind. 382; 52 N. Y. 636; 13 Cyc. 608; par. H; 62 S. W. 734; 45 Hun. (N. Y.) 198; 110 N. Y. 569.

Gaughan & Sifford, for appellee.

1. The term "white oak" timber includes all species of white oak, commonly called forked leaf, overcup, cow and post oak, and J. R. Taylor so intended in his conveyance. 9 Cyc. 579; 12 *Id.* 1041; 20 Ark. 251.

2. While a chancellor's findings are not binding on appellate courts, they will not be disturbed except where the preponderance of the evidence is clear. 44 Ark. 216.

WOOD, J., (after stating the facts). The testimony on behalf of the appellee tended to prove that, according to the general custom of those buying, selling, and manufacturing oak timber into lumber, when one buys or sells white oak timber it includes the species known as forked leaf, cow oak, overcup and post oak. The testimony of the witnesses on behalf of the appellant, on the other hand, tended to prove that when one bought timber under a deed specifying "white oak," in Union County, where this timber is situated, he would get only that species of white oak known as forked leaf, and not including the various other species of cow oak, overcup and post oak. The testimony showed that the government classified oak into two families, viz:, white oak and red oak, white oak including the various species of forked leaf, cow oak, overcup and post oak.

The testimony of the witnesses on behalf of the appellee and the appellant showed that on the lands on which the timber in controversy is situated there were species of oak timber commonly and popularly known and designated as white oak, cow oak, post oak and overcup oak.

Mr. Webster's definition of "white oak" is as follows: "An American oak of the eastern United States, having characteristic leaves with usually seven deep, rounded, entire lobes; also, its very hard strong wood, used in construction work and in manufacturing. By extension, any species of oak of the group of which the above is typical, having acorns maturing the first season," etc.

There is sufficient ambiguity therefore as to the meaning of the term "white oak," as used in the deed, to warrant the testimony introduced both on behalf of the appellee and the appellant tending to show the sense in which this term was employed. It could serve no useful purpose to set out in detail and discuss the evidence tending to support the contention of the respective parties.

The appellee contends that the term "white oak" was intended to include all the various species of white oak, cow oak, post oak and overcup oak. The appellant, on the other hand, contends that the term "white oak" was only intended to include the single species of forked leaf oak, or what is commonly and popularly known as white oak, and that the parties did not intend by the term "white oak," as used in the deed, to include the other species of oak commonly known as cow oak, post oak and overcup oak.

We are of the opinion that the finding of the chancellor to the effect "that the term 'white oak' as used in the deed of conveyance includes in its meaning the various species of white oak commonly called forked leaf oak, overcup, cow oak, and post oak" is clearly against the preponderance of the evidence.

It is a well-established rule of construction that "in interpreting a contract ordinary words must be taken in their ordinary sense unless a technical sense is established by a preponderance of the evidence, and this use is shown to be of such generality among the class of persons concerned that the party using them may be inferred to have used them in that sense." *Potter* v. *Phoenix Ins. Co.*, 63 Fed. 382.

In *McCoy* v. *Erie & Western Trans. Co.*, 42 Md. 498, it is said, (quoting syllabus): "However terms may be understood in their ordinary sense, if the parties have attached other or unusual or arbitrary meaning to them, to be derived from

a fair interpretation of the contract, they have a right to so employ them, but to accomplish such purpose and to vary the common understanding the meaning ought to be plain and free from reasonable doubt."

The testimony of the witnesses on behalf of the appellee for the most part shows that they were giving to the term "white oak" its technical sense as generally understood by the trade, or those dealing in the business of manufacturing forest products. But the decided preponderance of the evidence, in our opinion, shows that it was not the intention of the grantor to use the term "white oak" in its technical sense, but according to what was popularly and generally known in the community where the timber was situated as white oak.

Witness Seaman, who made the contract for the appellee, testified that he bought all of the pine and oak timber that appellant's ancestor, J. R. Taylor had except the pin oak and red oak. He said that he thought "the cow oak and other oaks except pin oak and red oak were all considered in the deed." Witness Scott, who wrote the deed, stated that Seaman, who made the contract for appellee, reported that the red oak and pin oak were not to be included in the deed, and that in writing the deed, when he got to the kind of timber conveyed, he told Taylor what Seaman said, and that Taylor then told the witness that the pin oak and red oak were not to go in, whereupon the witness wrote the deed specifying white oak, which he intended to cover the white oak species, that is, everything other than red oak and pin oak.

The testimony of Mrs. J. R. Taylor, who executed the deed with her husband, tends to contradict the testimony of Seaman and Scott. She says: "When I signed the deed with my husband, I did not understand that I was selling the cow oak, post oak and overcup, but understood that we were selling nothing but the white oak, and by the term "white oak" I mean what is commonly known as the forked leaf oak. Two deeds were made. Mr. Taylor received a copy of the deed, and the change was made in the copy given to Mr. Taylor so as to make it read 'white oak.'" She further says, "When we went to the office at Huttig (where the deed was executed), my husband had the word 'white oak' written on the deed before it was presented to me. He explained to me the con-

tract before we went down there. When the deeds were presented, they called for all the oak timber, and my husband changed it to 'white oak' timber. The word 'white oak' was written in after the deeds had been prepared and presented. Mr. Taylor told me he simply had the words 'white oak' inserted in the deed."

The physical appearance of the deed corroborates Mrs. Taylor, showing that the deed, before the word "*white*" was inserted, first specified "all the pine and oak," and that the word "white" was inserted above, between the words "and" and "oak."

There was testimony showing that after the deed was executed Taylor made use of post oak timber on the land for fencing, and that he claimed that he had not disposed of any of his oak timber except the white oak, meaning the forked leaf; that he had not included in the deed the other species of oak on the land.

In the recent case of *Ford Hardwood Lumber Co.* v. *Clement*, 97 Ark. 522, 532. we said: "Where the interest of the parties to the contract conflict under a clause of doubtful purport, it should be construed most strongly against the party who prepared the contract." See also *Gulf Compress Co.* v. *Harrington*, 90 Ark. 256. That principle is applicable here. The draftsman for appellee could have easily put the matter beyond dispute by inserting the various species of white oak in the deed if the parties intended to include them.

We are of the opinion that the preponderance of the testimony does not show that there was a local usage in Union County to the effect that when white oak was sold under a deed that specified white oak timber the same included, or was intended to include, also the other species of oak known as cow oak, overcup and post oak, and we are convinced that, even if there was such a custom, it was not brought home to J. R. Taylor, the ancestor of appellant, when he made his deed to appellee. If there was a local usage of trade whereby the term "white oak" included the other species of overcup, cow oak and post oak, that usage must have been uniform, reasonable and well established before it could be held that appellant's ancestor knew the same and contracted with reference thereto. *Walls* v. *Bailey*, 49 N. Y. 464, 12 Cyc, § 1035-1042. True,

some of the witnesses on behalf of appellee testify to a general custom prevailing in southern Arkansas to include other species of oak, towit, overcup, cow oak and post oak, under the term "white oak" in conveyances using that term. But we doubt whether the preponderance of the evidence, even by appellee's own witnesses, shows that there was a uniform custom to include all other species of white oak, towit, cow oak, overcup and post oak. For instance, one of the witnesses, E. C. Nelson, testified that the words "white oak" included forked leaf, overcup and cow oak. He omitted post oak. Another witness, A. S. Johnson, said that the term "white oak" included "forked leaf white oak, cow oak, overcup and post oak," including them all. Another witness, H. H. Brinkman, said that the term "white oak" included forked leaf and cow oak and overcup, omitting post oak. Another witness, W. V. Brown, testified that the term "white oak" included all the other species, towit, cow oak, post oak, overcup oak, "and many other varieties of oak timber." Another witness, Pingle, testified that the term "white oak" included "the different species of white oak, such as forked leaf, overcup, post oak, cow, chestnut, etc." Witness Scott testified that the term "white oak" included all other species of oak called post oak, overcup and cow oak. Witness Hampton testified that the "accepted meaning of white oak in Union County covers every species of white oak, including cow oak, but I don't state that the term 'white oak' would cover post oak and overcup oak, although post oak and overcup oak are used for staves and bolts, as they are both tight-grained timber, but more defective than white oak and its species."

It thus appears that the testimony of the witnesses for the appellee by no means establish the fact by a preponderance that there was a uniform custom to include under the term "white oak" all the other species of oak named and claimed by the appellee in its complaint, towit: cow oak, post oak, and overcup oak. The witnesses for appellee differ as to the kinds of oak that are included under the term "white oak." But, on the other hand, the witnesses for the appellant testify uniformly that the term "white oak" has a popular and well-understood meaning in Union County, where the timber in

controversy is situated, and that it does not include overcup, cow oak and post oak.

As the finding of the chancellor, in our opinion, upon the whole record, is not supported by a clear preponderance of the evidence, the judgment is reversed, and the cause remanded with directions to dismiss the complaint for want of equity, and for further proceedings on appellee's claim for damages, according to law and not inconsistent with this opinion.

WORTZ v. FORT SMITH BISCUIT COMPANY.

Opinion delivered October 21, 1912.

1. TRIAL—DIRECTED VERDICT—EVIDENCE.—It is proper to direct a verdict for defendant only when, under the evidence and all reasonable inferences deducible therefrom, the plaintiff is not under the law entitled to recover. (Page 528.)
2. MASTER AND SERVANT—DEFECTIVE MACHINERY.—Where a foreman, not having the duty to make repairs, was injured by the neglect of the manager of the master to exercise ordinary care to perform the duty of making repairs, such negligence renders the master liable for resultant injuries to such foreman. (Page 531.)
3. SAME—ASSUMED RISK.—Where a servant was injured while putting a belt upon machinery while in motion when he had been warned of and knew the danger of doing so, he will be held to have assumed the risk and can not recover therefor. (Page 532.)

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

Read & McDonough, for appellant.

A master owes the same duty to a foreman to provide safe machinery and instrumentalities with which to work that it owes to other employees. 98 Ark. 34. The risks and hazards incident to the set-screws and pulleys were not open and obvious, and were not risks that were known to the plaintiff. 27 Ark. 347. Where, as in this case, the plaintiff was acting under the direct commands of the master and was performing work, as the undisputed evidence shows, which was not in the line of his duty, it would be error to instruct the jury that he assumed all risks of which he knew or could have known by the exercise of ordinary care.

Such being the case, it was patent error to instruct a verdict in favor of the defendant. 97 Ark. 358. A servant assumes only ordinary risks. 97 Ark. 358; *Id.* 486. Under the circumstances shown in evidence, it is always a question of fact for the jury to determine whether or not the complainant assumed the risk, or was guilty of contributory negligence. 97 Ark. 553; 98 Ark. 34; 89 Ark. 522; 95 Ark. 291; 93 Ark. 564; 92 Ark. 102; 92 Ark. 502; *Id.* 554; 91 Ark. 86; *Id.* 102; *Id.* 388; 90 Ark. 145; *Id.* 223; *Id.* 543; *Id.* 555; 88 Ark. 20; *Id.* 28; 77 Ark. 367; 78 Ark. 38; 82 Ark. 534. A servant acting under orders does not assume the risk. 67 Ark. 377; 77 Ark. 556; 71 Ark. 55. An order from the master relieves from the doctrine of assumed risk, unless it is shown that the danger is so patent that no person of ordinary prudence would have obeyed. 77 Ark. 458; 65 Ark. 138; 76 Ark. 184.

Ben Cravens, John H. Vaughan, C. B. Fisher and *A. L. Berger,* for appellee.

1. The evidence does not tend to prove negligence on the part of defendant, nor that the proximate cause of the injury was any of the acts or omissions alleged as negligence in the petition. The injury itself is not evidence of negligence, and it will not be presumed.

2. If there are any facts disclosed by the evidence which tend to prove that appellee was in any respect guilty of negligence towards appellant, it is clear that there was concurring negligence on the part of appellant which contributed to the injury. Appellant's own testimony shows that he had been warned and knew of the danger of attempting to put on the belts without stopping the machinery, and knew of the order not to put on the belt while the machinery was in motion. 142 S. W. 153, 154; 141 S. W. 1176, 1179; 61 N. E. 262; 32 So. 232; 90 Ark. 223, 119 S. W. 73; 90 Ark. 555; 120 S. W. 146; 130 N. W. 630; 96 Ark. 466; 132 S. W. 212; 84 Ark. 337; 105 S. W. 878; 120 Am. St. Rep. 74; 140 S. W. 584; 79 Ark. 437, 96 S. W. 183.

3. Appellant assumed the risk and can not recover. He knew and appreciated the dangers incident to the work in which he was engaged. He was not relying upon a promise to repair. The dangers were open and obvious, within the

knowledge not only of the master but also of appellant through the caution given him by the manager, the order forbidding that method of doing the work, and through his own observation. A safe way existed which he had been directed to use, yet he chose the dangerous way. 142 S. W. (Ark.) 1131, 1132; 73 N. W. 992, 993; 141 S. W. 1176, 1178; 77 Ark. 367, 92 S. W. 244; 92 Ark. 102, 122 S. W. 116; 90 Ark. 387, 199 S. W. 277; 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; 97 Fed. 423, 38 C. C. A. 239; 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720; 95 Ark. 136; *Id.* 291; *Id.* 560; 96 Ark. 387; *Id.* 206; 97 Ark. 486; 135 S. W. (Ark.) 892; 140 S. W. (Ark.) 14, 21; 140 S. W. (Ark.) 587; 138 S. W. (Ark.) 469; 145 S. W. (Ark.) 562, 563; *Id.* (Ark.) 564, 566.

FRAUENTHAL, J. This is an action instituted by Walter W. Wortz, the plaintiff below, to recover damages for an injury which he received while in defendant's employ, and which he alleged was due to its negligence. The defendant denied that the injury was due to any negligence upon its part, and pleaded as a bar to any recovery the plaintiff's assumption of the risk and his own negligence contributing to its cause. After the plaintiff had introduced his evidence and rested his case, the court directed the jury to return a verdict in favor of defendant, which was done. From this action of the court the plaintiff has prosecuted this appeal.

In reviewing this ruling of the court directing a verdict, the evidence adduced upon the part of the plaintiff must be considered in the light most favorable to his cause of action. If under that evidence, however, with every reasonable inference of fact that is deducible therefrom, the plaintiff is not under the law entitled to a recovery, then the ruling made by the court is correct.

The evidence adduced upon the part of the plaintiff consisted of the testimony of two witnesses, the plaintiff himself and a witness who was not present when the injury was received, but who had special knowledge as to the character of the machinery at which plaintiff was injured, and as to whether it was in a resonably safe condition. The case thus made by this testimony is this:

The defendant is a corporation located at Fort Smith, and is engaged in the manufacture of crackers, fancy cakes, cracker

meal and other products of like character. In this factory the defendant has a number of machines, amongst which is one known as a cracker mill, which is used for the purpose of grinding crackers into meal. This machine was located on the lower floor of the building, and consisted of a hopper, burr and discs, in which the crackers were crushed. It was situated upon a platform about eight inches from the floor, and was driven by a belt four inches in width, attached to a pulley on said machine, and to a larger pulley on an overhead shaft, about eight feet above the machine. On the occasion of the injury, the plaintiff was directed by defendant's manager to grind some cracker meal, and he proceeded to this machine to perform that duty. He found that the belt was off, and it became necessary, in order to start the machine, to put the belt upon said pulleys. To do this, the plaintiff called to his assistance a girl employed at the factory, who held the belt upon the lower pulley while he climbed upon a step ladder to put the belt on the top pulley while the same was in motion. The plaintiff climbed up the ladder, and put the belt over the top pulley while in motion, and then proceeded down the ladder while the belt and machinery were in motion. In making the revolutions, the belt jumped off the pulleys, and the lower end was thereby whirled about. As plaintiff was in the act of stepping from the ladder to the floor, this end of the belt caught him around the arm and whirled him around the shaft, breaking his right arm so as to necessitate its amputation, and injuring him on other parts of his body.

It appears that the burr or discs had become broken, probably a year or more before the accident, and in order to grind the crackers it was necessary to tighten them up to an extent which would somewhat choke the machine while running, and thus tend to throw the belt from the pulleys; that the platform upon which the machine stood had become somewhat shaky, and, as plaintiff described it, "wobbly" to some extent, and thereby also tended to throw the belt off the pulleys. It also appears that upon the line shaft to which the top pulley was attached there was also attached a smaller pulley, about two or three inches from the larger pulley, and that from the journal of the larger pulley there extended some set-screws for a distance of an inch or more.

The plaintiff was twenty-seven years old, and had been engaged for a number of years in working with machinery similar to that used in defendant's factory. His father was president and manager of defendant's company, and plaintiff had been working at its factory for about four years prior to the injury. He began as an ordinary employee, and had been advanced until he was made foreman, about a year and a half before the injury, and continued in that position up to the time of the injury. He was not a machinist, but it was his duty as foreman to look after the machinery in a general way, repairing the smaller defects in it himself and reporting to the manager larger defects which he could not fix. He had authority to employ and discharge servants engaged at the factory, but was himself subject to the orders of the manager of the company. He testified that he had noticed for some time prior to the injury the broken condition of the burr, and called the manager's attention to it, who had promised to repair it; but he continued to work at the machine for a long time after that without complaint and, as we think, without any reliance upon any promise to repair. It also appears that he was well acquainted with the fact that the stand upon which the machine was placed was somewhat shaky long prior to the accident. In placing the belt upon the top pulley, the plaintiff was a foot or so from it, and reached his arm over the smaller pulley upon the shaft, located two or three inches from it, and this and the obtruding set-screws were directly in front of him as he faced them.

The expert witness introduced by plaintiff testified: "When standing on the floor, I could see this line shaft and the pulleys and the set-screws; they were open to common observation. Anybody, as a stranger looking at it, could see it, and it was easily discernible." He also testified that if one had gone up to the place where these pulleys were located on the shaft as many as six times to put the belt on, with the machine in motion, the pulley and set-screws were very easily discovered. He said: "I can not conceive of anybody going in twelve inches of the line shaft and not being able to see the set-screws and collars; he is bound to see them."

It further appears from the testimony of the plaintiff that he had put the belt upon the pulley in the same manner

as upon this occasion at least six times prior to the accident; that he had learned and knew that in placing the belt on the pulleys while in motion it was liable to fly off, and had done so several times before, wrapping itself around the shaft, with its lower end whirling around, endangering those near it. He testified that defendant's manager had ordered him not to put the belt on the pulleys while in motion, but to stop the machinery and put the belt on the pulleys while at rest. He also testified that this order was often disregarded with the knowledge of the manager. He testified further, however, that he knew it was dangerous to put on the belt without stopping the machinery.

In his complaint, the acts of negligence attributed by the plaintiff to the defendant consisted (1) in permitting the cracker mill to remain out of repair and in a defective condition, causing the belt to be thrown from the pulleys; and (2) in placing the two pulleys upon the shaft so close together with the set-screws protruding therefrom, so that when the belt, which was wider than the distance between the pulleys, flew off it caught between them and thus became fastened, so that, instead of permitting the shaft to revolve beneath it, it was whirled around the shaft, making it dangerous to those near it.

It is contended by counsel for defendant, that, if these conditions of the machine and pulleys were defective, it was attributable to the negligence of the plaintiff, rather than to that of the defendant. They urge that plaintiff was foreman at the factory, and as such foreman it was his duty to discover defects in the machinery and to remedy such as were of an ordinary character, and to report those which were of a nature that he could not remedy; and that he failed to perform that duty. The plaintiff, however, testified that he was not a machinist; and it might be inferred from his testimony that it was not within the province of his duty to make these repairs, but that this was the duty of the manager. If, therefore, this duty was imposed upon the manager, and plaintiff was injured through the failure on the part of the manager to exercise ordinary care to perform that duty, such negligence of the manager would be the negligence of the defendant, for which it would be liable for resultant injuries to plaintiff,

regardless of the grade of his service as foreman. *Bryant Lumber Co.* v. *Stastney*, 87 Ark. 321; *Oak Leaf Mill Co.* v. *Smith*, 98 Ark. 34.

But, in the view which we have taken of this case, we do not find it necessary to pass upon the question as to whether or not the testimony was sufficient to warrant a finding that the injury was due to an act of negligence upon the part of the defendant. We are of the opinion that the testimony clearly shows that the injury which plaintiff received was due to one of the risks which he assumed by reason of his employment.

According to his own testimony, the plaintiff knew of any defect which there was in the cracker mill and in the platform on which it stood. With this knowledge he had worked at the machine, while this condition existed, for probably more than a year prior to the accident. While he called the attention of the manager to this defect, and the manager promised to repair it, still his testimony clearly shows that he continued to work at the mill without any reliance upon that promise, and without any complaint of the failure to repair it.

But we do not think that the defective condition of the cracker mill or the shaky condition of the platform were the proximate cause of the injury. The testimony shows that the machine had not been in operation for some days, and was not choked at the time of the injury, and that the belt was placed upon the pulleys. The proximate cause of the injury was the whirling of the belt. Counsel for plaintiff concede that this was the proximate cause of the injury, but they earnestly contend that it was due to the defendant's negligence in permitting the two pulleys on the shaft to be placed so close together, with the set-screws protruding from one of them, thereby catching the belt between them and causing the upper end of it to become fixed, and thus to wrap around the shaft. The undisputed evidence shows, however, that the pulleys and set-screws could be readily seen from the floor. They were plainly open to observation, and they could more certainly be seen when one was within a foot of them, as plaintiff had been upon a number of occasions, and was upon the occasion of this injury. The expert witness introduced by plaintiff testified that he could not conceive of any one going within

twelve inches of this shaft and not being able to see the set-screws and the position of the pulleys. He said he was bound to see them. The plaintiff had placed this belt upon the pulley at this place under the same conditions for at least six times prior to the accident. Under this testimony, therefore, we are compelled to say that the plaintiff must have seen the smaller pulley and set-screws upon the shaft and the condition of the machinery. He had been warned of the danger of putting the belt upon this pulley while the machinery was in motion, and himself testified that he appreciated the dangers arising therefrom. In fact, he had been ordered not to place the belt upon the pulleys while the machinery was in motion. While he contends that this order was abrogated by its violation, nevertheless it shows that he fully appreciated the danger of performing this duty in this way. If the injury was due to these defects of which he now complains, the testimony shows that they were open and obvious, and that he fully appreciated the dangers arising therefrom. The risk of the danger arising from putting the belt upon the pulley under these conditions, while the machinery was in motion, was one which he necessarily assumed.

The injury which plaintiff received is a very severe one, but under his own testimony it is one for which under the law the defendant is not liable.

The judgment is accordingly affirmed.

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

Opinion delivered October 28, 1912.

1. TRIAL—OBJECTION TO EVIDENCE.—An objection, in an action for personal injuries, to testimony and conclusions arrived at "from an examination made by the witness of X-ray pictures, when the witness testified that he was no X-ray expert," was insufficient to assign error in the admission of testimony showing a controversy mong the physicians as to the nature of plaintiff's injuries and his present and future condition as a result therefrom. (Page 540.)
2. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.—Where a locomotive fireman, twenty-seven years of age, in good health, earning from $125 to $150, with prospect of earning from $175 to $250, was perma-

nently injured and by loss of a limb incapacitated to perform the duties of his vocation, endured intense suffering for three years, and incurred a surgical bill of $500, a verdict of $25,000 was not excessive. (Page 540.)

3. DAMAGES—EVIDENCE OF LIFE EXPECTANCY.—Where there was evidence of plaintiff's age at the time of his injury, and that he was then in good health, the jury may determine the probable duration of his life, though mortuary tables were not in evidence. (Page 542.)

4. INSTRUCTION—ERROR CURED BY OTHER INSTRUCTIONS.—An instruction, in an action by a fireman for injuries received from his engine colliding with a car on a side track, that the jury find for plaintiff if he was injured, in the performance of his duties, from his engine colliding with a car which defendant, in its failure to exercise reasonable care, had negligently placed and left standing, and which caused the collision, was not objectionable as assuming that defendant was negligent, when followed by other instructions submitting to the jury the question whether defendant was negligent in placing the car on the side switch. (Page 543.)

5. MASTER AND SERVANT—ASSUMED RISK.—Where a locomotive fireman is injured in a collision between his engine and a car on a side switch, resulting from the railroad company's failure to exercise due care to permit safe passage for the engine, the fireman is not chargeable with having assumed, as an incident of his employment, the risk of being hurt unless he realized the danger and then voluntarily exposed himself to it. (Page 544.)

6. SAME—INSTRUCTIONS AS TO ASSUMED RISK.—Instructions correctly announcing the doctrine of assumed risk are not open to objection that they ignore the defense of contributory negligence; the latter defense being presented in other instructions. (Page 545.)

7. SAME—DEFENSES.—The defenses of "assumed risk" and "contributory negligence" are separate and independent; the former arising out of contract, while the latter does not. (Page 545.)

8. APPEAL AND ERROR—HARMLESS ERROR.—An instruction which submitted the issue of contributory negligence, if erroneous, was harmless as to the defendant where there was no evidence tending to prove that plaintiff was negligent. (Page 546.)

9. TRIAL—ARGUMENT OF COUNSEL—ACTION OF COURT.—Statements of plaintiff's counsel in argument that defendant had time before suit was filed to offer settlement, and that none was offered, were not prejudicial where they were immediately withdrawn, and the court admonished the jury not to consider them. (Page 547.)

10. DAMAGES—PERSONAL INJURIES—INSTRUCTION.—Where, in an action for personal injuries, there was evidence limiting plaintiff's expenses to a certain sum, an instruction that, in arriving at the amount of plaintiff's damages, the jury should consider "the ex-

pense to which he is subjected as a result of his injured condition" was not erroneous, as permitting the jury to speculate. (Page 548.)

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

STATEMENT BY THE COURT.

Appellee was in the employ of the appellant as a locomotive fireman. On October 17, 1911, he was engaged in firing on a locomotive engine in the Argenta yards while switching freight cars. He had never before worked in that yard as a switch engine fireman, nor had he ever worked as a switch engine fireman on any other road. He was not familiar with the tracks in the Argenta yards. He had been firing on the main line of the Iron Mountain until he was called on the night of October 17 to fire on the switch engine in the Argenta yards. He went on duty that night about 9 o'clock. Had to keep firing right along all the time to keep steam and water in the engine. He had no time to look out. Had put a fire in the engine and got up in the seat, and his eyes were blinded from the fire and heat. Five cars were attached to the head of the engine. They were moving towards the north. He didn't know what kind of cars were coupled in front of the engine, other than that there was a box car next to the engine. That car was as high as the top of the headlight on the engine. The distance between the end of the box car and the headlight on the engine was about two feet. The box car, appellee says, caused the headlight to reflect back in his eyes. He could not have seen the car standing out at the side and ahead of the engine because of the light reflecting in his eyes. The signals for working purposes were given on the engineer's side. As his engine was propelling, at a slow speed, the cars ahead of it along the lead track, the cab of the engine collided with a car standing on the side track leading out from the lead track on appellee's side of the engine. The cars ahead of the engine on the lead track had passed the car standing on the side track, but the cab of the engine cornered it. When appellee heard the crash he endeavored to get out through the front window, but his leg was caught, and he sustained serious injuries, which will be hereinafter described.

Appellee did not know that the box car with which the engine collided was so close to the lead track on which the engine was moving. This car had been dropped into the side track from the lead track and left there by the engine on which the appellee was at work. After the box car had been dropped in on the side track from the lead track, the engine had pulled back onto the lead track with the remaining five cars of the string, and as these cars were pushed forward by the end of the side track the collision occurred by which the appellee was injured.

The foreman of the switch crew directed the movement of the switch engine and the location of the cars. He had placed the car in the position where it was at the time it struck the engine. He states that the appellant company had rules covering the placing of cars in the clear on side tracks. The rule required that "conductors must see that brakes are set on cars they leave on sidings, and when the siding is on a grade they must, when practicable, couple all the cars together; and, in addition to setting the brakes, the wheels must be blocked and safety switches properly adjusted. When not in use safety switches must be left open. In switching, trainmen must know that brakes are in good order before cutting off cars."

The rule refers to conductors, and in switch yards the yard foreman is the same as the conductor. There was a down grade there to the east from the south end. The grade was such as to cause the cars to go away from the lead, and the engine was headed east when they kicked the car in on the track where it stood when the collision occurred. The foreman stated that, according to his judgment, the rules of the company were complied with in placing the cars there that night. The down grade would be to prevent the car coming out if moving. The brake would not have to be set on that car. If the brakes were set on the cars below, they would hold that car. He went down and got on top of the rail, which was the custom and the rule, and stood on top of the rail and held his hand out, and ordinarily if it cleared his fingers, holding his arm out straight as he did that night, it would clear a car or an engine. He adopted the usual method that they had adopted and been using for twenty-seven years

to see if it would pass, and in his judgment he thought it would. The brakes were not set on the box car that collided with the engine, nor was any block placed under the wheel on the end of the car towards the lead on which the engine was moving. He stated that it was not necessary. He kicked the car in on the track, which consisted in giving a cut of cars a start and then cutting the car loose from the rest and it rolls into the track. On that occasion he kicked the car in and walked up the lead and stood on the rail and held his hand out, taking the precaution above mentioned. The witness testified that the box car would "have no reflection on a person's eyes looking ahead. If you were looking directly at the light alone, it would; but where you are looking at the reflection, it does not."

Appellee brought this suit on November 6, 1911, and in his complaint he alleged that "the cab in which he was working was struck by a car that had been negligently left standing on the side switch north of the one in which plaintiff's engine was running, and the left side of the cab was crushed in upon the plaintiff and seriously injured him;" that "said accident and injury was caused by the negligence of the defendant and its servants in placing and leaving on the side track, so near the lead switch, the car which struck the locomotive on which plaintiff was at work, and in negligently directing the train on which plaintiff was working to move into the side switch."

The defendant answered, denying the material allegations of the complaint, and setting up that the plaintiff was injured by his own negligence in failing to keep a lookout, which it was his duty to do; and also setting up that plaintiff "was as well informed of the dangers from cars being left too close as any of defendant's other servants, and assumed the risk of such injury as might occur thereby."

The above are substantially the facts on the issues of negligence, contributory negligence and assumed risk. The court granted and refused requests for instructions to which appellant duly excepted, and which we will comment upon in the opinion. The jury returned a verdict for $25,000, judgment was entered for that sum in favor of the appellee, and this appeal has been duly prosecuted. Other facts stated in opinion.

E. B. Kinsworthy, W. V. Tompkins and *R. E. Wiley,* for appellant.

1. Where the complaint alleges negligence on the part of the defendant in a certain particular which must be sustained by evidence, it is a question for the jury to determine whether there was negligence as alleged, and an instruction which assumes that the defendant was negligent in the particular alleged is erroneous. A later instruction submitting that question would not cure the error first committed, because it could not be known which instruction the jury followed. 96 Ark. 311, 314; 93 Ark. 564, 573.

Appellee's instructions given are further erroneous in that they submit the case on the theory that appellant had the absolute right to presume that his fellow-servants would do their duty. 89 Ark. 522, 536, 537; Elliott on Railroads, 768; 93 Ark. 564, 573; 95 Ark. 506.

Section 3 of the Act of 1911, Acts, p. 55, is not meant to absolve a plaintiff from the exercise of ordinary care for his own safety The rule of "comparative negligence" does not abrogate this duty. 1 Thompson on Neg., 255, § 269; *Id.* 258, § 272; 126 Ill. 381; 13 Ill. App. 148; 12 Ill. App. 400.

Instruction No. 1 does not correctly submit the question of comparative negligence under our statute. 1 Thompson on Neg., § 18; *Id.* § 282; 16 How. 469; White on Personal Injuries on Railroads, 622; *Id.* 643, § 459; 90 Ill. 425; 27 Ill. App. 450; 13 Ill. App. 148, 153; 92 Ill. 139; 105 Ill. 554.

2. The appellee's instruction given by the court on the measure of damages is erroneous, and the verdict is excessive. 1 White on Personal Injuries on Railroads, § 182; *Id.* § 184; 77 Ark. 405, 412; 58 Ark. 205; 20 S. W. 766; 88 Ark. 229; 68 Ark. 6; 76 Ark. 184; 89 Ark. 541; 94 Ark. 270.

Robertson & DeMers, for appellee.

1. There was no error in the instructions given on the part of appellee. The first instruction does not assume negligence on the part of appellant in the placing of the car on the sidetrack. Moreover, other instructions given specifically charge the jury that they must find from the evidence that defendant was negligent in placing the car, and that such negligence caused the collision and injury to plaintiff, before

there would be any liability on the part of defendant. This first instruction was in accordance with the provision of the statute, Acts 1911, p. 55, and under it plaintiff's right of recovery was made to depend entirely upon such negligence of the defendant and the absence of contributory negligence on his own part equal to or greater than that of the defendant causing his injury. 89 Ark. 424.

There was no evidence upon which to submit the question of plaintiff's having assumed the risk of the danger of being hurt by a collision between the cab of his engine and the car on the ground of his having knowledge and appreciation of the danger. 89 Ark. 424; 77 Ark. 367; 98 Ark. 227; 93 Ark. 564, 570; 90 Ark. 223.

Instructions 2 and 3 could not have led the jury to believe that appellee was absolved from the duty to exercise ordinary care for his own safety. Appellant's contention is the result of confusing the questions of assumed risk and contributory negligence. 87 Ark. 396; 88 Ark. 243; 92 Ark. 102; 77 Ark. 458; *Id.* 367; 98 Ark. 227.

2. The verdict is not excessive, and the instruction on the measure of damages is correct. 88 Ark. 225; 93 Ark. 564; 87 Ark. 443.

WOOD, J., (after stating the facts). The appellant contends that the verdict was excessive, caused "partially at least by the exploitation" in the testimony of a "disagreement amongst the doctors who treated appellee at the hospital and those treating him after he left the hospital as to whether his injuries were properly treated at the hospital, and as to the present and future results of his injuries as affected by that treatment."

The testimony of physicians on behalf of appellee, one of whom had treated him for twelve days preceding the trial, tended to show that when they examined appellee his broken leg was unhealed; that, notwithstanding the efforts of the physicians at the hospital to save appellee's foot from amputation, same was now necessary, in order to save appellee's life, and that by reason of a failure to operate at first and on account of the prolonged treatment in trying to save the limb, the bone had decayed and the limb had become so infected that it would have to be amputated above the knee, whereas, in their

opinion, if the limb had been amputated soon after the injury occurred it would have been only necessary to amputate between the ankle and the knee. In describing appellee's injuries, the testimony of physicians in his behalf tended to show that he had a broken shoulder, the bones of which, on account of the long lapse of time since the injury, could not be knit together because of the decayed bone at the fractured ends.

The testimony of the physicians and surgeons on behalf of the appellant, who treated appellee at the hospital where he was taken immediately after his injury occurred, tended to show that the methods adopted by them were the latest and most improved methods for the treatment of injuries such as appellee had received, and were adopted because of the hope they entertained of saving the appellee's limb. They gave appellee the same treatment that they gave other patients, under similar conditions, in order to save his leg; that the progress towards ultimate recovery had been satisfactory up to the time the patient was taken out of their charge, and that there had been no indication of death of the bone and no infection, and they still believed the bone could be saved.

Appellant contends here that this disputation among the doctors, as shown by the testimony, prejudiced the minds of the jury, resulting in an excessive verdict. It is sufficient to say of this contention that appellant did not make any objection at the trial to the testimony of the physicians on behalf of appellee describing the nature of appellee's injuries. Appellant only objected to one of the physicians testifying as to the nature of these injuries and giving the conclusions he arrived at as to the condition of the injury *from an examination made by the witness of X-ray pictures, when the witness testified that he was no X-ray expert.* This objection, reserved in the motion for a new trial, does not assign any error growing out of the ruling of the court in permitting testimony showing a controversy among the physicians as to the nature of appellee's injuries and his present and future mental and physical condition as a result thereof.

Moreover, the verdict was not excessive. Appellee, at the time of his injury, was twenty-seven years of age and in good health. His wages were from $125 to $150 per month, and he was in line of promotion, after three years service, to

the position of engineer, whose average monthly wage was $175 to $250. The jury were warranted in the conclusion that appellee would be permanently incapacitated for performing the duties of the vocation that he had selected and for which he was qualified. In fact, it was practically certain from the testimony that appellee, by reason of his injuries, had lost his earning power. His left leg was so badly crushed as to necessitate amputation of same above the knee, and the bone of the left shoulder, that helps to support and gives motion to the arm, was broken; and one of the physicians testified that it had been broken so long that "it would be very difficult to get down in there and wire it together." It was a question, says he, "whether the bone could ever be brought up together and kept in place." "The effect of the failure of the broken bone to reunite would cause the shoulder to drop down and the bone to come up. As a consequence he could not use the left arm without a good deal of pain as the fragments would be rubbing together all the time, and it would be impossible for him to get around on a crutch at all." There was a severe injury to the back that would give appellee "trouble with his spinal column and spinal cord for a good many years, and cause him to suffer with a nervous condition."

Appellee at the time of the trial had endured intense suffering for a little over three months. He described his suffering as follows: "I suffered pain and didn't sleep much of the time. I was awake most of the time at night. I couldn't sleep. My back hurt me. My leg and my heel hurt me so bad that they had to take the wrapping off of the bottom part of my foot, and my heel hurt so bad I couldn't stand it, and it worked independent of the front part. Every time I would move, I could feel the bone. It hurt me every time I moved, and every time I moved my back hurt. My shoulder hurt all the way up in the back of my neck. I suffered all kinds of pain and everything."

The testimony showed that for surgical treatment appellee would be at an expense of $500. Appellee at the time of his injury was receiving an average of $1,650 per annum for his work. It would require nearly $22,000 to purchase an annuity amounting to $1,650 for one during appellee's expectancy of life. If at the end of three years he had been promoted

to the position of engineer, then his yearly income for his work would have been $2,550, and it would have required over $30,000 to have purchased an annuity for appellee with his expectancy of life at the age of thirty years.

In *Railway Company* v. *Sweet,* 60 Ark. 550, this court, having under consideration the damages resulting to the family of Sweet from his death, said: "He was thirty-four years of age, in good health, a robust man. He had an expectancy, as shown by the Carlisle life tables, of twenty-five years. The jury doubtless weighed all the probabilities of loss from sickness and other various contingencies, likely to arise in the course of a man's life, and balanced these against the probabilities also of an increase of efficiency in money-making power. They might have found from the evidence that Sweet's life was worth at least eight hundred dollars per annum to his wife and children; * * * and, according to the Carlisle tables (which were in evidence), estimating money at the legal rate, it would require over ten thousand dollars to purchase an annuity of eight hundred dollars for one of Sweet's age."

So we say here, that the jury, weighing all the probabilities of loss from various contingencies, and also the probabilities of an increase in money-making power, might have well reached the conclusion that appellee would have earned for the term of his expectancy in life at least the sum of $1,650 per annum, and that he lost the power to produce this by reason of the injury, and that it was a total loss to him. It would have taken about $22,000 to have compensated him for this loss alone. When to this is added the expense of his surgical and medical treatment and damages for the mental anguish which he has endured on account of his personal disfigurement and the pain and suffering which he has undergone and must continue to undergo by reason of his bodily injuries and infirmities, we can not say that the verdict is excessive.

While mortuary tables were not in evidence, it was shown that appellee at the time of his injury was in good health, and the jury could judge from the character of the work in which he was engaged as to his power of physical endurance. In *St. Louis, I. M. & S. Ry. Co.* v. *Glossup,* 88 Ark. 225, we said: "Introduction of mortuary tables is not the only method of proving life expectancy. The question may be submitted to

the jury upon testimony showing the age, health, habits, physical condition, etc., of the individual, so that the jury may estimate the probable duration of life."

2. Appellant objected to an instruction given at the instance of appellee wherein the court told the jury, "If you find that while he was engaged in the performance of his duties as fireman, the cab of the engine on which he was working collided with a car which defendant in its failure to exercise reasonable care and precaution for the safe passage of plaintiff's engine over its tracks had negligently placed and left standing on a side switch so close to the lead switch on which plaintiff's engine was running at the time of the accident as to obstruct its free passage, and caused the collision, and as a result thereof plaintiff was injured, then the defendant is liable, etc."

Appellant contends that the above instruction assumed that there was negligence on the part of the appellant. In *Brinkley Car Works & Mfg. Co.* v. *Cooper*, 75 Ark. 325, the court had under consideration an instruction reading as follows: "If the jury find from the evidence that the Brinkley Car Works had notice that children did frequent the place of this pool, or were from the nature of the surroundings likely to do so, and that it carelessly left a pool of hot water there concealed in such a way that one would reasonably expect it to occasion injury to such children, the company would be liable for damages to the plaintiff, who, by reason of its concealed nature, walked into the pool of hot water, and was burned."

The court said: "Counsel for appellant insist that the instruction is erroneous in that it assumes the existence of facts which were disputed, viz., that the plaintiff walked into the pool of hot water on account of its being concealed, and that he was not aware of the presence of the water, or that it was hot. The instruction, standing alone, might be open to that construction, and would be objectionable; but not so when read with the other instructions given at appellant's request submitting to the jury the question as to whether the plaintiff knew at the time that the water was hot, and that it was concealed."

In other instructions following the one under consideration here, the court made it clear that it did not intend to assume as an established fact that appellant was negligent in placing

the box car on the switch track, but submitted that question to the jury. For instance, in an instruction given at the request of the appellant the court told the jury as follows: "It devolves upon the plaintiff to show, by the greater weight of the evidence, that the defendant was negligent in the manner alleged. If the proof shows that the defendant's servants exercised ordinary care in the use of the precautions taken to prevent the cab and cars coming in contact," etc. And in an instruction on behalf of the appellee the court told the jury: "If you find that the alleged collision between plaintiff's engine and the car on the side switch was the result of the failure of the defendant railway company to exercise reasonable care and precaution to place said car on said side switch," etc.

If the instruction, standing alone, is susceptible of the construction for which appellant contends, it could not be so construed when taken in connection with the instructions following it under the doctrine of the above case, and, when all are considered together, it is manifest that the court did not assume negligence on the part of appellant, but submitted that issue to be determined by the jury. There is no conflict in the instructions.

The appellant objects to the following instructions:

"2. You are instructed that if you find that the alleged collision between plaintiff's engine and the car on the side switch was the result of the failure of the defendant railway company to exercise reasonable care and precaution to place said car on said side switch and to maintain it in such position as to provide a safe passageway for plaintiff's engine, then plaintiff can not be charged with having assumed the risk of being hurt by said collision as one of the ordinary risks incident to his employment.

"3. You are instructed that plaintiff had the right to presume that the defendant railway company had discharged its duty towards him by the exercise of reasonable care and precaution for his safety by so placing the car upon the side switch and so maintaining it in a position that would provide a safe passageway for his engine, and that he can not be charged with having assumed the risk of being hurt by the collision with said car unless you find that prior to the time of the alleged collision he actually knew of the dangerous position of the car

on the side track and realized the danger of being hurt by a collision between said car and his engine, and that with such knowledge and appreciation of danger he voluntarily exposed himself to it."

The appellant contends that these instructions, as well as that part of instruction No. 1 already quoted, absolved the appellee from any duty to exercise ordinary care for his own protection. In instructions Nos. 2 and 3 and that part of instruction No. 1 set out above the court was declaring the rule, under the statute, in regard to the assumption of risk. The court announced that doctrine correctly according to many decisions of this court since the passage of the act of March 8, 1907, making railway companies and other companies and corporations liable in damage caused by the negligence of a fellow-servant. *St. Louis S. W. Ry. Co.* v. *Burdg*, 93 Ark. 88; *St. Louis, I. M. & S. Ry. Co.* v. *Ledford*, 90 Ark. 543; *Aluminum Company of North America* v. *Ramsey*, 89 Ark. 522; *Ozan Lumber Co.* v. *Biddie*, 87 Ark. 587.

The doctrine of the above cases is that a servant has the right to assume that a fellow servant will exercise due care in the performance of the duties imposed upon him; and if a servant is injured, while exercising ordinary care for his own safety, through the negligence of a fellow-servant, the master will be liable for the damages resulting from such negligence. While the servant does not assume any risk or danger arising from the negligence of the master or of a fellow-servant of which he has no knowledge and does not appreciate, he is not, under the act of March 8, 1907, *supra*, relieved of the duty of exercising ordinary care for his own protection. See cases *supra*.

The instructions criticised correctly declared the law under the statute on the issue of assumed risk, and they were directed solely to that issue. The court, in other instructions given at the instance both of the appellant and the appellee, presented the issue of contributory negligence. The instructions set out above are not obnoxious to criticism because they do not embrace the defense of contributory negligence. The defenses of assumed risk and contributory negligence are separate and independent. The former arises out of contract relations, while the latter does not. *St. Louis, I. M. & S. Ry. Co.* v. *Corman*, 92 Ark. 102; *St. Louis, I. M. & S Ry. Co.* v. *Holman*, 90 Ark. 555; *Johnson* v. *Mammoth Cotton Oil Co.*,

88 Ark. 243; *Southern Cotton Oil Co.* v. *Spotts*, 77 Ark. 458; *Chicago, R. I. & P. Ry. Co.* v. *Jones*, 77 Ark. 367.

The court did not err, on the specific objection of appellant, in refusing to modify these instructions so as to embody therein the issue of contributory negligence.

3. The appellant contends that the court erred in the latter part of the first instruction, in which it undertook to present the doctrine of comparative negligence under the act of 1911, which modifies the doctrine of contributory negligence theretofore existing in this State. We will not pass upon that statute and the court's instruction under it, for the reason that the undisputed evidence in this record shows that there was no negligence on the part of the appellee causing or contributing to his injury, and therefore the instruction of the court, even if erroneous, could not have prejudiced the rights of appellant. The court, in our opinion, might have very well declared as a matter of law that the appellee, under the uncontroverted evidence, was free from negligence. Therefore, the instructions submitting that issue to the jury, even if erroneous, were favorable to appellant, and it could not complain.

The appellee testified that he was not familiar with the switch tracks of the yard where he was injured; that he was called to the service about 9 o'clock that night, and was injured the next morning about 1:50 o'clock; that he did not know the position of the car on the switch track with which the engine collided; that, while it might have been his duty to look for cars on the switch track, he could not have seen the car, had he looked, for his eyes were at the time so blinded by the heat and bright glare of the fire that he had just replenished that he could not have seen had he looked; that he had no time to look out; that he was very busy firing the engine; had just got up on the seat box and was putting on the injector when the crash came. If appellee, while discharging his duties as fireman, had no time to look out, as this testimony shows, then it was wholly immaterial whether the reflection from the car would have blinded his eyes or not. Appellee's testimony shows he was so busy he could not look for the car when the collision took place. The appellant offered no testimony to the contrary, and the burden was on it to do so. His testimony is reasonable and consistent. Therefore, it was the duty of the

jury to consider it, and reasonable minds could have reached no other conclusion than that the appellee himself was diligent in discharging his duties.

The issue of appellant's negligence was correctly submitted to the jury, and there was evidence to support the verdict. There was testimony tending to show that the foreman, who acted as conductor of the switch engine, ignored the rule introduced in evidence adopted by the company for the protection of the employees while switching. No brakes were set on this car; it was not coupled to the other cars; the wheels were not blocked. The foreman having the placing of the cars in charge only endeavored to see that the lead track was clear by placing his hand out to ascertain if there was space sufficient for cars on the lead track to pass the car on the side track. He said if it cleared his fingers, holding his hand out straight, it would clear a car or engine, and he had adopted that method and used it for twenty-seven years; that it was the usual method. But the jury would have been warranted in finding that this method itself was negligent, or the jury might not have accepted his testimony. For the fact remained that the box car was too near the lead track. Either the foreman did not take the precaution he says he did, or else the car ran down too close to the lead track after he had held out his hand, showing that it had no breaks or blocks to check it. The rule required these. Had the foreman but observed the requirements of the rule to keep the lead track free and safe from collisions, the unfortunate accident would not have happened. The slightest diligence on his part would have prevented the occurrence of the accident.

4. The record shows that in the argument to the jury Mr. A. N. DeMers, of counsel for appellee, stated: "Now, gentleman, I want to be fair about this matter; I will ask you to place yourselves in the place of the Iron Mountain railroad, and see what you would do under the circumstances in this case, then put yourselves in the place of Mr. Brogan, and see what is fair and just to both of these parties."

Mr. W. V. Tompkins, counsel for appellant, in his argument, said to the jury:

"Gentleman, as counsel ask you to put yourselves in the place of the parties, if you are going to do this, then I will

ask you to consider how it would appear to you if you had accidentally injured a man on the 17th of October, and had sent him to a hospital and was caring for him as best you could, and he should sue you on the 6th of November, as Mr. Brogan has done in this case?"

Mr. T. N. Robertson, counsel for appellee, in his closing argument, said: "Mr. Tompkins has said to you to put yourselves in the place of the railroad company, and seems to criticise plaintiff for suing on the 6th of November, when the injury occurred on the 17th of October. They had all that time to offer a settlement, and none had been offered."

Appellant objected to the argument that appellant should have offered a settlement; counsel for appellee thereupon said: "Well, I withdraw the argument since he objects to it."

Appellant's counsel then said: "I object to these wrongful statements, and then, when an objection is made, letting counsel say he withdraws them. They have already had their ill effect."

The court said to the jury: "Well, gentlemen, it is withdrawn; do not consider that statement."

Appellant saved its exception to the action of the court in permitting counsel for appellee to make such argument, and in refusing to rebuke him for making such argument.

There was no prejudicial error in the ruling of the court. The improper argument of counsel for appellee was not so flagrant in character as to create a prejudice in the minds of the jury against appellant, especially after counsel had withdrawn the remarks and the court had admonished the jury not to consider them. This action of the court and counsel was sufficient, in our opinion, to remove any possible prejudice that the objectionable argument was calculated to produce.

5. Appellant complains of the ruling of the court in giving the instructions on the measure of damages.* There is

* The instruction on the measure of damages was as follows:

Instruction No. 5: "You are instructed that if you find for the plaintiff you will assess his damages at such a sum of money as will be a fair and reasonable compensation to him for the injuries he has received as a result of the alleged accident; and in arriving at the amount of said sum of money you will take into consideration, as you find from the evidence, the nature and extent of his injuries, whether temporary or permanent in character, results reasonably certain to follow, any disfigurement of his person as a result of his injuries, the bodily pain and mental suffering he has endured, and that he is

no error in the instruction. It is not open to the criticism which appellant's counsel makes. The instruction is not argumentative, but only mentioned elements of damage proper for the jury to consider in the event that they find, from the evidence, such elements to exist. There was evidence in the record limiting definitely the expense to which appellee had been and would be subjected by reason of his injured condition, to the sum of $500. The jury therefore were not allowed to speculate as to the amount of such expense.

There is no error in the record, and the judgment is therefore affirmed.

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reasonably certain from the evidence to hereafter endure, as a result of his physical injuries, the loss of earnings from his labor since he received his injuries, and the loss of earnings in the future of his life by virtue of his decreased capacity to earn money because of his injured condition, his age and reasonable expectancy of years of life, his vocation and earning capacity prior to his injury, with his probable chance of being promoted to a position of increased remuneration of his services had he not been injured, his condition of physical strength and health prior to his injuries, and the expenses to which he is subjected as a result of his injured condition."

HARE v. SISTERS OF MERCY OF THE FEMALE ACADEMY OF FORT SMITH, ARKANSAS.

Opinion delivered November 18, 1912.

1. WILLS—TRUST—CREATION.—A will which devised one-half of the testator's estate to the Sisters of Mercy at Fort Smith "for the support and maintenance" of a daughter of testatrix during her life, and after her death to the said sisters "for the purpose to educate poor Catholic children," did not state the motive which led her to make an absolute gift of the property to the Sisters of Mercy, but imposed an obligation for the support and maintenance of her daughter, and created an express trust for that purpose. (Page 555.)
2. SAME—TRUST—ENFORCEMENT.—Where trustees under a will, which imposed upon them the care and custody of an imbecile daughter of the testatrix, accepted the trust and took care of the daughter for nineteen years, and by reason of a defect in the will were compelled to pay $5,500 to a grantee to whom they had conveyed part of the land devised, they will be placed *in statu quo* by permitting them to recover such amount from the estate of such daughter, and will continue to be liable for her support during the remainder of her life. (Page 556.)

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; reversed.

STATEMENT BY THE COURT.

This suit was brought by appellees to recover on a *quantum meruit* for the maintenance and support of Ella Hare, for nineteen years, at the rate of $150 per month, and resulted in a judgment in their favor for $41,330.76, which the court declared a lien against her estate, and ordered the same sold in satisfaction thereof. From this judgment the appeal comes.

The mother of Ella Hare, an imbecile, disposed of her estate in Sebastian County by will. The clauses of same which are necessary to be considered are as follows:

"I give devise and bequeath to the Sisters of Mercy at Fort Smith, known as Saint Ann's Convent, one-half of all my estate, real and personal, after deducting the legacies and bequest mentioned in this, my last will and testament, for the support and maintenance of my daughter, Ella Hare, during her life, and after the death of my said daughter, Ella Hare, I give, devise and bequeath to the said Sisters of Mercy the said half of my estate, real and personal, for the purpose to educate poor Catholic children.

"I give, devise and bequeath to the pastor of the parish of the Church of the Immaculate Conception, at Fort Smith, in the county of Sebastian, State of Arkansas, half of all my estate, real and personal, to be used by the said pastor for the said purposes of helping to establish a school in said parish for the education of Catholic boys and for helping to educate young men of the parish for the priesthood."

John Hare, the husband of Mary A. Hare and the father of the imbecile, Ella Hare, died possessed of a considerable estate in 1883, making his wife the sole beneficiary in his will and also the executrix.

Appellees, the Sisters of Mercy, are a corporation, a benevolent, religious body, associated in its work with the Church of the Immaculate Conception at Fort Smith, Arkansas, and has been since its organization in 1860.

John and Mary A. Hare, deceased, were both members of said church. Mary A. Hare administered the estate of her said husband, and the administration was closed long before her death in 1893, and at the close thereof the probate court of Sebastian County made an order vesting the entire estate of John Hare in her. The estate consisted of real estate in and

near to Fort Smith, of the value of about $26,000 at the time of her death. Only a small part of it was improved, and Mary A. Hare had no estate at the time of his death, but received $2,000 insurance on his life, erected some buildings on the real estate formerly owned by him, and acquired other real estate of her own, part of which she improved, and her real estate, when she died was worth $9,800, and her personal estate $1,347.87, and the demands against her estate amounted to $4,276.55. After her death, her administrator was appointed executor of the estate of Ella Hare, and, upon the court's finding that she was mentally incompetent, directed the payment to the Sisters of Mercy of $25 per month for her care, which was done as long as the administrator lived. After his death, Sister Aloysius, now Mother Superior of appellee, was appointed guardian, and acted as such until A. A. McDonald was appointed. During the administration of her estate appellees received from the administrators funds arising from the sale of real estate, which belonged to John Hare at his death and other sources, in all, the sum of $6,778.66. The settlements of the administrator of Mary A. Hare's estate show that he paid appellee, on Ella Hare's account from 1893 to 1904, the sum of $3,174.93, and that they received from the sale of lot 7, block 564, Reserve Addition to the city of Fort Smith, which belonged to the estate of Mary A. Hare, $9,000. During the administration of the estate, all the real property owned by John Hare at the time of his death, except that part of same sold and conveyed to Tillman Shaw, was sold by Matt Gray, administrator of her estate, who, at the time, received from said estate $6,955, in addition to the $3,000 for lands condemned, belonging to said estate of John Hare, and, in addition to these sums, he received, as shown by annual statements, exclusive of the fourth annual statement, which was lost, as such administrator, $15,187.63, rent on the improved property belonging to the estate of John Hare and Mary A. Hare, and his accounts show the disposition of all funds collected by him from all sources. Appellee, claiming to be the owner thereof through the will of Mary A. Hare, conveyed to Tillman Shaw, certain property, three lots in the city of Fort Smith, and a tract of land known as the Hare Wagon Yard, which had belonged to the estate of John Hare

for $21,000, one of which lots, valued at $9,000, was the property of Mary A. Hare at the time of her death. The $21,000 received was equally divided between appellee and the pastor of the Church of the Immaculate Conception of Fort Smith in accordance with the direction of the will of Mary A. Hare. After such conveyance, A. A. McDonald was appointed guardian of Ella Hare, and brought suit to recover various pieces of land sold by the executrix of the estate of John Hare and the administrator of the estate of Mary A. Hare and of said property which had belonged to the estate of said John Hare, which was sold to said Tillman Shaw, and recovered same, the will of said John Hare being declared invalid as to Ella Hare, his only surviving child, whose name was omitted therefrom. *McDonald* v. *Shaw*, 92 Ark. 15. The lands recovered in said suits and now owned by said Ella Hare are of the reasonable value of $34,000, and consist, nearly all, of real estate in the city of Fort Smith, a large part of which is unimproved.

The Sisters of Mercy had to refund to Tillman Shaw $5,500, the half of the purchase price of said property, belonging to the estate of John Hare, sold by them to him.

They took charge of Ella Hare upon the death of her mother, and have cared for her properly and well until now. She is an imbecile, about forty years of age at this time, can neither talk nor walk, and has about as much intelligence as a child of three or four years, and has had constant nursing and attention and been well provided for during all this time.

Upon the recovery of that portion of said estate which belonged to John Hare, they brought this suit, alleging:

"That Mary A. Hare believed at the time of making her will that she was the owner of all of the property devised to her by John Hare, and intended by her will to so devise all of said property, and thought she had done so; that plaintiff, at the time it assumed charge of Ella Hare, in good faith believed that, under the will of Mary A. Hare, it was to receive, not only such property as in fact belonged to the estate of Mary A. Hare, but also such property as belonged to the estate of John Hare, and which Mary A. Hare intended to devise to plaintiff under her said will. That, acting upon such belief, it assumed the charge of Ella Hare, and was willing to be bound by the terms of said will as it and the said Mary A. Hare

understood said will to be, and give the said Ella Hare such attention as she might need as long as she lived."

That, because of the decree of the court adjudging the will of John Hare invalid and that Ella Hare was entitled to all of real estate left by him at his death, "the consideration for the maintenance and support of said Ella Hare failed, and said plaintiff has not been paid for the support and maintenance of said Ella Hare for the time for which she has been taken care of, and that it was worth $150 per month, making a total of $31,500 for which judgment with interest was prayed."

The answer denied the allegations of the complaint and that plaintiffs had "received no adequate compensation for the maintenance and care bestowed upon her, and says that by its own admission in its complaint filed herein it has cared for her under and by virtue of the terms in the will of Mary A. Hare," and alleges further that the estates of both John Hare and Mary A. Hare have been wound up and finally settled, the administrators discharged, and that appellee has received "from the estate of Mary A. Hare all it could ever hope to receive and its obligation to support, maintain and care for this defendant as long as she lives was irrevocably fixed."

The court rendered judgment for $31,000, and declared same a lien against the property of Ella Hare, and ordered it sold for satisfaction thereof. From this judgment this appeal comes.

Winchester & Martin, for appellant.

If appellees believed when they took charge of appellant that the will of John Hare was valid, and that they would receive one-half of both the John Hare and Mary A. Hare estates, subject to debts and legacies, and if Mary A. Hare was never advised that the last will of her husband was ineffectual to devise his estate to her, these beliefs do not alter the case as to Ella Hare.

One is "bound by whatever, affecting his title, is contained in any instrument through which he must trace title, even though it be not recorded, and he have no notice of its provisions." 97 Ark. 397; 32 Minn. 313. The John Hare estate did not pass under the will of Mary A. Hare. 92 Ark. 15.

If the question at issue be treated in the light of a contract, that is that the devise to appellees in the will of Mary A. Hare was an offer which they accepted under the belief that the devise carried both estates, and that, since it did not carry the estate of John Hare, the consideration failed and they have the right to rescind, etc., it is to be remembered that Ella Hare was not a party to, and because of her mental incapacity could never have knowledge of, such contract. There could be no rescission. 26 Ark. 309, 313-14; 25 Ark. 183; 17 Ark. 237, 238. It would be impossible to place her *in statu quo*. *Id.*

Appellees are estopped to maintain this suit by their conduct and by the receipt of benefits under the will of Mary A. Hare. Appellees' claim is barred by the statute of limitations for any amount prior to three years preceding the institution of the suit, if it is good for any amount at all.

Read & McDonough and *Falconer, Youmans & Woods*, for appellee.

1. The estate of an insane person, like that of an infant, is liable for necessaries. 23 Ark. 418; 22 Cyc. 1176; *Id.* 1200, 1201.

2. The services rendered by appellee were rendered under an implied contract with appellant to pay their reasonable value, and such contract is entire and continuing, and the statute of limitations does not apply. 42 Pac. 603; 63 N. E. 51; 33 N. E. 456; 6 Ind. App. 268; 60 Pac. 312; 61 Kan. 533; 56 Atl. 342; *Id.* 728; 72 N. H. 254; 68 Pac. 252, 28 Wash. 52; 35 Ill. App. 319; 1 Ind. App. 284, 27 N. E. 573; 27 N. E. 511; 69 Pa. St. 144; 70 Tex. 279, 8 S. W. 40; 36 Mich. 206; 40 Ia. 38; 10 N. J. Eq. 370; 89 N. Y. App. Div. 398; 121 N. C. 238; 58 Atl. 293, 66 L. R. A. 591; 51 Atl. 632; 125 Ga. 47.

3. Appellant's pleas of laches, estoppel and *res judicata* are without merit. As to laches, if the claim is a continuing one, to be presented at any time while the services continue and for three years after they cease, the claim can not be defeated by a failure to demand payment at an earlier date. 16 Cyc. 153; 20 Fed. 277; 31 Barb. 230. And if the statute of limitations has not run, necessarily there can be no laches. 10 N. J. Eq. 370; 89 App. Div. (N. Y.) 395.

There is nothing in the acts or conduct of appellee which would afford any ground for the application of estoppel. Estoppels are not favored. 15 Ark. 316. To be binding, they must be mutual. 13 Ark. 217. There must generally be some intended deception in the conduct or declarations of the party to be estopped. 93 U. S. 326, 335. Estoppel does not arise where one is ignorant of his rights. 43 Ark. 21. See also 16 Cyc. 734; 111 La. 441, 35 So. 632; 97 Ark. 49. The claim of *res judicata* is met by the language of this court in its opinion delivered on rehearing in the case of *McDonald* v. *Shaw*, 92 Ark. 15, see page 28.

KIRBY, J., (after stating the facts). It is not disputed that the estates of both John and Mary A. Hare have been wound up and finally settled, and all the property belonging to both disposed of, except the said property sold to the said Tillman Shaw, nor can it be disputed that the Sisters of Mercy have realized out of said estate all they would have received, had the will of John Hare operated to convey his entire estate to Mary A. Hare, as they thought it did, except the $5,500 they had to refund to Tillman Shaw, by reason of their not being the owners of the one-half undivided interest they attempted to convey to him, and they say they would have been satisfied with this disposition of the property of these estates and willing to care for the imbecile, Ella Hare, throughout her life in consideration thereof, and took charge of her and the estate with the expectation of doing so.

It was the intention of Mary A. Hare, as plainly expressed in her will, to leave one-half of her estate, after the payment of her debts and the small bequests and legacies, to appellees, the Sisters of Mercy, for the support and maintenance of her daughter Ella Hare, during her life, and thereafter to said Sisters of Mercy to be used in educating poor Catholic children. It was doubtless. also, John Hare's intention to leave all of his estate to his wife, Mary A. Hare, in accordance with his will, which was invalid under the law, as against Ella Hare, his only child, her name having been omitted therefrom. It may be, and doubtless is, true that the Sisters of Mercy believed that the will of Mary A. Hare conveyed, not only her own estate, but also all the estate that had formerly belonged to her husband and was attempted by him to be devised

to her, and, so believing, they took charge of Ella Hare under the provisions of the will and have since furnished her care, maintenance and support. The will of John Hare was inoperative to convey his estate to Mary A. Hare, and some of it has been recovered by Ella Hare, and the Sisters of Mercy have been required to refund $5,500, that portion of the purchase money received by them from the sale of the one-half undivided interest of certain of his said property, which they sold and attempted to convey, claiming to be the owner thereof under the will of Mary A. Hare. On that account, they claim that the consideration for their taking charge of Ella Hare and furnishing her maintenance and support, under the provisions of her mother's will, has failed, and that they are entitled to pay for the reasonable value for the care, maintenance and support so furnished to Ella Hare for the past nineteen years.

It is manifest from the provisions of the will that Mary A. Hare was not incidentally stating the motive which led her to make an absolute gift of the property to the Sisters of Mercy, but intended, as clearly expressed, to impose an obligation for the support and maintenance of her imbecile daughter throughout her life, and an express trust was thereby created. *Bloom* v. *Strauss*, 73 Ark. 57. It was a gift in trust, with the right upon the part of the trustee to use all of said property, not required for the maintenance and support of said child, at their own discretion and without accounting therefor, and they accepted said trust. It is undisputed that they have received from the two estates of the parents of this imbecile ward the sum of $16,500, which they have not returned. It would be manifestly unfair and unjust now to permit them to repudiate the obligation and the trust and recover, upon a *quantum meruit* for services already rendered and maintenance furnished, a sum more than sufficient to consume the entire estate belonging to said imbecile, with no corresponding obligation on their part to maintain, support and care for her in the future, as the decree rendered below does, thus defeating the obvious purpose of the testator and leaving entirely without protection for the remainder of her life the imbecile ward, Ella Hare, while permitting the consumption of all the remaining estates of both her father and mother by

the trustee who expected, on accepting the trust and taking charge of her, to care for, maintain and support the said Ella Hare throughout her whole life for the one-half of said estates which they understood was devised to them for that purpose. It is true, as urged, that the imbecile has been as well cared for by them as she could have been by any one, and that it was the intention of her father to leave all of his estate to her mother, and of her mother to leave all of her estate to the church and appellee, except the few small legacies provided for, for her care and support during her lifetime and the church's benefit thereafter; but it does not follow, as insisted, that it would be only equitable that they should have what they thought they were going to receive, and what their testator intended to give, and that they would receive nothing more if the judgment of the lower court was affirmed. The parties can not be placed *in statu quo*, and the majority of the court have concluded, since they have expressed a willingness to carry out the purpose of the trust and care for and maintain said Ella Hare for life, under the provisions of the will, if they had received what they thought they were going to get, that the court, in the administration of the principles of equity, will permit them to recover of the said Ella Hare the $5,500 they have had to refund of the purchase money of the lands sold to Tillman Shaw, afterwards recovered by Ella Hare, and charge the same as a lien against the property of Ella Hare. By so doing they will be placed in the position they would have occupied had no suits been brought by Ella Hare for the recovery of the lands of her father's estate, and his will had, in law, as it attempted to do in fact, conveyed same to her mother.

They are entitled to a judgment for that amount with interest from the time of its return, and the same to be declared a lien and enforced against her property, leaving the obligation of the trust created by the will for her support throughout the remainder of her life unimpaired.

The court should have rendered such judgment, and, for the error of the decree as rendered, the cause is reversed and remanded with directions to enter a decree in accordance with this opinion.

MCCULLOCH, C. J., (dissenting). I concur fully in the

conclusion of the majority that the limit of appellee's recovery must be the sum of $5,500 which is to be refunded to Tillman Shaw, being the price of the property sold to him. This restores appellee to the situation which it would have occupied if it had received the expected benefits under the will of Mary Hare, and it can justly claim no more.

I do not, however, agree that appellee ought to recover anything from the estate of Ella Hare. It voluntarily accepted the custody of the imbecile under the terms of Mary Hare's will, and if less property was realized than expected that was the mistake of appellee alone, and it is my opinion that no principle of equity will justify a claim against the estate of an imbecile because of disappointment in the quantity of property received under the will. Mary Hare did not attempt to devise any property except that which she owned, so it can not be said that there was a mutual mistake. I think there is no equity in the complaint, and that it should be dismissed.

GALLOWAY v. DARBY.

Opinion delivered November 18, 1912.

1. WILLS—DEATH OF LEGATEE OR DEVISEE—LAPSE.—It is the rule, except where changed by statute, that a legacy or devise lapses when the legatee or devisee dies before the testator. (Page 562.)
2. SAME—CONSTRUCTION.—Where a will provides that "all the property herein devised and bequeathed, unless otherwise and specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple," the words "heirs and assigns" are used in a technical sense to denote the character of the estate or extent of the interest to be taken by the devisees, and are words of limitation, and not of substitution. (Page 563.)
3. SAME—CONSTRUCTION—LAPSE OF LEGACY OR DEVISE.—The rule that a devise lapses when the devisee dies before the testator applies where the devise is to persons named and "their heirs and assigns" if there is nothing else to show that the word "heir" was used in the sense of children. (Page 571.)
4. SAME—LAPSED DEVISE—EFFECT.—Lapsed devises of real estate fall into the general residuary clause unless a contrary intention of the testator is clearly expressed in the will. (Page 572.)
5. SAME—PRESUMPTION AGAINST INTESTACY.—Where the testator's intention is in doubt upon the whole will, a broad, rather than a strict,

construction of the residuary clause should be adopted, because such a clause is usually inserted to provide for contingencies or lapses, and to cover whatever is left after satisfying specific and special purposes of the testator manifested in the other clauses of the will; the presumption being against partial intestacy. (Page 572.)

6. SAME—PRESUMPTION AGAINST INTESTACY.—In a residuary clause in a will devising "all the rest and residue of my estate *not hereinbefore specifically devised and bequeathed,*" the words in italics do not overcome the presumed intention to include lapsed devises in such clause. (Page 574.)

7. EQUITY—JURISDICTION.—Objection to the jurisdiction of chancery upon the original complaint will not be considered where the allegations of the cross complaint are sufficient to give the court jurisdiction. (Page 575.)

8. SAME—RETAINING JURISDICTION FOR COMPLETE RELIEF.—Where equity takes jurisdiction for one purpose, it will retain jurisdiction to settle the rights of the parties in the subject-matter of the controversy. (Page 575.)

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

Rose, Hemingway, Cantrell & Loughborough, for appellant.

1. The court had jurisdiction, plaintiff being in possession. 50 Ark. 562.

2. On the death of the devisee, Mrs. Darby, in the lifetime of the testatrix, the devise lapsed and passed to the residuary legatee. Jarman on Wills, p. 617, 1 Am. Ed; 18 A. & E. Enc. of L. 748; 2 Redf. on Wills, 157; 2 Williams on Ex. 496. The rule is changed as to a child or descendant by § 8022, Kirby's Dig. Mrs. Darby was not a descendant. For constructions of similar statutes, see 18 A. & E. Ency. Law 756; 89 Ind. 529; 7 N. J. Eq. 462; 1 Bradf. Sur. (N. Y.) 314; Words of inheritance are not necessary in deed, but otherwise as to wills. 49 Ark. 125; 3 *Id.* 422.

3. Where a gift is to a person, his heirs, etc., the term "heirs and (or) assigns," in a will is used, merely as words of limitation, never as words of substitution. Jarman on Wills, 618, No. 338; 18 A. & E. Ency. Law 754; Redf. on Wills 436, 1 S. 324, (2-160); Willis, 293; 67 Conn. 249; 83 Ind. 339; 80 Me. 290; 108 Mass. 382; 158 *Id.* 411; 159 *Id.* 280; 162 *Id.* 59; 27 Abb. N. C. (N. Y.) 437; 3 Dem. (N. Y.) 43; 113 N. Y. 396;

60 Tex. 426; 2 Williams on Ex. 327; 3 Jarman on Wills, 700, section 838.

4. On lapse of devise property goes to residuary legatee and not to the heirs. 2 Jarman on Wills, p. 365, § 762; Underhill on Wills, p. 79, § 62; 2 Redf. on Wills, p. 116; 113 N. Y. 522; 129 Mass. 97; 45 N. Y. 254; 51 Ark. 61; 131 N. Y. 237; 88 *Id.* 560; 113 N. Y. 115; 141 *Id.* 29; 144 *Id.* 621; 32 Hun 10; 16 Vis. 451; 4 *Id.* 709; 24 N. J. Eq. 512; 63 Hun 352; 113 N. Y. 123.

5. The distinction between devises and legacies at common law has been abolished. 51 Ark. 61; 55 N. J. Eq. 189; 127 Cal. 90; 53 Nev. 354; 79 Ind. 167; 7 Met. (Mass.) 141; 91 Mass. 283; 16 Hun. 76; 45 N. Y. 245; 141 N. Y. 29; 67 Conn. 249, 34 Atl. 1106; 5 Lea 653; 89 Ind. 529; 54 Me. 291; 152 N. Y. 475; 13 Rich. Eq. (S. C.) 104; 5 Dutch. (N. J.) 345; 88 Pa. St. 474; 147 *Id.* 67.

J. A. Comer and *John McClure*, for appellees.

1. A "residuum" caused by a lapsed devise can not be called or treated as a "rest and residue of an estate." 1 Swanston (Eng. Ch.) 570; 23 N. Y. 312; 71 N. Y. 346; 62 Oh. St. 414.

2. In the construction of residuary clauses of a will, if there be a doubt about what the testator intended should pass, the doubt should be resolved in favor of the heir at law. 1 Hill (S. C.) 96; 10 Ohio 334; 62 Conn. 142.

3. Courts are not at liberty, in the absence of words showing such intent, to presume the testator intended to pass the lapsed lands away from the heir. 6 Paige Ch. (N. Y.) 611; 1 Willes Rep. (Eng. Ch.) 296; 3 Harr. & McHenry (Md.) 333; 4 Paige Ch. (N. Y.) 117; 13 How. (U. S.) 390; 86 Pa. St. *Yard* v. *Murray*; 1 Swanst. Eng. Ch. 570; 23 N. Y. 312; 79 N. Y. 346; 62 Oh. St. 414; 2 Blackstone 737; 6 Conn. 304; 36 Pa. St. 113; 3 Manf. (Va.) 77; 62 Conn. 142; 94 Md. 463 etc. The doubt should be resolved in favor of the heir at law. Cases *supra*; 1 Hill Ch. (S. C.) 96; 19 Oh. 334; 18 How. (U. S.) 300; 16 Vesey Jr. 451. *Patty* v. *Goolsby* is not an authority in this case.

4. The rule as to lapsed devises of real estate at common law is noted in 1 Underhill on Wills, § 335. All other writers

concur. The land goes to the heir at law. 6 Paige. Ch. 611, 113 N. Y. 354; 1 Willes E. Ch. 296; 6 Conn. 304; 18 R. I. 68; Ambler 325; Fortescue 182.

McCULLOCH, C. J. The merits of this controversy involve the construction of the last will and testament of Elizabeth S. Shall, who died in the city of Little Rock on March 23, 1908, the owner of a large estate, consisting mostly of valuable lands, city and farm property. The will was executed January 17, 1898, and on April 14, 1905, she added a codicil. The preamble or introductory clause of the will reads as follows:

"I, Elizabeth S. Shall, of the city of Little Rock, county of Pulaski, State of Arkansas, being in good bodily health and of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs and directing how the estate with which it has pleased God to bless me shall be disposed after my decease, while I have strength and capacity so to do, do make and publish this, my last will and testament, hereby revoking and making null and void all other last wills and testaments, by me heretofore made; * * * as to my worldly estate and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, towit:"

In item 1 the testatrix gave to appellant, D. F. S. Galloway, who was her grandnephew, her home in the city of Little Rock, and all its contents, furniture, paintings, silver, etc.; horses, carriages and harness; and also certain other lots of real estate in said city, and a tract of land in Pulaski County containing 180 acres.

In item 2 she gave to her nephew, W. A. Galloway, two lots in Little Rock, and a certain tract of land in Pulaski County.

In item 3 she gave to her niece, Elizabeth S. Darby, a farm in Pulaski County known as the "Shall place," containing about 786 acres. The language of that devise is as follows:

"I give, devise and bequeath to my niece, Elizabeth S. Darby, the place known as the 'Shall place,' consisting of

about 786 acres of land in Pulaski County, State of Arkansas, towit:" (Here follows description).

In item 4 she gave two lots in the city of Little Rock, and a farm in Pulaski County known as the "Beasley place," to her niece, Mary A. Eanes, for life, with remainder over to D. F. S. Eanes, a grandnephew of the testatrix.

In item 5 she gave to her grandnephew, D. F. S. Eanes, three lots in the city of Little Rock, the property being left in trust to D. F. S. Galloway as trustee for the benefit of said D. F. S. Eanes until the latter should come of age.

In items 6 and 7, respectively, she bequeathed sums of money to a friend and to a certain church in Little Rock.

Item 8 contained the following residuary devise and bequest:

"I give, devise and bequeath to my grandnephew, David F. Shall Galloway, all the rest and residue of my estate not hereinbefore specifically devised and bequeathed, whether real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease."

After the residuary clause the will reads as follows:

"The property herein devised and bequeathed in items 4 and 5 to my grandnephew, David F. Shall Eanes, shall, in the event of his death without issue of his body him surviving, vest in fee simple in his mother, my niece, Mary A. Eanes, her heirs and assigns.

"All the property herein devised and bequeathed, unless otherwise and specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple, and the property devised and bequeathed to my nieces is to be their sole and separate property and free from the control and debts of their said husbands, together with the rents and profits of the same."

By her codicil the testatrix revoked the devise to appellant, D. F. S. Galloway, as to some of the said lots given to him in the will, and devised the same to Elizabeth S. Darby in fee simple. The codicil made certain other changes not material to this controversy.

Elizabeth S. Darby died prior to the death of the testatrix, and the controversy in this suit is as to the devolution of the property devised to her in the will and codicil.

It is the contention of appellant that both of the devises

to Elizabeth S. Darby lapsed on account of her death prior to the death of the testatrix, and that that property fell within the residuary clause of the will. The chancellor decided that the devise to Mrs. Darby in the will did not lapse, but went to her children under the terms of the will; and that the devise to Mrs. Darby in the codicil lapsed, but did not fall within the residuary clause, and as to that the testatrix is deemed to have died intestate, and the property descended to her heirs at law. Appellant, D. F. S. Galloway, is not one of the heirs of the testatrix, so under the decree he gets none of the property in controversy, and he appealed to this court. W. A. Galloway, the father of D. F. S. Galloway, is one of the heirs, and is a party to this suit. He appealed from that part of the decree which holds that the property devised to Mrs. Darby in the will goes to her children.

The rule is established beyond controversy, except where changed by statute, that a legacy or devise lapses when the legatee or devisee dies before the testator. 17 Am. & Eng. Ency. of Law, p. 748, and authorities there cited.

"The liability of a testamentary gift to failure or, as it is generally termed, lapse," says Mr. Jarman, "by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills, which, not taking effect until the death of the testator, can communicate no benefit to persons who previously die." 1 Jarman on Wills (6 ed.), p. 307.

A statute of this State changes that rule as to a legacy or a devise to a child or other descendant of the testator, and provides that it shall not lapse, but that "the property so devised or bequeathed shall vest in the surviving child or other descendant as if such devisee or legatee had survived the testator and died intestate." Kirby's Digest, § 8022.

It is conceded that the devise to Mrs. Darby in the codicil lapsed, as decided by the chancellor, by reason of her death before the death of the testatrix and the property either falls within the residuary clause of the will, if that clause is broad enough to include it, or descends to the heirs at law of the testatrix, as undisposed-of property. That question will be considered later.

It is contended on behalf of appellees that the devise of

the Shall place did not lapse, and that it was the intention of the testatrix to substitute the children of Mrs. Darby as devisees in the event of the latter's death before the death of the testatrix. This contention is founded on the general provision in the will that "all the property herein devised and bequeathed, unless otherwise and specifically stated, shall vest in the devisees, their heirs and assigns, in fee simple." The argument is, that there is presumed an intention not to permit the devise to lapse, and that the word "heirs" should be construed to mean "children," so that a line of succession should be prescribed in order to prevent lapse. There might be more reason for adopting that construction of the provision if it applied only to the devise to Mrs Darby, but it applies to all of the property devised in the will except when "otherwise and specifically stated," and the fact that the provision is a general one materially weakens the basis for construing the word "heirs" to mean "children." We do not, however, mean to say that such would be the proper construction, even if the provision applied only to the devise to Mrs. Darby. On the contrary, we are of the opinion that the words, "their heirs and assigns," were used in a technical sense to denote the character of the estate or extent of the interest to to be taken by the devisees—that they are words of limitation, not words of substitution.

The aim in construing a will is to correctly arrive at the intention of the testator, but the meaning is to be gathered from the language used.

"The question in expounding a will is not what the testator meant, but what is the meaning of his words; the use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation that it is to be sought in his words and a rigorous attention to them, is apt to lead the mind unconsciously to speculate upon what the testator may have been supposed to have intended to say, instead of strictly adhering to the true question, which is, what that which he has written means; the will must be expressed in writing, and that writing only is to be considered. And in construing that writing the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnancy or inconsistency with

the declared intention of the writer, to be extracted from the whole instrument, should follow from the reading of it." 2 Williams on Executors, p. 327.

Cases are to be found where the words "heir" in a will or deed was construed to mean "children." The following are among those cases: *Wyman* v. *Johnson*, 68 Ark. 369; *Shirey* v. *Clark*, 72 Ark. 539. Other examples are found in the many cases cited by counsel for appellees. But words used in a will must be construed according to the technical legal meaning unless explanatory words in the context qualify them or give them another meaning, or unless the peculiar situation under which they are used indicate an intention to use them other than in a technical sense.

In *Moody* v. *Walker*, 3 Ark. 147, this court said:

"When technical phrases or terms of art are used, it is fair to presume that the testator understood their meaning, and that they expressed the intention of his will, according to their import and signification. When certain terms or words have by repeated adjudication received a precise, definite and legal construction, if the testator in making his will use such terms or similar expressions, they shall be construed according to their legal effect; for, if this was not the case, titles to estates would be daily unsettled, to the ruin of thousands."

In *Johnson* v. *Knights of Honor*, 53 Ark. 255, in construing the meaning of the word "heirs," the court said:

"It is a technical word. When used in any legal instrument, and there is no context to explain it, as in this case, it should be understood in its legal and technical sense." To the same effect, see *Myar* v. *Snow*, 49 Ark. 129.

"Though the intention of a testator, when ascertained," says Mr. Jarman, "is implicitly obeyed, however informal the language in which it has been conveyed, yet the courts in construing that language resort to certain established rules by which particular words and expressions, standing unexplained, have obtained a different meaning, which meaning it must be confessed does not always quadrate with their popular acceptation. This results from the enactment of law, which presumes every person to be acquainted with its rules

of interpretation, and consequently to use expressions in their legal sense, *i. e.*, in the sense which has been fixed by adjudication to the same expressions occurring under analogous circumstances, a presumption, though it may sometimes have disappointed the intention of a testator, is fraught with great general convenience, for, without some acknowledged standard of interpretation it would have been impossible to rely with confidence on the operation of any will not technically expressed until it had received a judicial interpretation." 2 Jarman on Wills, p. 1651.

"In seeking for the expressed intention of the testator, his words are to receive that construction and interpretation which a long series of decisions has attached to them, unless it is very certain that they were used in a different sense." 1 Redfield on Wills, 433.

Lord Denman, in *Gallini* v. *Gallini*, 5 Barnewall & Adolphus, 621, said:

"Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense."

Mr. Washburn has this to say on that subject:

"On the other hand, 'heirs' may have sometimes meant the same as 'child' or 'children.' That the testator intended to use it thus must be clear and something more than implication. Otherwise, it is a word of limitation." 2 Washburn on Real Property, p. 603.

Judge Sharswood, speaking for the court in *Doebler's Appeal*, 64 Pa. St. 9, said:

"While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted, had he been truly advised as to the legal effect of the words actually employed.

That would be to make a will for him, instead of construing that which he has made."

This rule of construction has been universally adopted by judges and law writers. The exceptions to it are, as above stated, found in cases where there are qualifying words in the context, which show that a technical meaning was not intended, or the peculiar circumstances under which the words were used demonstrate clearly that they were meant otherwise than in the technical sense. In the present instance there is nothing to indicate that the term, "heirs and assigns," was used otherwise than in the technical sense as words of limitation. There are numerous authorities holding that the word "heirs" in a will is a word of limitation, and not of substitution, and that the use of it, following the name of the devisee, does not prevent a lapse in the event of the latter's death before that of the testator.

Mr. Jarman has this to say on that subject:

"The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus if a devise be made to A and his heirs * * * or to A and the heirs of his body, and A died in the lifetime of the testator, the devise absolutely lapses." 1 Jarman on Wills, p. 307.

"For the word 'heirs' in such cases," says Mr. Underhill, "gives the heirs no interest under the will, but it is merely a word of limitation, showing what interest the ancestor was to take in case he should survive the testator." 1 Underhill on Wills, p. 436.

Mr. Redfield states the same rule as follows:

"The general presumption being that these terms of succession are used to mark the extent of the interest thus intended to be conveyed to the legatee or devisee, and are therefore words of limitation merely." 2 Redfield on Wills, 160.

The same rule is stated in numerous authorities in support cited in Am. & Eng. Enc. of Law, vol. 18, p. 754. See, also, *Jackson* v. *Alsop*, 67 Conn. 249; *Maxwell* v. *Featherston*, 83 Ind. 339; *Keniston* v. *Adams*, 80 Me. 290; *Kimball* v. *Story*. 108 Mass. 382; *Wood* v. *Seaver*, 158 Mass. 411; *Hand* v. *Marcy*, 28 N. J. Eq. 59; *Kimball* v. *Chappel*, 27 Abbott, N. C. (N. Y.) 437; *In the matter of Wells*, 113 N. Y. 396; *Moss* v. *Helsley*, 60 Tex. 426.

In the case of *Watson* v. *Wolff-Goldman Realty Co.*, 95 Ark. 18, it was urged that the use of the words, "and assigns forever," enlarged the estate, which otherwise would have been restricted by the use of the words, "bodily heirs." But this court held, following other decisions cited in the opinion, that the word "assigns," was to be construed in a technical sense, and that it only imported "that the estate may be transferred, and can not operate to enlarge the grant or defeat its express limitations."

Our conclusion, therefore, is that the devise to Mrs. Darby in the will lapsed, and that the property the same as that devised in the codicil, either fell within the residuary clause or descended to the heirs at law of the testatrix.

The remaining question relates to the devolution of the property described in the lapsed devises to Mrs. Darby. Did it fall within the clause giving the residuum of the estate to appellant, D. F. S. Galloway? The residuary clause is general in its terms, and covers all property of every kind not otherwise disposed of in the will. At common law there was a distinction made, with respect to the operation of the residuary clause of a will, between bequests of personalty and devises of real property, the English courts holding that lapsed legacies fell into the residuum, unless otherwise directed in the will itself; but that a devise of real estate did not go to the residuary devisee. This rule was based upon another distinction arbitrarily made by the English courts that, as to personalty, a will was deemed to speak from the date it took effect, *i. e.*, from the date of the testator's death, and, therefore, included property acquired by the testator after the execution of the will; but that, as to real estate, the will was deemed to speak only from the date of its execution, and did not include after-acquired property. The rule of the common law has been changed in England by the Statutes of Victoria (1837), and in most of the American States, so as to completely sweep away the old distinction between bequests of personalty and devises of real property, and make a will speak from the date of the testator's death and convey after-acquired real estate as well as personalty; and where those statutes have been put into effect the rulings have been that lapsed legacies and devises fall into the residuary clause, unless a contrary inten-

tion on the part of the testator is expressed in the will. The rule and its changes are very clearly stated in the following excerpt from the opinion of the Indiana Supreme Court:

"It is said, however, that there exists an important distinction between a void or lapsed bequest of personal estate and a void or lapsed devise of real estate, which obtains both in England and America in this, that the former falls into the residue and the latter goes to the heirs. The reason generally assigned for such distinction has been the different operations of a will upon personal and real estate. It is said that as to personal estate the will would operate upon all the personal estate held by the testator at the time of his death; while as to his real estate the testator could only devise such as he owned at the time of his will. It is certain, we think, that the reason thus given for the supposed distinction has long since ceased to exist, if it ever existed in this State. Here the testator's will of personal estate must be executed with precisely the same solemnity and formality as the will devising real estate; and there is no perceptible or practical difference in the operation of a will upon personal and upon real estate." *Holbrook* v. *McCleary*, 79 Ind. 167.

And the Supreme Court of Massachusetts, speaking through Justice Dewey, gives the following explanation of the changes in the law on the subject:

"With us all ground for any such distinction has long since been done away with. Our whole system since the enactment of the revised statute, chapter 62, section 3, has been to carry out the principle that devises of real estate and legacies of personal estates were to be placed substantially upon the same footing as to the extent of the power to devise and the formalities required in the execution of the testamentary instrument." *Thayer* v. *Wellington*, 91 Mass. 283.

For other cases announcing the same changes in the law see: *Molineaux* v. *Reynolds*, 55 N. J. Eq. 187; *Estate of Upham*, 127 Cal. 90; *Drew* v. *Wakefield*, 54 Me. 291; *Reeves* v. *Reeves*, 5 Lea (Tenn.) 644; *Youngs* v. *Youngs*, 45 N. Y. 254; *Jackson* v. *Alsop*, 67 Conn. 249; *West* v. *West*, 89 Ind. 529.

We have no statute on this subject specifically abolishing the rule of the common law as to the distinction in the operation of wills between personalty and real estate. But in the

case of *Patty* v. *Goolsby*, 51 Ark. 61, it was decided that the course of legislation here has swept away all distinctions, and that a will is deemed to speak from the date of the testator's death as to real estate as well as to personalty, and carries after-acquired property, both real and personal. In that case the court, speaking through Special Justice SOL. F. CLARK, said:

"We are not aware that the question has ever been directly before this court nor has there been any legislation in this State in terms changing or abolishing the English law on the subject. But a course of legislation was adopted at an early date wholly inconsistent with it and which has certainly swept away the principles or grounds upon which the rule has ever been understood to be predicated. * * * Considering the great changes in the policy as well as the formalities in alienating and assuring title to real estate as to what they were when the English rule on this subject originated and prevailed, we can not see, notwithstanding the common law has never been changed by any positive statute, any reason why a will should not speak from the death of the testator as to real as well as personal estate, and we are therefore of the opinion, and so hold, that, the testator being seized and possessed of said lands at the time of his death, they were included in his will and were conveyed thereby."

That decision established here a state of the law similar to that of other jurisdictions where changes in the common law on this subject have been brought about by express statutory enactments. It necessarily and logically follows, from the application of the principles there announced, that lapsed devises of real estate fall into the general residuary clause unless a contrary intention of the testator is clearly expressed in the will.

It is insisted with much earnestness that the rule announced in *Patty* v. *Goolsby*, *supra*, was mere *dictum*, and should not be binding on us now as a precedent. We can not agree with counsel that the opinion on that point is *obiter dictum*. That particular question was elaborately argued in the brief on one side and seems to have been carefully considered by the court. If the court had reached a different conclusion upon that question of law, it would have been decisive of the issue be-

tween the parties. In other words, the case could have turned entirely upon the decision of that question; therefore, it can not be regarded as *dictum* merely because it was found necessary to consider another question in consequence of the conclusion reached by the court on that question. Besides, the case was a carefully considered one, and has undoubtedly become a rule of property in this State. We decline to overrule it or to discredit it.

Now, turning to the question of lapsed legacies at common law, which must now be considered as the established rule also as to devises of real estate, we find little, if any, conflict in the authorities.

"A residuary gift of personal estate," says Mr. Jarman, "carries not only everything not in terms disposed of but everything that in any event turns out not to be well disposed of. A presumption raises for the residuary legatee as against every one except the particular legatee, for the testator is supposed to give his personalty away from the former only for the sake of the latter. It has been said that to take a bequest of the residue out of the general rule very special words are required, and accordingly a residuary bequest of property 'not specifically given' following various specific and general legacies will include lapsed specific legacies." 2 Jarman on Wills, p. 716.

The rule sustained by a long list of adjudged cases is thus stated by the cyclopedists of the law:

"The residuary clause passes all the property of the testator that is not otherwise disposed of by the will, unless the words used show an intention to exclude from the operation of the residuary clause some part of the estate, it being the rule that a residuary clause will be liberally construed to prevent intestacy. This includes property acquired after the will was made if it appears that the testator intended his will to operate on after-acquired property, and legacies and devises that lapse or otherwise fail for any reason." 18 Am. & Eng. Ency. of Law, p. 724.

In *Lovering* v. *Lovering*, 129 Mass, 97, the court said:

"A general residuary gift carries all property which is not otherwise disposed of by the will, and includes lapsed legacies and all void legacies. In this case the residuary

gift was 'all the rest, residue and remainder of my estate, real and personal, of every nature and description.' The fact that he specifies certain remainders and reversions as included in the general description does not limit or narrow it."

In the Matter of L'Hommedieu, 32 Hun (N. Y.) 10, the following statement of the rule is given:

"It is a settled rule of construction that a residuary clause carries all which is not legally disposed of by the will, unless a contrary intention is manifest by the will itself. Such an intention can not be deduced from the mere absence of words or that the testator failed to provide for the contingency upon which the lapse was occasioned. A testator is supposed to have given away from the residuary legatee only for the sake of the particular legatee." Authorities need not be multiplied on this point.

It is argued that the language of the will prevents the operation of the residuary clause as a general one, and evinces a specific intention on the part of the testatrix not to include lapsed legacies. Counsel invoke a strict construction of the language of the residuary clause on the ground that a presumption should not be indulged of an intention on the part of the testator to cut the heirs off from the lapsed devises, unless the intention is made clear, by the language of the will. While it is sometimes said that an intention to disinherit lawful heirs is not to be presumed, in the absence of clear and explicit language to that effect, yet there are other presumptions not to be overlooked. In the construction of wills there is always a presumption against partial intestacy unless such an intention clearly appears from the language used in the instrument. *Booe* v. *Vinson*, 104 Ark. 439; 2 Redfield on Wills, 116.

The presumption against intended intestacy leads to a liberal, rather than to a restrictive, construction of the residuary clause in the will, in order to prevent partial intestacy.

"Where the language of the residuary clause is ambiguous," says the New York court, "the leaning of the courts is in favor of a broad rather than a restricted construction. It prevents intestacy, which it is reasonable to suppose testators do not contemplate; and if the mind is left in doubt upon the whole will as to the actual testamentary intention, a broad rather than a strict construction seems more likely to meet

the testamentary purpose, because such a clause is usually inserted to provide for contingencies or lapses, and to cover whatever is left, after satisfying specific and special purposes of the testator manifested in the other clauses of the will." *Lamb* v. *Lamb*, 131 N. Y. 237.

This presumption is greatly strengthened by the language of the will and of its provisions, taken as a whole. The emphatic language used evinces a clear intention to cover all of the testator's property. The preamble reads thus:

"As to my worldly estate and all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath and dispose thereof in the manner following, towit:"

In 1 Underhill on Wills, § 464, this pertinent statement of the law on the subject is found:

"The rule is that the testator's intention is to be ascertained from the whole will. If, therefore, the testator in the introduction expresses an intention of disposing of all of his estate, as when he says 'I give and devise all of my worldly goods,' it should be considered. The presumption arises that, having the disposition of his whole estate in view, he did not intend to die intestate as to any part of it. If his subsequent language may be construed in either of two ways, by one of which a complete disposition will be made of his whole estate, and by the other only a partial disposition will be made, resulting in a partial intestacy, the introductory statement pointing to a complete disposition ought to be considered, and that sense adopted which will result in a di position of the whole estate. Hence it follows that language which in a general or residuary clause may not alone be sufficiently conclusive to dispose of all the property of the testator may have its meaning enlarged to correspond with an intention shown in the introductory clause."

Mr. Redfield states the same conclusion as follows:

"The courts have for a long time inclined very decidedly against adopting any construction of wills which would result in partial intestacy unless absolutely forced upon them. This has been done partly as a rule of policy perhaps, but mainly as one calculated to carry into effect the presumed intention of the testator, for the fact of making the will raises a very

strong presumption against any expectation or desire on the part of the testator of leaving any portion of his estate beyond the operation of the will. Hence, where a general residuary bequest was accompanied with expressions affording a more limited construction and pointed only to a particular surplus beyond the properties specifically mentioned, it was nevertheless held to pass the residuum of his property at the time of his decease, as well that which he held at the date of his will as that afterwards acquired. Lord Eldon here said that it was the general rule in regard to residuary bequests to avoid partial intestacy, and that it required very specific words to confine a residuary bequest to the property belonging to the testator at the date of his will." 2 Redfield on Wills, p. 116.

The words of the residuary clause, "not hereinbefore specifically devised," do not overcome the presumed intention to include lapsed devises. That phrase must be construed with reference to the time that the will speaks, and, when so considered, it refers to valid devises or those which finally take effect under the will, but does not exclude from the residuum lapsed devises or those which are void when the will takes effect.

"In all these cases of lapsed or void legacies," says the Massachusetts court, "or a legacy that fails for want of using proper language to create the same, or to designate the legatee, all of which are uniformly held to pass to the residuary devisee, the testator had no purpose in his mind at the time of executing his will to pass such an estate to the residuary devisee. 'It is not necessary that the testator's mind should be active in including it.' *Goodright* v. *Downshire*, 2 B. & P. 600. The contrary intention of the testator, spoken of in the books as that which will prevent such legacy going to the residuary devisee, is something more than the fact that the testator supposed that he had made a valid legacy to some one of a portion of his estate, but which the court held void and inoperative." *Thayer* v. *Wellington, supra.*

In the following cases use of the same words in substance was held not to take lapsed devises out of the operation of the residuary clause: *Roberts* v. *Cook*, 16 Ves. Jr. 451; *Brown* v. *Higgs*, 4 Ves. Jr. 709; In re *L'Hommedieu*, 32 Hun (N. Y.)

10; *Tindall's Executors* v. *Tindall,* 24 N. J. Eq. 512; *Riker* v. *Cornwell,* 113 N. Y. 115.

The conclusion is inevitable, if the principles above announced are to be considered as controlling, that the property included in the lapsed devises to Mrs. Darby fell within the general residuary clause of the will and passed to appellant, D. F. S. Galloway.

Objection is made to the jurisdiction of the chancery court upon the original complaint of appellant; but, inasmuch as the allegations of the cross complaint are confessedly sufficient to give the court jurisdiction, and having taken jurisdiction for any purpose, the court will completely settle the rights of the parties in the subject-matter of the controversy.

The decree is therefore reversed, and the cause remanded with directions to dismiss the cross complaint of appellees and to quiet the title of appellant to all the property in controversy.

EMERSON *v.* STEVENS GROCER COMPANY.

Opinion delivered November 25, 1912.

1. INSTRUCTIONS—REPETITION.—It is not error to refuse an instruction the subject-matter of which is covered by an instruction given by the court. (Page 576.)
2. SALES—ACCEPTANCE—EVIDENCE.—The fact that the seller retained the buyer's check for an unreasonable time without notifying the buyer that he only retained it pending negotiations as to the terms of the contract, or that he failed to return it within a reasonable time, was admissible upon the issue of acceptance. (Page 578.)
3. SAME—ACCEPTANCE—TIME.—Where an offer to buy goods is made, and the time of acceptance is not limited, the offer is open until accepted or rejected, provided it be done within a reasonable time. (Page 578.)
4. INSTRUCTION—SPECIFIC OBJECTION.—Where an instruction is confusing or misleading, the objection should be pointed out specifically. (Page 579.)
5. SALE OF CHATTELS—SUFFICIENCY OF ACCEPTANCE OF OFFER—INSTRUCTION.—Defendants offered to sell a car of potatoes to plaintiff to be delivered at Newport, and plaintiff proposed to buy them if delivered at Marianna at same price, and inclosed a check in part payment. The court instructed the jury that "if you find that, upon the plaintiff ordering a car of potatoes on Newport quotations delivered

at Marianna, defendants notified plaintiff that delivery at Marianna would require a deposit of $100 for future delivery, and that plaintiff remitted the amount, but asked a modification to the Newport rate, and if you further find that the defendants accepted the check upon the terms and in assent to the offer set out in plaintiff's letter of January 6, or that, under the circumstances of this case, the defendants retained such check for an unreasonable time, then you may find for the plaintiff the amount sued for." *Held*, that the instruction was not open to a general objection. (Page 579.)

Appeal from Jackson Circuit Court; *R. E. Jeffery*, Judge; affirmed.

Jno. W. & Jos. M. Stayton, for appellants.

Jones & Campbell, for appellee.

HART, J. This is the second appeal in this case. The first appeal is reported in 95 Ark. 421, under the style of *Emerson* v. *Stevens Grocer Company*. The issues and facts are fully stated in that decision, and, as counsel for appellants concede that the facts on the retrial of the case are the same, they need not be restated here. Appellee brought this suit against appellants to recover damages for failure to deliver a car of potatoes which the former alleges the latter had sold it. There was a verdict and judgment for the appellee, and the case is here on appeal.

It is first contended by counsel for appellants that the court erred in refusing to give instruction numbered 6 asked by them. The instruction is as follows:

"The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the defendant accepted plaintiff's counter proposition."

There was no error in this. Instruction numbered 1 given by the court is in part as follows: "The first contract between the parties has been abandoned by the plaintiff, and the only thing left in the case, and the only question for you to decide, is whether or not the defendants accepted the said counter proposition and agreed to deliver the potatoes at Marianna at the same prices it had quoted for their delivery at Newport; and, before you can find for the plaintiff, you must find from a preponderance of the evidence in this case that the defendants did accept the offer thus made by plaintiff, and did agree to deliver said potatoes at Marianna at the

same prices that it had previously quoted for a delivery of them at Newport."

It will be observed that the concluding part of this instruction is practically the same as instruction numbered 6 requested by appellants and refused by the court.

The court instructed the jury as follows:

"3. You are instructed that the request of the plaintiff contained in its letter of January 6 was a counter proposition to buy a car of potatoes for delivery at Marianna at the same price as quoted by the defendants for delivery of a car of potatoes at Newport, and that you must find that this counter proposition was accepted by the defendant before you can find for the plaintiff in this case, and that the receiving and depositing of said check for $100 contained in said letter of January 6 was not an acceptance of said counter proposition in itself, but merely evidence of such acceptance, and that it is the intent with which such check was received and deposited that is to guide you in determining the weight to be given such acts as showing an acceptance. Now, if you find that the defendants received and deposited said check upon the terms and with the intention of assenting to the terms of said counter offer, or retained said check an unreasonable time without notice, then you will find for the plaintiff; but, if you find that it was received and deposited and merely held by the defendants for a reasonable time, pending negotiations between plaintiff and defendants for the purchase of the Marianna car, such holding would not be an acceptance of the counter offer, and you will find for the defendants."

"4. If you find that, upon the plaintiff ordering a car of potatoes on Newport quotations delivered at Marianna, defendants notified plaintiff that delivery at Marianna would require a deposit of $100 for future delivery, and that plaintiff remitted the amount, but asked a modification to the Newport rate, and if you further find that the defendants accepted the check upon the terms and in assent to the offer set out in plaintiff's letter of January 6, or that, under the circumstances of this case, the defendants retained such check for an unreasonable time, then you may find for the plaintiff the amount sued for."

It is now insisted by counsel for appellants that the

court erred in giving instruction numbered 4. They contend that the two instructions are contradictory and confusing, and say that the jury must have understood instruction numbered 4 to mean that appellants were liable if they retained the check for an unreasonable length of time, no matter what they did or said to indicate their refusal to accept appellee's offer; that the simple retention of the check outweighed everything else.

In the former opinion the court said: "The mere retention of the check was only evidence of such acceptance, and not conclusive proof thereof. If the appellants retained the check for an unreasonable time without notifying appellee that they only retained it for the purpose of waiting negotiations looking to the agreement of the parties to the terms of the contract, or failed to return it within a reasonable time, then the jury might infer from such action and conduct on the part of appellants that they actually did accept the terms of the offer contained in the letter of January 6 for the purchase of the potatoes. We think that, under the testimony, it was a question of fact for the jury to determine whether or not the appellants accepted the check upon the terms and in assent to the offer set out in appellee's letter of January 6, or whether they only held it awaiting negotiations; and that it was also a question of fact for the jury to determine whether under the circumstances of this case they retained it for an unreasonable time."

By the letter of January 6, appellee made a counter proposition to appellants that it would take the car of potatoes if it was delivered at Marianna at the same price as made in the original proposition of appellants for delivery at Newport. The disputed question of fact in the case is as to whether appellants accepted the counter proposition of appellee. In our former opinion we held that the fact of appellants retaining the check sent with the counter proposition was evidence of acceptance, but was not conclusive thereof. We reversed the case because the court in effect told the jury that the retention and collection of the check by appellants constituted, as a matter of law, an acceptance of the counter proposition made by appellee.

In the case of *Kempner* v. *Cohn*, 47 Ark. 519, which was

cited in our decision on the former appeal, it was held that, where an offer is made, and the time of acceptance is not limited, the proposition is open until it is accepted or rejected, provided an answer is given in a reasonable time. In the decision on the former appeal we held that, under the facts and circumstances of this case, it was a question of fact for the jury whether appellants retained the check for an unreasonable time, and also held that, if appellants did retain the check for an unreasonable time without notifying appellee that they only retained it for the purpose of further negotiations in regard to the counter proposition made to them by appellee, the jury might infer an acceptance.

It is the contention of appellee that appellants unconditionally retained the check for an unreasonable time, and that from this the jury might infer an acceptance. On the other hand, appellants claim that they retained the check pending further negotiations in regard to the counter proposition made to them by appellee on January 6, and that the facts and circumstances adduced in evidence were such that the jury should find appellee had notice that they so held it.

Instructions numbered 3 and 4 immediately followed each other, and it is evident that in them the court endeavored to submit to the jury the respective theories of the parties to the suit. If instruction numbered 4 was not satisfactory to appellants for the reason that they thought it might be confusing and misleading to the jury, in fairness to the court, they should have specifically pointed out their objections, to it to the end that the court might correct it. If they had done so, doubtless the court would have changed the verbiage of the instruction so as to meet their objection. Having failed to make a specific objection to the instruction, we do not think that the judgment should be reversed for giving it.

We think that the respective theories of the parties in regard to the disputed question of fact were fairly submitted to the jury, and the judgment will be affirmed.

FRIEDMAN v. SCHLEUTER.

Opinion delivered November 25, 1912.

1. FRAUDS, STATUTE OF—CONTRACT TO BE PERFORMED WITHIN YEAR.—An oral contract for erection of a building which may be performed within a year is not prohibited by the statute of frauds. (Page 584.)
2. CONTRACTS—FORMAL REQUISITES—WRITING.—Where the terms of a contract are agreed upon, the agreement becomes effective, though it is expected that the terms of the contract will be embodied in a written instrument and signed. (Page 584.)
3. SAME—BUILDING CONTRACT—TIME FOR PERFORMANCE.—Where a contract to erect a building does not fix the time for completion, the law implies that a reasonable time for performance is intended. (Page 587.)
4. SAME—BUILDING CONTRACT—TIME OF PAYMENT.—In the absence of any provision in a building contract as to the time of payment, the law presumes that payment shall be made on the completion of the work. (Page 587.)
5. SAME—BUILDING CONTRACT—CERTAINTY.—A contract for the construction of a building contract according to the plans of an architect which fixes the time for completion and damages for delay and which requires the contractor to enter upon the work immediately is sufficiently definite, though the intention was that the contract should be reduced to writing as evidence of its terms. (Page 587.)

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

STATEMENT BY THE COURT.

Appellees brought this suit in the circuit court against appellants to recover damages for the alleged breach in a building contract with them. Appellees were contractors and house builders, and appellants were the owners of certain lots in the city of Fort Smith upon which they desired to erect a three-story business house. Appellants advertised for bids for the erection of the house on the lots according to the plans and specifications furnished by them. The notice and advertisement for bids and the plans and specifications which accompanied them comprised twenty-two typewritten pages of legal size. Hence it is impracticable to set them out in full here. We deem it sufficient to say that the description of the lots upon which the house was to be built is contained in the notice and advertisement for bids. The plans and specifications were prepared by the architect of appellant,

and were full and complete. They contained a definite and detailed statement of the kind and quality of material to be used, the dimensions of the building and the various rooms to be contained therein and the exact manner in which every part of the work should be done. In short, they were as specific as could be, and were intended as a definite and specific guide in the erection of the building. They provided for a bond to be executed by the builder, and contained clauses relative to changes in the contract and disputes arising between the builder and owner. They provided that the work should be done by union labor, and that the contractor should be responsible for all damage suits arising out of and in connection with the work. Another clause provides that the details, drawings and specifications are intended to describe the work, and shall not be deviated from without written instructions from the architect. The notice and advertisement reserved to the owner three days to determine the successful bidder, and provided that any and all bids might be rejected after the bids were opened. The bid of the appellees was as follows:

"Fort Smith, Ark., August 9-11.

"We propose to erect the building for Friedman-Mincer according to plans and specifications for the sum of $26,229.00 (twenty-six thousand two hundred and twenty-nine dollars). This bid is subject to the agreement of June 15, 1911, between architect and contractors and subject to three days' acceptance."

The testimony on the part of appellees tended to show that the bids were opened on Thursday, and that appellants, after looking at the bids, said they would not need three days to determine who was the successful bidder, that they would decide the question the next morning.

Will Schleuter, one of the appellees, testified that he met Mr. Friedman, one of the appellants, the next morning after the bids had been opened, and, in regard to the acceptance of the bid of appellees by appellant, we quote from his testimony as follows:

"A. I met Mr. Friedman and asked him whether he had decided on who was to have the job. Q. That was Friday morning about what time? A. That was between 9 and 10 o'clock. Q. Where did you meet him? A. Right at Padgett's cafe. Q. In front of where their office had been?

A. Yes, sir. Q. And he said, Yes, they had decided that yesterday? A. Yes, sir; and that we got the job, and he was glad we got it, and that he had told Mr. Strong to make up the contract, and that he was working on it then. I told him I was glad of it, glad that we got the job, and went on. That same afternoon, Friday afternoon, I met Mr. Mincer on the car, and he told me the same thing, that we had the job, and they were fixing up the contract and bond then. So the next morning, that is Saturday morning, there was to be another job let out of Mr. Strong's office, and I went up there to see him about it, and I went up, and he said: 'Here is the bond, you take the bond and have it fixed up and come back here at 10 o'clock, and I will have the contract ready for you,' so I took the bond and was going to give it to Fred, my brother, and that is all I know about that; he took it off at that time."

He testified further that appellees were the lowest bidders, and that the architect who made the plans for appellants, and whose business it was to prepare the bond and contract, did prepare the bond and gave it to appellees and also prepared a written contract. The testimony showed that appellees executed the bond with sureties, and that the bond was submitted by them to appellants who retained it. Later on the appellants refused to sign the contract, and notified appellees that they would not be permitted to construct the house.

Fred Schleuter testified that appellants examined the bond executed by appellees and accepted it. He said they told him the bond was satisfactory, and then suggested that we had not agreed on the time limit and the forfeiture. After some discussion of the matter, we agreed to complete the job in one hundred working days and agreed on twenty-five dollars per day for damages for delay.

He also stated that Mr. Mincer, one of the appellants, said they had not signed the contract that morning, that he wanted to see his attorney and would be ready to sign the contract at 4 o'clock that afternoon. That he went to see Mr. Mincer about 4 o'clock, and after some discussion about the matter he declined to sign the contract.

Appellees also adduced evidence tending to show the amount of damages suffered by them.

The evidence on the part of appellants tends to show that they did not accept the bid of appellees by exercising their right under the notice and advertisement to reject it. They were questioned in regard to the conversation with Will Schleuter and Fred Schleuter, and denied that they had it or that they told them that appellees' bid would be accepted.

The architect admitted that he prepared the contract, but testified that he wrote it at the suggestion of one of the appellees, and that neither one of appellants requested him to prepare it.

The jury returned a verdict for appellees, and from the judgment rendered appellants have duly prosecuted an appeal to this court.

Read & McDonough, for appellants.

1. There was no agreement entered into between appellants and appellees.

It is a requisite of all contracts that the minds of the contracting parties must meet and assent to the same thing in the same sense and at the same moment of time. 90 Ill. App. 515; 77 N. W. 665. It has been held that in order to constitute a binding contract the terms of payment as well as other elements of a contract must be agreed upon. 78 Pac. 493.

2. If there was an agreement entered into, it was oral and not binding upon the parties, for the reason that it was the understanding and intention of the parties that any agreement should be reduced to writing before it should become binding.

Even if nothing had been said between the parties as to whether or not the contract should be reduced to writing, the custom shown to exist with reference to such contracts being in writing would control and be considered as a part of the agreement. 21 Ark. 85; 25 Ark. 261; 9 Cyc. 582; 46 So. (La.) 620; 106 La. 309; 30 So. 863. If it was the understanding and intention of the parties to draft and sign a written contract covering the oral agreement, the oral agreement is not binding and enforceable without being reduced to writing and signed. 106 Pac. 135; 148 Ill. App. 316; 130 N. W. 1097; 116 Pac. 650; Clark on Contracts, 62.

C. E. & H. P. Warner, for appellees.

1. On appellants' contentions as made, the case was for the jury, and a directed verdict was properly refused.

The first contention raised by appellants, that there was no agreement made and entered into, involves a dispute or controversy as to the facts, and, such being the case, it was necessarily a matter for the jury under proper instructions as to the law. The second contention, that the contract was oral and hence not binding because it was not reduced to writing, was a material question of fact as to the intention of the parties in this respect, and therefore a question for the jury. Clark on Contracts, 62, and cases cited below.

2. The parol contract was binding. 95 Ark. 426; 144 N. Y. 209; 21 N. Y. 308; 69 S. W. 225; 115 S. W. (Tex.) 903; 112 S. W. (Ky.) 1126; 21 N. Y. 305; 39 Pac. (Wash.) 131; 14 S. W. (Mo.) 872; 121 Mo. App. 168; 63 Mo. 141; 117 N. Y. App. Div. 66; 147 Fed. 641; 160 Fed. 240; 7 Am. & Eng. Enc. of L. (2 ed.), 140; 73 Ky. 632; 91 N. E. 975; Story on Contracts, 370, 372; Bishop on Contracts, 129; 1 Parsons on Contracts 518; 14 O. St. 292; 6 Cyc. 76; *Id.* 66; 9 Ind. 192; 95 Va. 527; 77 Ark. 150.

HART, J., (after stating the facts). Counsel for appellants asked the court to direct a verdict for them, and the refusal of the court to do so is the only ground upon which we are asked to reverse the judgment. They asked for a directed verdict on the ground that no agreement was ever made between appellants and appellees, and contend further that, if there was an agreement entered into, it was an oral agreement, and not binding on the parties, because it was the understanding and intention of the parties that any agreement entered into should be reduced to writing before it should become binding.

The contract could be performed within a year, and contracts of this character are not prohibited by the statute of frauds in this State. Hence a written contract was not necessary. 6 Cyc. 10; *Sarles* v. *Sharlow,* 37 N. W. (Dak.) 748.

In the case of *Emerson* v. *Stevens Grocer Company,* 95 Ark. at page 426, the court said: "If the contract is actually entered into and made, whether by messages, correspondence or by word of mouth, the agreement becomes at once effective,

although it was expected that the terms would afterwards be embodied in a written instrument and signed. The mere reference to a future contract in writing would not negative a present contract if the terms thereof were actually assented to by both parties. The written draft of the contract would only be a convenient record of the agreement and the evidence thereof, but it would only constitute evidence of the agreement, and its absence would not affect the binding force of the contract that was closed. Therefore, if an unconditional offer is made, and that offer accepted, this will constitute an obligatory contract, although the parties also understand that a written contract embodying the terms should be drawn and executed."

The principles of law applicable here are well stated in the case of *Rosster* v. *Miller*, 3 App. Cas. (Eng.) at page 1151, where Lord Blackburn said: "I quite agree with the Lords Justices (wholly independent of the statute of frauds) it is a necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement; for, if not, there was no contract. So long as they are only in negotiation, either party may retract; and, though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But, as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

To the same effect, see *Western Roofing Tile Co.* v. *Jones*, 26 Okla. 209, 109 Pac. 225, 23 A. & E. Ann. Cases, 127; 7 A. & E. Ency. of Law, 140; Page on Contracts, § 54; *Boysen* v. *Van Dorn Iron Works*, 87 N. Y. Supp. 995; *Lowrey* v. *Danforth*, (Mo. App.) 69 S. W. 39; *Green* v. *Cole*, 103 Mo. 70, 15 S. W.

317; *International Harvester Co.* v. *Campbell,* (Tex. Civ. App.) 96 S. W. 93; *Lane* v. *Warren,* 115 S. W. 903, (Tex. Civ. App.); *Disken* v. *Herter,* 73 N. Y. App. Div. 453.

In the application of the principles above announced to the facts in the case at bar, it can not be said that the undisputed evidence shows that the agreement made was not the end of negotiations between appellants and appellees.

Counsel for appellants insist that, because the contract was to be reduced to writing and a bond tendered accompaying it, and because the notice and advertisement and the plans and specifications did not provide a time of payment to the builder and a time for the completion of the contract, no contract could exist without such writing.

The testimony of appellees shows that the bond provided for in the notice and advertisement was executed by appellees and accepted by appellants; that their bid was accepted by appellants; that they subsequently agreed that the time for the completion of the building should be one hundred working days, and that the damages for delay in the completion of the building should be twenty-five dollars per day. It appears then from their testimony that all the terms of the contract were agreed upon and its reduction to writing was intended merely for facility of proof as to its terms. In such cases the provision for a contract in writing is not inconsistent with the present contract, and this is especially true in a case where the things to be done are provided for in written plans and specifications, which are so definite and detailed as to present a perfect guide as to the rights and duties of the respective parties in the erection of the proposed building. According to the evidence for appellees, the minds of appellants and appellees were in accord as to all the provisions of the contract, and the writing was intended to exhibit and set forth just what they had agreed upon and understood. Appellants did more than tell appellees that they were the lowest bidders. According to the testimony of appellees, they told them that they had gotten the job, and that their architect was then working on the contract. As we have already seen, the terms of the contract were then as definite and certain as they could be, except as to the time of payment, the time of completion of the work, and the amount of damages for

delay in the completion of the work. The time for completion of the work and the damages for delay were subsequently agreed upon.

Moreover, where a contract fails to specify a time for completion, it will be implied that a reasonable time for performance was intended. 6 Cyc. 66; *Long* v. *Chas. T. Abeles & Co.*, 77 Ark. 150.

In regard to the time of making payment, it may be said that, in the absence from the contract of any provisions on the point, the time of making payment is presumed to be completion of the work. 6 Cyc. 76; *Wright* v. *Maxwell*, 9 Ind. 192; *Shanks* v. *Griffen*, 14 B. Mon. (Ky.) 153.

The contract then could not be said to be too uncertain and indefinite for enforcement. Under the instructions of the court, the jury in effect found that the contract was made or entered into, that its performance was to be immediately entered upon, and that the preparation of the written form of the contract was a matter to be subsequently attended to, and that the written contract was not intended to be a condition precedent to the taking effect of the contract. The verdict of the jury was supported by the evidence, and the court did not err in refusing to direct a verdict for appellants.

No other assignments of error are urged for the reversal of the judgment, and the judgment will be affirmed.

BEDFORD *v.* BEDFORD.

Opinion delivered December 2, 1912.

1. REMAINDERS—EQUITY—POWER TO SELL CONTINGENT REMAINDERS.—Equity has jurisdiction to order sale of contingent remainders for reinvestment; and this is true though one of the remaindermen is an infant. (Page 590.)
2. SAME—SALE FOR REINVESTMENT.—Where the chancery court orders that lands bequeathed to the testator's widow with remainder over to the other heirs be sold for reinvestment, it should follow up the reinvestment and see to it that the testator's will is carried out. (Page 593.)
3. SAME—POWER TO ORDER PRIVATE SALE.—The jurisdiction of equity to order the sale of contingent remainders does not arise from any statute on the subject, and is not restricted by any of the statutes regulating other judicial sales, and therefore the sale may be a private one. (Page 593.)

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

F. N. Burke, for appellant.

The court was without jurisdiction to render the decree, and it is not binding on appellant or other parties owning an interest. The title to the fee is "*in nubibus*; *in gremio legis*," etc., according to the ancient authorities, but, according to the modern authorities, it is still in the grantor, or in abeyance. 44 Ark. 458.

C. E. Daggett, for appellee.

The court had jurisdiction. Equity will furnish a remedy for eve y wrong. Pom. Eq. (3 ed.) § 423; 36 Ark. 120; 44 *Id.* 458; 95 *Id.* 18; 16 Cyc. 653 (2); 61 S. W. 1025; 32 N. E. 704.

MCCULLOCH, C. J. John Harper, a citizen of the State of Kentucky, died leaving a last will and testament, whereby he devised certain lands in that State to the children of his nephew, Adam Harper, "for their life only and at their respective deaths to go to such of their children or grandchildren, respectively, as by last will and testament they may direct; and, in case any fail so to direct, to be divided equally between their children or their descendants; the children of any that are dead to take the place of their parents." Mrs. Susan Bedford was one of the children of Adam Harper, and the lands thus devised to her were sold for reinvestment under an order of a court of proper jurisdiction, and the proceeds were reinvested in the purchase of a plantation in Lee County, Arkansas, known as the "Pillow Mound" place. The deed from the vendor followed literally the terms of the John Harper will, and the lands were thereby conveyed to Mrs. Bedford "for and during the term of her natural life, * * * and at her death to go to such of her children or grandchildren as by last will and testament she may direct, and, in case she fails so to direct, to be divided equally between her children or their descendants, the children of any that are dead to take the place of their parents, all as provided by and in accordance with the terms, conditions and limitations of the will of the late John Harper of record in the office of the clerk of the county court of the county of Woodfore, State of Kentucky."

Mrs. Bedford is still living, and has six children, all of whom are adults except the youngest daughter, Margaret O. Bedford, who is a minor under the age of fourteen years. Mrs. Bedford and her five adult children instituted this action in the chancery court of Lee County against Margaret O. Bedford, praying for confirmation of a sale of said land which they proposed to make, and had agreed to make, to one Thompson, for the purpose of reinvesting the proceeds in the purchase of other lands. They show, by allegations in their complaint and by proof, that only a small portion of said lands is in cultivation and yields but little income; that the farm is badly out of repair, and that they have no means with which to make repairs; that the lands suffer great injury from year to year on account of overflow of the Mississippi River, and that no protection is derived from the levees; that said lands do not constitute a fit place for the residence of the life-tenant and her said children; that they have negotiated a sale of the lands to Thompson for the sum of $10,000, which is a full and adequate price, and that it is to the interest of all parties that the sale be made and the proceeds reinvested in other lands. The court appointed a guardian *ad litem* for the infant defendant, and proceeded to a hearing of the cause. A final decree was rendered, approving the sale to Thompson on the terms mentioned, and ordering a deed to be executed by the court's commissioner upon payment of the agreed price. The sum was ordered to be paid to the clerk of the court, subject to the further orders of the court. An appeal to this court has been prosecuted by the guardian *ad litem* of the infant defendant.

There is a statute in the State of Kentucky authorizing the proceedings under which the Kentucky lands were sold for reinvestment. Section 491, Kentucky Code of Practice. Pursuant to the decree of the Kentucky court, the property there was sold and the proceeds subsequently invested in lands in this State, the conveyance from the vendor vesting the title in the same way as originally prescribed by the last will and testament by which the property was devised.

There is no statute in this State, such as the Kentucky statute, either directly or indirectly authorizing chancery courts to sell lands for reinvestment. In order to find such

authority, we must look to the general powers of chancery courts.

It will be readily seen, from a consideration of the language of the will of John Harper, and the conveyance of this property which followed closely its terms, that a life estate was conveyed to Mrs. Bedford, with contingent remainder over to such of her children as she should nominate or specify by her last will and testament. This evidently refers to such children of Mrs. Bedford, or their descendants, as shall survive at the time of her death, and a limited power of appointment is given to Mrs. Bedford to determine which of the class shall take the remainder. There is, therefore, a double contingency attached to the remainder, as to whether any of the class shall survive at the death of Mrs. Bedford, and also which of them will take under the power of appointment if it should be exercised by her. All of the members of the class who may possibly take are adults save one, the defendant Margaret O. Bedford, and she is an infant.

This court held, in *Watson* v. *Henderson*, 98 Ark. 63, that courts of equity have no jurisdiction to order the sale of a minor's lands for reinvestment, the exclusive jurisdiction over the estates of minors being vested by the Constitution in probate courts.

The fact, however, that one of the class of contingent remaindermen is an infant does not deprive the chancery court of jurisdiction, if jurisdiction is otherwise conferred. The fact that the probate court has exclusive jurisdiction over the estates of infants does not deprive the chancery courts of jurisdiction to sell parts of their estates, for instance, for the purposes of partition, or for the foreclosure of liens, or in other cases where, upon other grounds, jurisdiction is conferred upon chancery courts. The question in this case is not whether the jurisdiction is exclusively vested in some other court, but whether there is any authority to sell lands for reinvestment where there are different interests or estates, including contingent remainders. In many States there are statutes similar to the one in Kentucky referred to above, and we find numerous decisions in those States bearing upon the construction of such statutes. But, as before stated, we have no statute to guide us in this State, and there are few decisions to be found in States where there is no statute on the subject.

The case of *Gavin* v. *Curtin*, 171 Ill. 640, is directly in point. There the will of the testator devised certain property to his daughter for life, with remainder in fee to the children of the daughter surviving at the time of the latter's death and to certain of the testator's sons in the event that no children of the daughter survived. Suit was instituted in a court of equity, similar to this action, alleging the necessity for a sale for reinvestment in order to preserve the rights of all the parties in interest, and the court said:

"It remains to be determined whether a court of equity may assert and exercise the necessary jurisdiction and power. If not, it would seem we have an instance of the existence of a legal right which can not be protected and maintained because of a lack of an appropriate tribunal having adequate judicial power to render the necessary relief. * * * The right possessed by the defendant in error in this case is one which belongs to the purview of municipal law and comes within the scope of juridical action, but the power of the courts of law, or their modes of procedure, are inadequate to furnish a complete remedy. It may be that an instance can not be cited where a court of equity has been called upon to take jurisdiction and render relief in a case in all its aspects precisely the same as the case at bar, but that does not furnish a sufficient reason for declaring the jurisdiction does not exist."

The relief prayed for was granted in all the cases, including the ones based upon statutes authorizing the sale of contingent interests for investment. It has been held that, where there is created a class of contingent remaindermen, some not in being at the time, the suit may be maintained, and those in being sufficiently represent the whole class. *Ridley* v. *Halliday*, 106 Tenn. 607, 61 S. W. 1025; *Faulkner* v. *Davis*, (Va.) 18 Grattan 651; *Gavin* v. *Curtin*, *supra*; *Kent* v. *Church of St. Michael*, 32 N. E. 704, 136 N. Y. 10.

This is treated as a doctrine of necessity, for otherwise the jurisdiction of the court would be entirely defeated, because of the fact that there might arise other parties not then in being. The theory upon which the rule rests is, as stated by the Illinois court, that "the possible persons not *in esse* are therefore represented by the parties before the court, and, if

they ever come into being, will be bound and concluded by the decree."

In the recent case of *Watson* v. *Wolff-Goldman Realty Co.*, 95 Ark. 18, 128 S. W. 581, we announced a doctrine which is not without considerable force in its application to this case. In that case there was a life estate with contingent remainder over, and one of the questions involved was, whether the contingent remainderman had a remedy to prevent waste and to recover for waste already committed. The court laid down the rule that there could be no recovery by the remainderman at law, and, *a fortiori*, no remedy to recover damages for waste already committed; but that a different rule prevailed in equity. The court said:

"It is well settled that the rights of a remainderman, whether vested or contingent, are more extensive in equity than at law; and it is equally well settled that he may obtain relief in equity by injunction to prevent the life tenant of his grantee from committing waste. * * * The most serious question in the case is whether a contingent remainderman may seek relief in equity for waste already committed. The courts of this country have held that a contingent remainderman can not maintain an action at law to recover damages for waste already committed. For a collection of the principal cases on the subject, see 30 Am. & Eng. Enc. Law (2 ed.) p. 1. The reason a contingent remainderman has no standing in a court of law is that it can not be known in advance of the happening of the contingency whether he would suffer damage or loss by the waste; and, if the estate never became vested in him, he would be paid for that which he had not lost. On the other hand, it is a rule of universal application that a contingent remainderman may obtain relief in equity by injunction to prevent waste, and this remedy is given him on the theory that he is entitled to prevent the loss or destruction of that which may become his at the termination of the life estate. * * * Two of the cardinal principles of chancery jurisprudence are, that equity will not suffer a wrong to be without a remedy, and equity looks to the substance rather than the form. * * * For these reasons it seems to us that the plaintiffs are entitled to equitable relief. They should not be entitled to it now by way of indemnity; but we are of the

opinion that it is in accord with the principles of equity for the chancellor in cases like this to take an account of the amount of the damage suffered and impound the same and invest the proceeds for the benefit of the one to whom the estate tail would first pass according to the course of the common law by virtue of the deed in question, in which interest the plaintiffs have an expectancy."

We are of the opinion that the doctrine thus announced is correct, and that the chancery court had jurisdiction to order sale of the property for reinvestment.

It is the duty of the chancery court, not only to safeguard the sale itself, but to follow up the reinvestment of the proceeds so as to see to it that the will of the original testator is carried out. This seems to have been done by the court in the present instance.

Another question arises as to the power of the court and the propriety of its action in approving a private sale, instead of ordering a sale to be publicly made by a commissioner. There is no statute expressly requiring chancery sales to be made publicly. It seems, however, to be the policy here for judicial sales to be made at public outcry, and that is manifested by all the statutes which authorize and attempt to regulate involuntary sales. This does not, however, exclude the power of the chancery court to order a private sale where the same does not fall within the terms of any statute, and we are of the opinion that such power exists. *Cox* v. *Price*, 22 S. E. 512, 2 Va. Dec. 170; *Williamson* v. *Berry*, 8 Howard (U. S.) 495.

The jurisdiction of the chancery court to order the sale does not arise from any statute on that subject, and is therefore not restricted by any of the statutes regulating other judicial sales.

Private sales under judicial decrees are not to be encouraged, and the courts should proceed very cautiously in taking that course. In the present instance, however, as we conclude that the chancery court is not entirely without power and jurisdiction to order the sale made in that manner, no error was committed, for the court seems to have inquired carefully into the propriety of approving the sale already negotiated by the adult parties in interest. The evidence

taken in the case shows conclusively that the sale negotiated is a highly advantageous one, and the court was warranted in concluding that the terms were better than might be secured at a public sale. Therefore, we do not find that any error was committed in that respect, and the decree as a whole will be affirmed.

SMITH, J., dissents as to the power of the court to order or approve a private sale.

STUBBLEFIELD v. STUBBLEFIELD.

Opinion delivered December 2, 1912.

1. GUARDIAN AND WARD—EXCEPTIONS TO SETTLEMENT—TRIAL BY JURY.—A trial by a jury of exceptions to a guardian's settlement in the probate court is not contemplated by law. (Page 595.)
2. SAME—FINAL SETTLEMENT—CONCLUSIVENESS OF PRIOR SETTLEMENT.—The court, on a final settlement of a guardian's account, should take as basis of settlement the last prior settlement made by him unless an affirmative showing is made that at the time of its approval there was property in the guardian's hands not included in such settlement. (Page 597.)
3. SAME—SETTLEMENT—INTEREST.—Where a guardian's final settlement did not show how much of the balance was represented by notes, and all the notes offered in evidence bore interest at the rate of 10 per cent per annum, interest will be charged at the rate of 10 per cent per annum. (Page 597.)
4. SAME—SETTLEMENT—CREDITS.—Where, in proceedings for a final settlement of a guardian's accounts, the parties treated certain notes as worth their face value in money, the court, on the notes being surrendered by the administratrix of the deceased guardian, must give credit for the balance due on the face of the notes. (Page 597.)

Appeal from Randolph Circuit Court; *J. W. Meeks*, Judge; reversed.

Witt & Schoonover, for appellant.

T. W. Campbell, for appellee.

SMITH, J. This action originated in the Randolph County Probate Court, and involved the correctness of a final settlement made by the administratrix of a deceased guardian. E. H. Stubblefield in his lifetime was guardian of certain

minors, who are referred to throughout the record of this case as the "Bryan heirs." The last settlement made by him was filed August 15, 1906, and showed a balance due his wards of $482.71. This settlement was duly approved by the probate court, although it does not appear of what this balance consisted, but in all probability it consisted to a large extent, if not entirely, of notes taken by him for various loans of money belonging to his wards. The said E. H. Stubblefield died July 17, 1909, without having made any further settlement of his guardianship, although he continued to act in that capacity, collecting old loans and making new ones, and otherwise managing the estate in his charge. Upon his death his wife filed what purported to be a final settlement of his guardianship, showing various debits and credits and a balance due of $213.86.

After the death of E. H. Stubblefield, letters of guardianship on the estate of said minors were granted to one J. D. Stubblefield, and he filed exceptions to the settlement of the administratrix, alleging that at the death of E. H. Stubblefield he had in his hands certain promissory notes belonging to his wards with which he was not charged in his settlement, and that, after all proper credits had been given, there still remained a balance due of $642.69. He also excepted to the allowance of the credits asked by the administratrix, which included certain sums of money alleged to have been paid the minors and himself as their guardian together with certain attorney's fees, taxes, and court costs and compensation in the sum of $50. It was contended in the exceptions that the compensation asked was excessive, and it was prayed that only such of the other credits be allowed as were covered by vouchers that might be produced.

The case reached the circuit court on appeal, where the present guardian demanded a trial of his exceptions before a jury, and this demand was granted, over the objections and exceptions of the administratrix, and much of the confusion of the record in this case flows from the acquiescence in this demand. While we do not reverse this case because of the trial court's action in awarding a jury, we do take this occasion to again disapprove the practice of submitting the decision of exceptions to settlements in the probate court to the verdict

of a jury. Judge EAKIN said, in the case of *Crow* v, *Reed*, 38 Ark. 485: "A trial of exceptions by a jury in the probate court is not contemplated by law. The function of the county and probate courts in such matters is rather that of an auditor, clothed with judicial power or that of a master stating an account. It is not usually such matters as juries can perform. Any circuit court has the power, under the Code practice, to order any special issue or issues to be tried by a jury which before the Code might have been so tried. But that has no application to the probate courts. It would not do to have exceptions to accounts burdened with the cost of jury trials. The judges must take the responsibility of determining the facts as well as the law."

Upon the trial the jury made no finding as to the credits asked for, except that of compensation which was allowed in the full amount claimed, and neither the briefs of counsel nor the transcript itself shows what became of the other credits, and we may only conjecture whether the jury treated them as unexcepted to and therefore unnecessary to be considered by them; or whether, on the other hand, they regarded the credits as being without proofs to support them and were for that reason not considered at all. There was both a general and a special verdict in the case, which apparently are in conflict; or at least their effect is not clear to us, and in the preparation of the judgment there may have been information or explanation before the court, and which we do not have, but the court entered up a judgment which appears to us to be an improper one.

At the trial, proof was offered as to all the notes shown to have been in the hands of the guardian and his administratrix, notwithstanding two of the notes were shown to have been dated prior to the guardian's settlement, and there was evidence in regard to his possession of three other notes, the dates of the execution and payment of which are not shown. The good faith and fair dealing of this guardian is not questioned by the appellee, but, on the contrary, a compliment, no doubt well deserved, is paid his fidelity and diligence, but appellee says that his settlement did not include all the notes in his hands. This settlement appears to be a common account against all of his wards, but no point is made here of

that fact, and these funds will no doubt be properly distributed when this guardianship is finally closed.

Proof offered by the appellee tended to show, and did in fact show, that, first and last, there were in the hands of E. H. Stubblefield, and afterwards in the hands of his administratrix, notes for a sum considerably in excess of the amount for which the guardian and his administratrix charged themselves in the settlement, but it is equally as certain that this resulted in part from relending the same money. And, as to at least one of these notes, the proof on the part of appellee showed that the money loaned belonged in part to the guardian individually and to his wards, and some of the notes which were taken to himself individually were evidently for money belonging to his wards. In other words, this appears to have been an estate administered by an honest man, who had only limited knowledge in keeping accounts.

This case will be reversed and remanded with directions to the court below to state this account without a jury, and in doing so the court will take, as a basis for settlement, the sum shown to have been due in the guardian's settlement of August 15, 1906, unless an affirmative showing is made that at that time there was either money or notes or other property in his hands not included in that settlement. Interest must be charged at the rate of 10 per cent. per annum, because the settlement does not show how much of the balance is money nor how much is represented by notes, and all the notes offered in evidence appear to have borne interest at the rate of 10 per cent. per annum. After charging interest at this rate, the court will determine what part of the credits asked should be allowed, and the balance will be the sum for which judgment will be rendered.

It appears that, under the directions of the court below, the administratrix surrendered to the clerk of the county court the notes remaining in her hands, and during the progress of the litigation one of the notes matured and was paid to the clerk. The parties treated the notes in question as being worth their face value in money, as approved personal indorsements appear to have been exacted in each instance, and the court will allow credit for the full balance due upon

the face of the notes surrendered in obedience to its order, and the administratrix will have credit therefor.

REEVES v. MOORE.

Opinion delivered December 9, 1912.

1. BOUNDARIES—PAROL AGREEMENT.—Where there is doubt, dispute or uncertainty as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive between them, although the possession is not for the full statutory period. (Page 605.)
2. WATERS AND WATER RIGHTS—ACCRETIONS—APPORTIONMENT.—Accretions to several sections of land should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line on the particular section bore to the whole of the old shore line, and then drawing lines from the points of division, thus made in the outer boundary line, to the points at which the old shore line is intersected by the boundaries separating the different sections. (Page 606.)
3. APPEAL AND ERROR.—HARMLESS ERROR.—One can not complain of error in his favor. (Page 607.)

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

Jacob Fink, P. D. McCulloch, W. W. Hughes, and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

1. A conventional boundary, acquiesced in for many years, is binding on the parties. 71 Ark. 248; 75 *Id.* 395; 96 *Id.* 168; 96 Ark. 168.

2. Moore is estopped by his conduct to deny his acquiescence. 64 Ark. 628; 75 *Id.* 400; 91 *Id.* 148.

P. R. Andrews and *H. F. Roleson*, for appellee.

1. A guilty party can not raise the question of fraud or misrepresentation in a court of equity. 37 L. R. A. 593; 4 Houst. (Del.) 119; 54 Cal. 189; 107 Ill. 302; 69 Tex. 509; 51 Minn. 300; 21 L. J. Chy. (N. S.) 563; 46 N. W. 540, 18 Minn. 470; 55 Ark. 299; 76 Atl. 331; 122 N. W. 1044; 107 *Id.* 478;

2. Negligence or laches does not estop where the signature to a contract was obtained by trickery or fraud. 100

Pac. 117; 95 *Id.* 490; 89 *Id.* 325; 47 Ark. 335; 42 N. E. 1128. Asserting a belief is the assertion of a *fact*; and, if done with a fraudulent intent, it is fraudulent. 18 Am. St. 456; 55 *Id.* 824; 12 *Id.* 206; 34 Wis. 52. Nondisclosure of facts, where it is the duty of a party to speak, is a ground of avoidance of a contract. 37 Am. Dec. 725; 47 *Id.* 447; 67 *Id.* 195.

3. A person is entitled to relief from a fraud based on a positive false representation intended to be relied upon and deceive. 14 A. & E. Enc. 122; 5 Am. Dec. 167; 22 Am. St. 407; 47 Ark. 165, 335.

4. There is no estoppel. 56 Ark. 360; 71 Ark. 614; 75 *Id.* 72; 82 *Id.* 226.

5. To entitle an owner to accretions, there must be a natural and actual continuity of accretion to his land. 145 S. W. 840; 37 Cent. Dig., § § 266-279; 127 N. Y. S. 949.

SMITH, J. Appellant, who was the plaintiff below, filed his complaint in the chancery court of Lee County on September 12, 1907, and alleged that on April 4, 1899, he and the defendant, John P. Moore, entered into a contract whereby, for the consideration of $600, the said Moore sold and conveyed to plaintiff the privilege of cutting and removing from his land at Walnut Bend, Arkansas, the ash, cypress, cottonwood, oak, walnut, and sycamore timber on certain described lands and the accretions thereto; the lands being described as follows: the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 6; sections 7, 8, and 17 and accretions thereto; and section 9; and the east one-half of southwest quarter of section 9, all in township 2, range 6.

The contract further provided that this privilege and sale by agreement was to continue for the term of five years, but the right to cut and remove the timber was to cease at the end of five years. That later for the additional consideration of $100 the contract was amended to include the elm trees. The amendment was dated December 27, 1899.

Plaintiff further alleged that, being unable to remove the timber within the prescribed time, he entered into another contract with the said Moore, under date of June 8, 1901, whereby, for an additional consideration of $250, be bought the privilege of cutting and removing from the lands described

in the first contract, above mentioned, all the young sapling cottonwood trees, and, in addition, there was given ten years' time in which to cut and remove the young cottonwood saplings and the other contract was extended to expire ten years from the said 8th day of June, 1911. That the contracts were recorded, although they were never acknowledged. That in making the contracts Moore represented that the accretions embraced a certain tract of land, which, subsequently, was adjudged to belong to one Dan Martin, in a suit for its possession, determined in the Lee Circuit Court, and also the accretions to section 20, and the accretions south of sections 21 and 22 to the river. That, since selling said timber to the plaintiff, the said Moore has procured a deed to the lands last above described from one Dan Martin, and is now attempting to set up his newly-acquired title against his timber deed to the plaintiff; that all of the title which Moore had acquired by his deed from Martin inures to the plaintiff's benefit.

The complaint further alleged that the said Moore had entered into a fraudulent conspiracy with his son and co-defendant, Frierson Moore, whereby, for a fictitious consideration of $40,000, the said Moore had conveyed all of the land in controversy and had caused his deed therefor to be recorded.

Plaintiff prayed that defendants be enjoined from conveying or incumbering plaintiff's timber rights, and that the deed to Frierson Moore be set aside as fraudulent, and that the defendant, John P. Moore, be required to give plaintiff a deed properly acknowledged, to the end that it might be recorded.

On September 18, 1907, plaintiff amended his complaint, alleging that at the time of the execution of the deed to him, set up in the original complaint, Moore was claiming to own the large body of land contiguous to the lands specifically described, as accretions thereto, and the plaintiff purchased in reliance upon the representations of said Moore; that he owned said lands and was selling the timber thereon; and that, by reason of said representations and his reliance upon them, the title acquired by the said Moore in his deed from Martin passed to the plaintiff; that defendant's said purchase inures to plaintiff's benefit; and he prays that he also be decreed to

have the right to cut and remove the timber from the lands conveyed by the said Martin to defendant.

Defendant, John P. Moore, answered, denying any understanding as to the extent of the accretions referred to in the contract or that any part of sections 20, 21, and 22 was included in the agreement; that all the lands in said section were acquired by him subsequent to his agreement with plaintiff; and that he made no representations to the plaintiff that anything in sections 20 or 21 or the accretions thereto was intended to pass by said deeds. And for further answer he said that he conveyed to his son, Frierson Moore, for the actual consideration of $40,000; and that his son had no knowledge of the existence of the timber contract in plaintiff's favor. He further alleged that he was an old man; that the lands were not easily accessible from the city of Helena where he lived; and that he had not been on them for more than twenty years, and knew nothing of the character or value of the timber growing thereon, while the plaintiff was advised and represented to him that there was only a very small amount of timber thereon, and that it was small in size and poor in quality and of little value, and induced him to convey said timber for a trifling part of its actual value; and that like misrepresentations were made by the plaintiff to secure an extension of the time and an amendment to the contract to include timber not originally included. Defendant tendered back the money which he had received, and asked that his contract with plaintiff be cancelled.

Frierson Moore answered on the same date his father did, and denied any knowledge of plaintiff's rights, and alleged that he had paid $40,000 for the lands.

Plaintiff filed notice of *lis pendens* September 12, 1907.

The record is a voluminous one, but the evidence will be stated briefly. The plaintiff was a sawmill man of wide experience, and was successfully operating upon an extensive scale. The defendant, John P. Moore, was a large land owner and a man of large wealth, but much advanced in age. It appears that to the lands in sections 7, 8, 17, 20, 21 and 22 vast accretions had formed, as to the extent of which neither plaintiff nor defendant appears to have had any very accurate conception at the time of their trade.

It further appears that some years before the first conveyance from Moore to Reeves a negro man, named Dan Martin, occupied and cleared a tract of land which Mr. Moore claimed to own, and for the possession of which he brought suit April 7, 1900, but this suit was determined adversely to him at the fall term of Lee Circuit Court, 1901. Moore's contention before and at the trial was that the land occupied by Martin was accretion to his land, while the judgment of the court sustained Martin's contention that it was an independent island. It is altogether probable that Reeves had no definite idea of the vastness of his purchase, and it is entirely certain that Moore did not know just what he was selling. The consideration paid proves, in comparison with the value of the timber sold, to have been only nominal, and even that price was not paid in cash. Neither party appears to have been in any need of money, but Reeves executed his note for the entire consideration of $600. None of the witnesses placed the value of the timber at less than $15,000, and one witness claimed to have negotiated a sale at $100,000, which was not consummated because of the controversy about the title. However, to a large extent, this disparity between consideration and value is accounted for by the fact that accretions continued to be made and cottonwood was shown to be a timber of extremely rapid growth and especially so in its sapling stage, and it appears further that in recent years very valuable commercial uses are made of cottonwood timber that was formerly not merchantable, because of its size.

We are not impressed with the contention made by the plaintiff that the defendant made any particular representation as to the lands upon which the timber was conveyed and in reliance upon which plaintiff purchased. In fact, plaintiff's contention in this respect, and the securing of ten additional years in which to remove the timber after having had nearly two years for that purpose, are the only circumstances which appear to give color to Moore's contention that Reeves knew what he was buying and deceived defendant to his disadvantage.

The chancellor set aside the deed from J. P. Moore to his son, Frierson, and the evidence fully warranted that action. It would be tedious and unprofitable to set out the evidence which leads to that conclusion, but it is reasonably certain

that this deed was executed, after Moore had discovered how poor a bargain he had made, for the purpose of avoiding its consequence.

It appears that the trade between Moore and Reeves was the consummation of negotiations pending between Moore and the negro, Dan Martin; that Martin had offered to buy the timber on the accretions to Moore's "Diamond place," which are the lands described as being in sections 6, 7, 8, 17, and 9, there being no accretions, however to sections 6 and 9. That Martin had no money and wanted to buy the timber by the thousand, but Moore appears to have disliked Martin, and to have been distrustful of him, and refused to sell the timber, except for $600 in cash. Martin, after several unsuccessful attempts to raise the money from other parties, finally applied to Mr. Reeves to either advance him the money or to buy the timber and let him log it. Both Moore and Reeves testified that the trade which was closed by the first contract was the identical one which Martin had attempted to negotiate; Reeves's evidence being that he took Martin's statement absolutely, and that he had no information, except that obtained from him. But he does say that Mr. Moore, in pointing out the lands on his map, swept his hand across the map to the river, saying that he owned all the lands and accretions indicated by his gesture, and which would include all the lands, the timber on which is here sued for. We think this evidence is not sufficient to sustain the allegations of plaintiff's amended complaint that Moore made representations about the extent of his accretions, upon which plaintiff relied and acted, and which defendant can not therefore now be heard to question. We reach this conclusion because the deed does not describe all the accretions now claimed, because the extent of these accretions has been unknown and their ownership to some extent uncertain; and because Moore denies that he sold any except that described; and because he did not then own all this land, although he may have claimed a part of it; and for the further reason that the description of the lands now claimed by appellant included Dan Martin's own land, and he of course had not offered to buy the timber on his own land. Appellant says that at the time of the first conveyance Moore claimed to be the owner

of the land, and claimed it as an accretion to his "Diamond place." It does appear that he attempted to recover the land from Dan Martin on that theory. As has been stated, he was unsuccessful in his attempt to do so, and we think that the plaintiff is in no position to take advantage of that fact. Accordingly, we hold that Reeves is entitled to the timber on the land specifically described in his contract; but when that conclusion has been reached, the case is still one of difficulty.

It appears that one Judge T. J. Ashley and a Mr. Beard owned sections 20, 21, and 22 and the accretions thereto, all of which were sold to Mr. Moore, subsequent to the date of the last contract, and that these lands, with the "Diamond place," comprise all the accretions to the main shore. The deed from Martin to Moore conveyed, not only the land which had been adjudged to be an island in the litigation, but also the lands which may have been an accretion to this island.

Appellant insists, and the proof tends to show, that about 1870 a line was run by agreement between Mr. Moore and Judge Ashley, who were then the owners, repsectively, of sections 17 and 20 and the accretions thereto. But the evidence as to this line consists of a deposition of Judge Ashley, taken in the case of Moore against Martin and read here as his deposition by the consent of the parties, and it does not fully appear just what the extent and purpose of this line was, farther than to mark the point up to which each might clear land, but it is not expressly stated in the deposition that they were apportioning the accretion between themselves. But, on the contrary, he makes the following statement in regard to the line and its purpose:

"Q. Where is the line between your and Moore's land? A. Running from the northwest corner of the original fractional section 20 straight to the river. Q. How was that line established? A. About the year 1870, by Mr. Bailey, as the surveyor of Phillips County at that time. Q. Was there any kind of agreement between you and Mr. Moore? A. (This question was objected to and not answered). (And on cross examination it appears that he testified as follows): Q. Mr. Ashley, about the line between you and Moore, is it not a fact, that there was no agreement at all, except along that Armstead line where he built? Moore cleared up to it

on one side and you on the other? A. Yes, sir. Q. You cleared up to a certain line and you recognized the line and he recognized it, A; Yes, sir; that is it. There was no other agreement. He cleared up to this line, and I cleared up to this line."

The recent case of *Malone* v. *Mobbs*, 102 Ark. 542, held that where there is doubt, dispute, or uncertainty as to the true location of a boundary line, the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive between them, although the possession is not for the full statutory period. We adhere to this rule, but its application is not determinative of the question here considered. True, the the case quoted from was one where the accretions were apportioned, but in that case the accretions had entirely formed, and the law permitted and enforced a parol agreement to fix the boundary, because the very purpose of such agreement is to make definite and certain that which is uncertain and in dispute. Here there is no express showing that they were apportioning the accretions between themselves. And it affirmatively appears that at the time of the survey the accretions did not extend more than a half of a mile from their common corner, and a considerable part of this space was taken up by accretions, which were then in process of formation. In the deposition of Judge Ashley, before quoted from, he said:

"Q. When you came there in 1870, how far was the river from the line of these sections? A. About one-half of a mile. Q. How far is it down now? A. I expect probably a mile. Q. State what the character of the formation was? That is, how was it formed in the year 1870 till the time you left there? A. Formed by accretion. Q. In what way? A. By gradually making up the land."

At the present time there is land for more than a mile and a half from this common corner; but, if the line which Moore and Ashley agreed upon as a boundary was projected to the river, it would extend for a distance of a mile across land which was not in existence when the line was established, and there would be included the Dan Martin land and what may have been accretions to it. In other words, would include accretions which were probably made to an island. It appears

from the record in the suit against Martin that Moore sued for only 85 and 84-100 acres, but when Martin conveyed to Moore there was not only conveyed by its metes and bounds the land involved in that litigation, but also a large area of other lands which are the lands that Reeves said Moore represented he owned as accretions to his lands. But for Moore's purchase from Martin and from Ashley and Beard, there would be some question among them as to the apportionment of these accretions. It may have been that Moore bought from Martin only to acquire color of title to fortify himself in the future, in the defense of his possession, but, however this may be, there is too much uncertainty about the location and purpose of this conventional boundary to hold that it must be accepted as the boundary of the accretions for the benefit of one who knew nothing about it. The Mobbs case, above cited, is authority for holding that grantees may claim the benefit of the agreement of their grantors, and they need not have had knowledge of that agreement at the time of their purchase to claim the benefit; but we are distinguishing the facts of this case from the Mobbs case, and hold that Moore is not estopped from saying that Reeves should have only the accretions which were properly apportionable to the lands described in the conveyance to him.

It is necessary to determine how these accretions should be apportioned. The Mississippi River has entirely changed its course along the front of the lands under consideration; and to such an extent is this true that what was once the main river and the boundary between this State and Swearingen Island, which is in the State of Mississippi, has filled, until now in places it is only a chute, called "Old River," and the main river flows to the west of this island, placing it on the Arkansas side of the river. Appellant now insists that only the present shore of the Mississippi River should be taken into account and that the bank of Old River should not be measured in determining the present shore line, as was done by the master under the directions of the court in apportioning the accretions among the different sections of land. But we think that the court's directions to the master were proper, that is, that he should take, as the present shore line, the line running from the point where the accretions commenced to the point

where they ended, even though, in doing so, the present bank of the main stream was departed from when the measurements were made to extend along the bank of the Old River. To adopt the rule contended for by appellant would either leave some accretions unapportioned or would leave the accretions to section 7 in such a shape that the stream of Old River would divide its accretions into two disconnected parts. The rule adopted by the court below is in conformity with the rule announced in the case of *Malone* v. *Mobbs*, cited above, where the rule for apportioning accretions between coterminous proprietors is announced substantially as follows:

The accretions should be apportioned by giving to each section a proportion of the outer boundary line of the accretions in the ratio that the old shore line on the particular section bore to the whole of the old shore line, and then drawing lines from the points of division, thus made in the outer boundary line, to the points at which the old shore line is intersected by the boundaries separating the different sections.

In other words, each section should have a part of the outer boundary line in the same proportion to the whole of the outer boundary line that its proportion of the old shore line bore to the whole of the old shore line, with lines drawn from the respective dividing points on the old shore line.

In the case just quoted from, Judge HART, speaking for the court, said: "The rule just applied was the one generally recognized as the proper one to follow, unless there are such irregularities in the shore line as to make it inequitable, and this rule was there adopted as the one to be followed in this State, unless there are peculiar circumstances to modify it, as where the shore line happens to be elongated by deep indentations or sharp projections. The exception does not apply to the rule adopted by the court below.

It might be said that the above apportionment does not take into account the question of whether the land conveyed by Martin to Moore was accretion to the main land or to Martin's Island, but treats it all as if it were accretion to the main shore. But this is necessarily to the appellant's advantage, and appellee in his cross appeal makes no objection to this method.

Upon the whole case we are of the opinion that the decree of the chancellor is correct, and it is affirmed.

MOTLEY v. STATE.

Opinion delivered December 16, 1912.

1. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.—An instruction that the law of self-defense "begins in necessity and ends in necessity" was not objectionable as depriving the accused of the right to act in self-defense upon the appearance of danger to them where in several other instructions the jury were told that they had the right to act upon the appearance of danger to the extent of taking the life of deceased if they honestly believed, without fault or carelessness on their part in reaching such conclusion, that it was necessary for their defense. (Page 613.)
2. APPEAL AND ERROR—FAILURE TO BRING UP EVIDENCE—PRESUMPTION.—Where the trial court in a murder case admitted evidence of a statement by deceased as a dying declaration, and the record does not bring up all the testimony heard at the trial, it will be presumed that the proper foundation for the admission of the declaration was made before it was introduced. (Page 614.)
3. HOMICIDE—DYING DECLARATIONS—PROVINCE OF COURT AND JURY.—It was within the province of the court to determine the admissibility of dying declarations, and of the jury to weigh the circumstances under which they were made, and give them only the credit to which the evidence showed them entitled. (Page 614.)
4. TRIAL—IMPROPER ARGUMENT—PREJUDICE.—Where, in a murder case, the prosecuting attorney, in closing his argument, stated that Sam Prater, prior to making his dying declaration, signed an affidavit before a justice of the peace in which he swore that he had no knife at the time of the difficulty, and that both of the defendants cut him, and, upon objection being sustained, withdrew the remark and requested the jury not to consider it, the prejudice was removed. (Page 615.)

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

Walker & Walker, for appellants.

1. The evidence does not sustain the verdict. The appellants, under the evidence, acted clearly within their rights in justifiable self-defense.

2. Instruction 8 was erroneous. While it is admitted that the law of self-defense "begins in necessity and ends in

necessity," yet such necessity need not be actual, but may be apparent only.

3. The judgment should be reversed for the error of the court in permitting two witnesses to testify, without sufficient foundation being laid therefor, to alleged dying declarations of the deceased made on January 4, following the cutting on December 23.

Even if sufficient foundation had been laid, it was still error to permit testimony of the opinion of deceased that he was cut by both defendants. Dying declarations, to be admissible, must be of facts, not opinions. 1 Greenleaf on Evidence, § 159; Wharton, Crim. Ev., § 292; 39 Ark. 221. The general tendency is to a greater stringency, rather than to a relaxation, of the rule with reference to the admission of this character of testimony. 4 Enc. of Ev. 945, and cases cited in note; 146 U. S. 140; 99 Ala. 180; 105 Ga. 242; 31 Ind. 193; 7 Ia. 347; 97 Ky. 103; 75 Miss. 559; 80 Mo. 67; 35 S. C. 290; 9 Humph. 9.

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

1. The verdict of the jury is equivalent to saying that they did not believe from the evidence that the killing was done in necessary self-defense—and there is ample testimony to sustain that finding.

2. There is no merit in appellant's objection to instruction 8. The concluding words of the instruction, as well as the language of other instructions, conveyed clearly to the jury the idea that the danger need not be real but might be apparent.

3. There was no error in admitting in evidence the statements of the deceased a short time before dissolution. 88 Ark. 579.

KIRBY, J. Appellants were indicted for murder in the second degree for the killing of Sam Prater, in Madison County, Arkansas, on December 23, 1911, by stabbing him with a knife. Upon trial, they were convicted of voluntary manslaughter, and their punishment fixed at two years each in the penitentiary. From this judgment they appealed.

It is contended for reversal: First, that the evidence is not sufficient to support the verdict; second, that the court

erred in giving instruction No. 8; and, third, because of the admission in testimony of the dying declaration of the deceased; also, because of improper argument of the prosecuting attorney.

The testimony tends to show that Sam Prater, the deceased, was drinking and quarrelsome on the evening of the difficulty, and had already had a fight with one Willard Patrick, who was a brother-in-law of Charley Vanbrunt, one of the appellants. During this difficulty, Charley Vanbrunt ran to one of the parties, who was trying to stop that fight, and caught hold of him, and said, "I am a friend of Willard Patrick and will fight for him," and was holding his hand at the time as though he had a knife in it. The man of whom he took hold said he was a friend of both parties, and if Charley was going to do any cutting he would help him, and drew his knife. The combatants made friends, and Willard Patrick went home, after inviting Sam Prater, who declined the invitation, to go to supper with him.

The first difficulty occurred in front of Barron's store and after it ended Patrick and Prater both passed around to the rear end of the store. Charley Vanbrunt went around that way with Tom Motley, Patrick invited Prater to supper with him and he declined to go, saying, he would "see him in hell first." Tom Motley then said to Prater, "Come on if you want to fight. There isn't but one of us." Charley Vanbrunt was with him at the time. Prater was following him, and, after the remark, walked up to Charley and drew his hand back as if to strike, and Charley threw his left arm up to ward off the blow, and said, "I don't want to fight." Tom walked between Charley and Prater, and Prater struck at him. Tom stepped back a step or two, and Ed. Landreth walked between them, and caught the lick on his left arm, and told them to "cut out the rowing." Sam hit Tom Motley on the head with his fist, and Tom fell to some extent and lost his hat. Landreth told Prater "not to start anything," and, as he was striking at Tom, caught his wrist and knew he had no knife open at all at any time during the fighting, and Motley said, "You hold him." This witness said he took hold of Prater, and Motley walked back several steps, and he thought the fight was over and started on. He heard quick steps,

looked back, and saw Tom Motley run up to Prater and strike his back with the side of his hand just below the shoulder on the left side of the backbone, and as Tom pulled his hand away Prater turned, and "I saw his coat come open and his white shirt show." Tom had to go from three to five short steps to get to Prater to cut him. "I saw Prater make no motion, and later saw Charley Vanbrunt, Tom Motley and Sam Prater getting up and Charley and Tom said, 'Let's go; he's had enough.' I went to the house with Prater, and saw him stripped and helped nurse him until he died." He also said that Prater made some remark, and attempted to strike Charley Vanbrunt at the beginning of the fight, and Charley said he didn't want to fight, and he then went for Tom, and said something before striking him. He struck at Tom two or three times before striking him, and said to Tom, "Don't get your gun," and Tom said to him, "Don't get your knife." He said further that, after he stepped between the parties, Charley Vanbrunt said he didn't want to fight, and then dashed by him and began fighting Prater.

All the testimony shows that both the appellants made common cause in the fight against the deceased, and that after Tom Motley had broken the quart bottle over the head of deceased he and Charley Vanbrunt were scuffling on the ground with him, and he said to Charley, "Let's go." Charley himself testified that he said, after stabbing Prater in the breast while on the ground in the scuffle, that he reached around under his arm and stabbed him in the back once or twice, and said to Tom, "Let's go; he's had enough." Appellants went off together.

Their version of the affair, as related by themselves and their witnesses, is that Sam Prater was drinking and quarrelsome, and had slapped the face of George Dotson out in front of the store, when Willard Patrick came up and said, "You ought not to do the boy that way." This resulted in the first fight. After it was over, the parties went around towards the rear of the store, and Prater assaulted and began striking Vanbrunt, and also striking at Tom Motley. Vanbrunt said he stabbed the deceased in the breast and also in the back under the shoulder while they were down on the ground scuffling; that he didn't begin to use his knife until after deceased had

struck him two or three times with his open knife in his hand. Deceased was striking over-handed with the knife blade up and out and striking him with the bottom of his fist, and that he acted in self-defense in stabbing the deceased, and that he was not cut by Tom Motley at all. Motley testified that he never struck deceased with his knife; struck him with his fist at first and finally broke the bottle over his head during the fight. That it was a quart bottle and had very little alcohol in it. Two witnesses testified that Tom Motley approached the deceased after he had been struck by him, and, after the witness thought the difficulty was over, ran up quickly behind him and struck him in the back with the side of his hand; one of them said he saw the knife in his hand when the lick was struck, and the other that he saw deceased's coat come open and his shirt show after he was struck. Prater was stabbed both in the breast and in the back, and died on January 6, after the fight, the physicians saying the wounds in the back caused his death. The dying declaration was admitted in which Prater stated that he was stabbed by both the appellants, by Charley Vanbrunt in the breast and Tom Motley in the back; that he never at any time during the fight had a knife.

Even if it be conceded that the parties voluntarily engaged in the fight, and that the deceased was the aggressor, still the jury was warranted in finding that appellants had no right to resist the assault made upon them by cutting and stabbing their assailant with knives, as the evidence tends to show they both did. They made common cause against the deceased, Tom Motley being the step-brother of Charley Vanbrunt, who was the brother-in-law of Willard Patrick, who had already engaged in a fight with deceased at the time at which Charley stated that he was a friend of Patrick and would fight for him and had his knife open in his hand. He used the knife in the last fight, and the jury could have found from the testimony of one of the witnesses that after the deceased struck at him and he threw up his left arm to ward off the blow and said he didn't want to fight, and Landreth stepped in between them and told the deceased "to cut it out and not to have any difficulty," Charley Vanbrunt then passed around the peacemaker and struck and grappled with

the deceased, and in the struggle stabbed him in the breast several times and reached around under him and stabbed him in the back under the shoulder as they were raising up from the ground. He says he did this, because deceased was striking at him with a knife open in his hand and in order to protect himself. The fact remains, however, that neither of the appellants was struck or cut with a knife, their clothing showing no indication whatever of any knife having been used against them in the difficulty, and the jury could well have found that the killing was unnecessary and not justifiable in self-defense within the meaning of the law, and the testimony is sufficient to warrant their verdict of voluntary manslaughter.

2. Instruction No. 8, objected to, reads:

"I charge you that the law of self-defense begins in necessity and ends in necessity, and, before the defendants can justify themselves in taking the life of Sam Prater, the defendants must have employed all the reasonable means in their power, consistent with their safety, to have avoided danger, real or apparent, to themselves, and avert the necessity of taking the life of the deceased."

It is contended that this instruction was erroneous and misleading, and deprived appellants of their right to act in their defense upon the danger as it appeared to them at the time of the difficulty; that the jury could have understood from the statement, "The law of self-defense begins in necessity and ends in necessity," that they were not justified in acting in self-defense upon the appearance of danger to them, but only if there was danger and the necessity existed for such action.

We do not think the instruction open to this objection, since it tells the jury they should have employed all reasonable means in their power, consistent with their safety, "to have avoided danger, real or apparent, to themselves." In five other instructions given, the court told the jury that they had the right to act upon the appearance of danger to the extent of taking the life of deceased if they honestly believed, without fault or carelessness on their part in reaching such conclusion, that it was necessary to do so in their defense. Instruction No. 15 was more favorable to appellants than the

law warrants. No error was committed in giving said instruction number 8, as the other instructions not in conflict therewith clearly and correctly defined the appearance of danger upon which appellant would have been justified in acting in self-defense, although it is not approved, and might well have been differently and more happily phrased.

It is next urged that no sufficient foundation was laid for the introduction of the alleged dying declaration, which was also objected to as the expression of an opinion of the deceased, rather than a statement of fact. In appellant's abstract of the testimony of Ed Landreth, who testified to the dying declaration, it is stated "that at the time Prater made these statements Prater knew he was going to die. He was physically weak, but his mind was strong." The bill of exceptions recites: "Before this witness, (Ed Landreth) testified, the showing was made before the court, among other things, evidence showed Prater said he knew he was going to die, and for us to bring his children, that he wanted to see them again," that he was physically weak, but his mind was strong; and the judge's certificate to the bill of exceptions states that it is "substantially true and correct, and finds the same to contain, so far as stated, a true and correct account of the proceedings had and done during the progress of the trial."

It was within the province of the court to hear the circumstances under which the declarations were made and to determine whether they were admissible in evidence, and it was the jury's province to weigh all the circumstances under which they were made and give to them only such credit upon the whole evidence as they thought they deserved and were entitled to. Upon this record not showing that all the testimony heard at the trial is included in it and the statement of the bill of exceptions that before the witness testified as to the dying declaration a showing was made before the court that Prater knew at the time he made the declaration he was going to die, it must be conclusively presumed that the proper foundation for the admission of the declaration was made before it was introduced. Neither is there any merit in the contention that it was only the expression of an opinion, and not a statement of facts that could have been known to the deceased. Questions of like kind were raised in a recent

case and decided adversely to appellant's contention. *Rhea* v. *State*, 104 Ark. 162.

It is next contended that the court erred in refusing to grant appellants a new trial, because of the improper argument of the prosecuting attorney.

The prosecuting attorney, in closing his argument, stated that Sam Prater, prior to making his dying declaration, had signed an affidavit before a justice of the peace in which he swore he had no knife in his hand at the time of the difficulty and that both of the defendants cut him. This statement was objected to, and the court instructed the jury that it was an improper argument and not to consider the statement, and the prosecuting attorney thereupon said it was only his opinion, and, the court having ruled upon it, he didn't want them to consider anything he had said about the affidavit, and did not mention it further.

Such statement of the prosecuting attorney was unwarranted and improper, as the court told the jury, but his direction to them that it should not be considered in evidence, with the prosecuting attorney's statement that they should disregard it, and no further mention being made of the matter during the argument, had the effect to remove any prejudice that might otherwise have resulted from the making of such statement. *Skaggs* v. *State*, 88 Ark. 62.

Upon a careful review of the whole record, we find no prejudicial error committed, and the judgment is affirmed.

JACKS v. GREENHAW.

Opinion delivered December 16, 1912.

1. PARTNERSHIP—POWER OF PARTNER TO MORTGAGE PROPERTY.—A partner has authority to bind firm property by a chattel mortgage given to secure a firm debt, without the consent of the co-partner. (Page 619.)
2. SAME—POWER OF PARTNER TO ISSUE NEGOTIABLE PAPER.—As a rule, a firm is liable on the individual negotiable paper of one of its members, when it is shown that such paper was intended to bind the firm, and was given and accepted for a firm indebtedness. (Page 619.)

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

H. F. Roleson, for appellant.

1. Wells had no authority to enter into a partnership or subpartnership with Greenhaw without Jacks's consent, and create a liability for which Jacks would be in any manner responsible. He could not bring Greenhaw into the firm on a profit-sharing basis without Jacks's consent. Any claim Greenhaw had against Wells on account of such subpartnership would be confined to redress against Wells alone, and the latter had no right to mortgage the partnership property for an obligation so created. 22 Am. & Eng. Enc. of L. 163, note 4; 43 N. W. 461; 56 Mo. 558; 37 U. S. (12 Pet.) 221; 24 Miss. 170; 6 Pa. 492; Century Dig., Partnerships, § 238; 1 Lindley on Partnership, 55.

2. Jacks was not responsible for the personal defalcation of Wells as agent of the Water-Pierce Oil Company. 1 Lindley on Partnership, § 309.

F. N. Burke, S. H. Mann and *J. W. Morrow*, for appellee.

A firm is liable on the individual negotiable paper of one or more of its members, where such paper was intended to bind the firm, and was given and accepted for a firm indebtedness. 30 Cyc. 510, and cases cited. See also *Id.* 497; 33 Ark. 475.

SMITH, J. On May 25, 1912, George W. Greenhaw, the appellee, instituted a suit in the Lee Chancery Court. making J. C. Wells, doing business as the Jacks Transfer Company, and Dow Jacks defendants.

The complaint alleged that the defendant Wells had been engaged in business in the city of Marianna for several years under the name and style of the Jacks Transfer Company, and that on the 20th day of March, 1911, he had executed to the plaintiff, Greenhaw, his note for $2,006.45, payable on the 20th day of December, 1911; that several payments had been made, leaving a balance due of $1,698.45; that on the date of the execution of the note the defendant Wells conveyed to F. N. Burke, as trustee, for the purpose of securing the payment of said note, certain personal property, consisting of mules and wagons and what appears to have been the outfit with which the business of the Jacks Transfer Company was conducted.

Default was made in the payment of the note, and the

trustee undertook to take possession of the property and found it in the possession of the defendant Dow Jacks, who claimed to have been a partner with the said J. C. Wells at the time of the execution of the mortgage, and who refused to surrender the property to the plaintiff.

The defendant Dow Jacks filed a separate answer for himself and the Jacks Transfer Company, denying that J. C. Wells had been engaged in the business for the past number of years as the proprietor of the Jacks Transfer Company, but stated the truth to be that, for the past eight or nine years before the institution of the suit, the said Jacks had owned the transfer business, and that he had made an agreement with his codefendant, J. C. Wells, by which the said Wells was to actively manage the business for a salary of seventy-five dollars per month, with the understanding that he might become a partner when he paid off the partnership debts; that the note was not executed in the name of the partnership, but in the individual name of Wells, and the deed of trust was executed by him individually to secure this note, and the answer further denied that the money was borrowed for or used in the business of the transfer company, but states that it was for the use of Wells personally, and that the said Jacks had no knowledge of the deed of trust until in May, 1912, which was fourteen months after its execution.

It appears that the transfer company was a going concern when Wells was employed, making some money above expenses, but it also appears that its debts about equalled the value of its assets.

Wells filed no answer, but became the principal witness in the case, while Jacks did not testify at all. It appears that Jacks desired to start Wells, who was a brother-in-law, in the business, and that he placed him in charge of the transfer business. It appears that thereafter for more than six years Jacks gave no attention to the business and exercised no control whatever over it, although he lived within a mile and a half of Marianna. Wells's control appears to have been absolute, and he conducted the business as if it were purely a private enterprise. The proof shows that he sold the property of the partnership at will, and bought other property when he pleased, and that he borrowed money and executed notes

in the name of the Jacks Transfer Company or in his own name, without even consulting with or reporting to his copartner.

It appears that among the number from whom Wells borrowed money was the plaintiff Greenhaw, and that he had an arrangement with him by which he secured $800 to be used in the wood and coal business, which Wells was conducting as a branch of his transfer business. This arrangement was entered into with the understanding that Wells would share with Greenhaw in the division of the profits of that branch of the business, but no profits were earned. It appears, too, that, to furnish business for the transfer company, Wells became the agent of the Water-Pierce Oil Company in handling oil, but this was not in the name of the transfer company for the reason, as explained by Wells, the oil company would not give an agency to a company name. But it appears that the transfer company derived all the benefits that resulted from the wood and coal business and the oil business. The accounts were kept as accounts of the Jacks Transfer Company, and the collections made by it and applied to its use. Persons who had extensive transactions with this transfer company testified that they never knew it was not the sole business of Wells. Greenhaw so testified. He was taken into a partnership with Wells in a business which was a subsidiary enterprise of the main business, and he testified that he retired from this connection without having ever known that Jacks was interested in any way in the business. No one contradicts this statement. Wells testified that Jacks knew what he was doing, and that he had authority for his acts, yet he does not appear to have disclosed to Greenhaw that the transfer business was not his private property. It appears that of this money, secured by the deed of trust which this proceeding was brought to foreclose, $438 was used to pay the oil company for oil furnished Wells, and $800 was for the money advanced by Greenhaw to operate the wood and coal business, and $262 was used in paying a balance due on the purchase price of some mules bought by the transfer company. Wells says that the remaining $500 was borrowed to buy wood and coal, and was "used for partnership business." Greenhaw had never received a cent of profit, and was given a note only for the exact

amount of money he had advanced Wells for the purposes here stated, and all of this was done, as he testifies without contradiction, in utter ignorance of the fact that Wells did not have the unquestioned right to dispose of and manage the Jacks Transfer Company property as he had done. It appears further that when the note and deed of trust in suit were executed Wells took over for the benefit of the transfer company all of the assets that had belonged to Greenhaw and Wells in the wood and coal business, including outstanding accounts. It must be conceded that Wells was operating without due regard to the rights of Jacks, but those questions may be settled in a suit for accounting between themselves. After executing the deed of trust and after taking over such assets as Greenhaw and Wells owned at that time, Wells continued to operate the business until some time after the maturity of this note.

The question here is, whose debt was evidenced by this note? and we conclude that the chancellor was warranted in finding that the debt which the note evidenced was that of Jacks Transfer Company, and the plaintiff has the right to have his deed of trust foreclosed. The power of one partner to bind firm property by a chattel mortgage given to secure a firm debt, without the consent of the copartner, is generally recognized. 30 Cyc. 497; *Gates* v. *Bennett*, 33 Ark. 475.

And the application of the rule to the facts of this case is not defeated by the fact that the note secured by the deed of trust was signed in the individual name of Wells, for "as a rule the firm is liable on the individual negotiable paper of one or more of its members, when it is shown that such paper was intended to bind the firm, and was given and accepted for a firm indebtedness." 30 Cyc. 510, and cases cited.

Affirmed.

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

Opinion delivered December 16, 1912.

1. CARRIERS—DUTY TOWARD PASSENGERS.—When a conductor in charge of a train wrongfully arrests a passenger and ejects him from the train,

in pursuance of the act of 1909, conferring upon him that power, the railway company must bear the blame and pay the damages. (Page 623.)

2. SAME—ARREST OF PASSENGER—LIABILITY.—If a conductor in good faith arrests a passenger, having reasonable cause to believe that he is drunk, the railway company is not liable, even though it appears afterward that in fact the passenger was not drunk. (Page 623.)

3. SAME—DRUNKEN PERSON—DEFINITION.—It was error to instruct the jury that "for one to be in a drunken and intoxicated condition as defined by the law, he must be under the influence of intoxicating liquors to such an extent as to have lost the normal control of his bodily and mental faculties and to evince a disposition of violence, quarrelsomeness and bestiality." (Page 624.)

4. SAME—ARREST OF PASSENGER.—A railway company is not liable for the wrongful acts of its conductor in swearing out a warrant of arrest against a passenger on the next day after he was ejected from its train. (Page 625.)

5. FALSE IMPRISONMENT—JUSTIFICATION—BURDEN OF PROOF.—In an action to recover damages for false imprisonment where the arrest is without a warrant, if the imprisonment is proved or admitted, the burden of justification is on the defendant. (Page 625.)

Appeal from Jackson Circuit Court; *R. E. Jeffery*, Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit against appellant to recover damages alleged to have been sustained by him in being wrongfully arrested and being ejected from one of appellant's trains while he was a passenger thereon.

Hal. C. Waters, the appellee, testified as follows: "I am the plaintiff in this action. On the 30th day of November, 1910, I left Pine Bluff, Arkansas, for Corning, Arkansas, over appellant's line of railroad. I reached Little Rock about 11:30 o'clock A. M. and left there for Corning about 4:30 that afternoon. The auditor took up my ticket, and it was never returned to me. I was put off of the train at Newport, Arkansas, by the conductor, whose name was Robinson. I was asleep in the chair car about 8 o'clock P. M. when the conductor came and caught me by the coat lapel and began jerking and shaking me. I woke up, and Mr. Wilkinson, who was with me, also woke up. The conductor told us that we were under arrest. I asked him if he was not mistaken, and he replied that he knew what he was doing. He told us to get off

of the train, that he was going to turn us over to the officer, and that we were arrested for doping and robbing two men in the smoker. The men whom the conductor claimed we had doped and robbed were also taken off of the train. We were held while they were being taken off and then delivered to the officers. After the other two men were taken off of the train, the conductor came back and tried to get us on the train and asked us to go on to Corning. We refused to do this, telling him that he took us off without any cause, and that, after he had gotten the two drunken men off and found that they were not robbed, he wanted us to go on, and we would not do it. We then went on to the jail with the town marshal where we remained about fifteen minutes, and then Mr. Wilkinson deposited a cash bond for our appearance the next morning. We went from there to the hotel, and there we remained during the night. I was not drunk, and did not drink any whiskey on the train."

Oscar Wilkinson testified to substantially the same state of facts as those testified to by appellee. Other witnesses who were on the train at the time appellee was arrested testified that he was not drunk, and did not drink any whiskey on the train.

The train auditor, the conductor, the brakeman and the train porter all testified that appellee was drunk on the train, and was so boisterous in his conduct that he disturbed the other passengers. They testified that all four of the men who were arrested and put off of the train were drunk.

Other witnesses who saw appellee and his companion on the depot platform at Newport after they were put off testified that they were drunk. The city marshal said that they were drunk, and that he carried them to the city jail because they were drunk and disorderly on the train. On the next day the deputy prosecuting attorney for Jackson County wrote out an affidavit for the arrest of appellee, and it was signed and sworn to by Robinson, the conductor on the train. Afterwards the case, by agreement of the deputy prosecuting attorney and appellee's counsel, was dismissed in the justice of the peace court from which the warrant of arrest was issued. Subsequently appellee was indicted for the offense of being

drunk on the train on the day in question, but the case had not proceeded to trial when the present case was heard.

The jury returned a verdict for appellee in the sum of fifty dollars, and the case is here on appeal.

E. B. Kinsworthy, S. D. Campbell and *R. E. Wiley,* for appellant.

1. Under the statute the conductor acted as a public officer, and appellant is not responsible for his acts as such. Acts 1909, p. 99; 95 Ark. 506; 88 Ark. 583, 587; 87 Ark. 524; 177 Fed. 189; 147 Ill. App. 20; 66 W. Va. 607, 616; 196 Mass. 353, 82 N. E. 10; 20 Atl. 188.

In the absence of testimony to show that the conductor was acting under the instructions of appellant, the presumption is that he acted pursuant to his duties as a public officer; and the burden was on appellee to prove that he was acting for the railway company when he committed the alleged wrong. 115 Mo. 596; 58 Ill. App. 279; 34 Am. & Eng. R. R. Cases 307.

2. The court erred in rulings and charge to the jury on the burden of proof. In an action for false imprisonment the gravamen of the case is the unlawfulness of the detention, which must be alleged and proved, and the burden on the whole case is on the plaintiff. 67 Am. St. Rep. 415; 103 Ala. 345, 49 Am. St. Rep. 32. Want of probable cause is a necessary allegation in an action for false imprisonment. 32 Ark. 605, 607. And it must be proved. 33 Ark. 316, 322; 32 Ark. 763, 772. The burden of proving want of probable cause is on the plaintiff also in an action for malicious prosecution. 96 Ark. 325.

3. The court erred in its instruction as to what constitutes drunkenness. Neither party requested a definition of drunkenness, and the definition given was wrong. It is not necessary that one go to the extent of showing violence, quarrelsomeness or bestiality in order to be guilty of drunkenness.

I. J. Mack, for appellee.

1. The act does not make the conductor a peace officer, but only allows him to act as one when it becomes necessary to make an arrest; and if in performing this duty he acts in

good faith, the company is not liable. If he does not act in good faith, the company is liable. 95 Ark. 506. From the testimony, facts and circumstances in evidence, it is clear that the conductor in making the arrest was not acting in good faith in the belief that appellee was drunk.

The company was under the duty to protect its passengers from wrongful assaults and illegal arrests. 133 S. W. (Ark.) 170; 17 Am. Rep. 504.

2. The burden of proof was rightfully placed on the appellant to show that the arrest was lawful. 56 Atl. 380; 45 S. E. 698; 66 Ill. App. 173; 67 N. E. 201; 8 Pac. 104; 54 Atl. 986; 53 N. E. 134; 81 S. W. 490; 20 Pac. 92; 12 Ark. 47; *Id.* 50.

3. The court's definition of drunkenness was not erroneous. 86 Ark. 364.

HART, J., (after stating the facts). In the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Hudson,* 95 Ark. 506, the court held:

"In a suit against a carrier for an arrest made by its conductor. an instruction that, though the conductor was the judge as to whether plaintiff was intoxicated when arrested, yet if he was mistaken the company would be liable, was erroneous, as it ignored the question whether the conductor acted in good faith."

It is now the contention of appellant that when a conductor arrests a passenger and ejects him from a train, in pursuance of the act of 1909 conferring upon him that power, he acts solely as a peace officer, and the railway company can not be held responsible for his acts.

We can not agree with counsel in their contention. It is the settled law that when a railway company puts a conductor in charge of its train, and he wrongfully ejects a passenger from the car, the railway company must bear the blame and pay the damages. This is so because it is the duty of the railway company to treat its passengers properly and to carry them safely. There is nothing in the act in question to indicate that it was the intention of the Legislature to diminish the responsibility of the common carrier or to render it less liable for failure to discharge its duties than before the passage of the act. The conductor is the person whom the railway

company puts in charge of its trains, and it was the evident intention of the Legislature to enable the company to discharge the duties it owed its passengers the more efficiently through its conductor by the enactment of the statute in question. It gave the conductor the protection as well as the authority and power of the State in keeping and enforcing the law. If the conductor makes an arrest under the statute with reasonable cause for belief and in good faith, the railway company is not liable, even though it appears afterwards that in fact the person arrested was not drunk. *Gillingham* v. *Ohio River Railroad Co.*, 29 Am. St. Rep. (W. Va.) 827; *King* v. *Illinois Central Railroad Co.*, 69 Miss. 245.

Error is next assigned because the court gave the following instruction:

"For one to be in a drunken and intoxicated condition as defined by the law, he must be under the influence of intoxicating liquors to such an extent as to have lost the normal control of his bodily and mental faculties, and to evince a disposition of violence, quarrelsomeness and bestiality."

In this contention we think counsel for appellant are correct. The latter part of the instruction was erroneous. A person might be drunk and still not evince a disposition of violence, quarrelsomeness and bestiality. There are various degrees of drunkenness. It is a matter of common knowledge that intoxication affects men in different ways. Some men become quarrelsome when they are drunk, while others become stupefied and inactive, and still others do not give any outward and visible signs except a pleasurable excitement. A man may be said to be drunk whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct, so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect.

In the case of *Midland Valley Railroad Company* v. *Hamilton*, 84 Ark. 81, the court said:

"Instructions given by the court undertaking to define soberness on the one hand and drunkenness on the other are criticised and assigned as error. It must be confessed that these instructions, to some extent, lacked accuracy, and were of little aid to the jury in determining from the evidence

whether the plaintiff was drunk or sober. In fact, it may well be doubted whether these terms are susceptible to any accurate definition for practical purposes. They sufficiently define themselves, and it would have been better to leave it to the jury, without attempt at definition, to determine what the condition of the plaintiff was in this respect."

The opinion of the court in this respect was approved in the case of *Brooke* v. *State*, 86 Ark. 364, and nothing said in the latter opinion was intended to be taken as a definition of drunkenness which could be given as a declaration of law in cases where that question was to be submitted to a jury.

In the case of *Little Rock Railway & Electric Company* v. *Dobbins*, 78 Ark. 553, the court said:

"A street railway company is liable for the wrongful acts of its conductor in ordering a policeman to arrest one of its passengers and remove him from the car in which he was riding; but not for such conductor's subsequent acts in prosecuting the passenger for a breach of the peace, such prosecution not being within the scope of the conductor's authority."

It follows that the appellant is not liable for the acts of its conductor in swearing out a warrant of arrest against appellee on the next day after he was ejected from the train. It was competent in the present case to show all that was said and done in the train pertaining to the arrest of appellee and all that was said and done on the depot platform at Newport after appellee was ejected. All that occurred after this time was not competent evidence. The undisputed evidence shows that the conductor and auditor of the train asked appellee while he was standing on the platform at Newport to get back on the train and that they would carry him on to Corning. The appellee refused to do this. The city marshal testified that he carried him on to the jail because he had been drunk and disorderly on the train. What happened after the conductor turned appellee over to the city marshal has no relevance to the case at bar; for the acts and conduct of the parties thereafter can not be attributed to the railway company, for the reason that the conductor's subsequent act in prosecuting the passenger was not within the scope of his authority as a servant of the company.

In an action to recover damages for false imprisonment,

where the arrest is without a warrant, if the imprisonment is proved or admitted, the burden of justification is on the defendant. In this respect the rule as to the burden of proof is not analogous to an action for malicious prosecution, where it has been held to be the duty of plaintiff to affirmatively show want of probable cause. *Jackson* v. *Knowlton,* 173 Mass. 94, 53 N. E. 134; *McAlees* v. *Good,* (Pa.) 65 Atl. 934, 10 L. R. A. (N. S.) 303. and case note. See also *Floyd* v. *State,* 12 Ark. 43.

Therefore, the court did not err in the instructions on the burden of proof. For the error in instructing the jury as to what constitutes drunkenness, the judgment will be reversed, and the cause remanded for a new trial.

ATTRIDGE v. SMITH.

Opinion delivered December 23, 1912.

1. CONTRACTS—TIME.—Time may be made of the essence of the contract by the express stipulation of the parties; or it may arise by implication from the very nature of the property or the avowed object of the seller or the purchaser, as where the condition of the parties and the circumstances under which the contract was made showed that time of performance was to be of the essence. (Page 629.)
2. SAME—BREACH OF CONTRACT—WAIVER.—The plaintiff will not be held to have waived a previous breach of a contract to cut timber by giving defendants notice to begin cutting at a certain date where defendants did not comply with such demand. (Page 629.)
3. SAME—DEPOSIT AS SECURITY FOR PERFORMANCE.—Where a sum of money was deposited by defendants with plaintiff as security for compliance with their contract, and plaintiff sustained damages in excess of such sum on account of defendants' failure to perform the contract, plaintiffs are entitled to retain the money, whether it be considered as penalty or liquidated damages. (Page 630.)

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

W. L. Moose and *Allen Hughes,* for appellant.

1. There was no such breach of the contract as entitled appellee to terminate it, unless appellants by words or acts manifested an intention not to perform. 78 Ark. 336.

2. If there was a breach by appellants, it was waived by virtue of the notice given by appellee on December 1, 1907, to proceed under the contract to remove the timber from certain parts of the land. 3 Page on Contracts, § 1494, and cases cited.

Before a breach of a contract will have the effect of discharging the other party to it, the covenant broken must be some vital term of the contract, breach of which makes performance impracticable and the accomplishment of the purpose of the contract impossible. 3 Page on Contracts, § 1450; 115 Wis. 219.

3. The $1,250 was not liquidated damages. It was deposited as the contract says "as security" for performance by appellants. 102 Va. 1; 73 Ark. 432; 55 Ark. 376; 122 N. Y. 397.

Bullock & Davis, for appellee.

1. Appellants did not have three years, but only such time or part of three years as was necessary to cut and remove the timber, under the terms of the contract. Time in entering upon the performance of the contract was of its essence. 95 Ark. 531.

2. It was not necessary that appellants by words expressly repudiate the contract, but the rule is that where a party to a contract, either by words *or conduct,* distinctly and unequivocally manifests his intention not to perform, the other party is justified in treating the contract as at an end, for the purpose of suing for a breach thereof. 78 Ark. 336.

3. Whether the sum sued for is liquidated damages or a penalty, it is not necessary to pass upon in this case. If it is liquidated damages, appellants can not recover. 16 Cyc. 77, § 6. If it is a penalty, they can not recover because they have failed to bring themselves within the rule entitling them to relief by proving that the damages resulting to appellee are less than the sum sued for. 16 Cyc. 76, note 54; 106 Ky. 763; 51 S. W. 593; 17 Johns. (N. Y.) 357. On the measure of damages, see 78 Ark. 336, 342, 343; 73 Ark. 432; L. R. 8 C. P. 167; 99 Fed. 222; 110 U. S. 338; 163 Mass. 95; 95 Ark. 363.

McCULLOCH, C. J. Appellee was the owner of a large tract of timber land in Yell County, Arkansas, and on May 23,

1907, entered into a written contract with appellants whereby he sold the timber to them for stipulated prices per thousand feet, payments to be made on semi-monthly inspections and itemized statement "giving number of pieces, sizes, kind of stock manufactured, and number of feet." The contract provided that appellants should manufacture the timber already cut by appellee before the same became damaged, and to use diligence in cutting and manufacturing the timber, and that no other timber should be manufactured by appellants during the time specified, namely, three years from and after April 15, 1907. Appellee further agreed to allow appellants the free use of a tramroad and cars in hauling the timber described in the contract. It also contained the following clause:

"10. The parties of the first part agree to pay said party of the second part the sum of twelve hundred and fifty dollars, and the same is hereby acknowledged by the party of the second part, this amount of money to be held by the party of the second part as security for the compliance of this contract by the parties of the first part."

The sum named above was paid over to appellee by appellants at the time the contract was executed.

At that time appellee was engaged in cutting the timber and manufacturing it into lumber. He testified that there were about 5,000 feet of logs on the ground, which he had cut, and about 3,000 feet of single-tree material, which he had manufactured, and that he pointed it out to appellants, who agreed to pay for cutting and manufacturing it. The testimony adduced by appellee was to the effect that appellants made no effort to cut or manufacture any of the timber until the summer of 1908, and that in the meantime appellee made repeated efforts to induce them to commence work. He testified that soon after the execution of the contract he went with appellants to assist them in making satisfactory arrangements for a mill-site and roads from the mill, which appellants had an opportunity to secure; that they declined to accept any of the offered arrangements, and left without returning again until the next year; that he frequently wrote to appellants during the year and urged them to commence work, but heard nothing from them, and on December 1, 1907, gave them

written notice to cut on certain tracts. Appellants left the State, and in January, 1908, appellee gave notice of forfeiture of the contract. The testimony also showed that the season of 1907 was a favorable one for working the timber.

Appellants claim that one Parker, who had a contract for certain other timber, interfered and prevented them from beginning work in the spring or summer of 1907. The testimony of Parker tended to contradict that.

Taking the testimony as a whole, it was sufficient to show that appellants had no reasonable excuse for their failure to commence work on the timber during the season of 1907.

They instituted this action against appellee on January 24, 1910, asserting the right under the contract to cut the timber and seeking to restrain appellee from interfering with them in performance of the contract.

Appellee answered, alleging a breach of the contract by appellants and an abandonment thereof, and setting up damages in the sum of $5,000 on account of the alleged breach of the contract.

The chancellor on final hearing dismissed appellants' complaint for want of equity.

The evidence was sufficient to sustain the finding of a breach of the contract and of an abandonment thereof by appellants. The finding is, at least, not against the preponderance of the evidence. The contract, according to its express terms, provided that appellants should "use due diligence in cutting and manufacturing said timber," and that they should manufacture no other timber during the specified time.

"Time may be made of the essence of the contract by the express stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed object of the seller or the purchaser." *Cheney* v. *Libby*, 134 U. S. 68.

The condition of one of the parties and the circumstances under which the contract was made clearly showed that time of performance was to be of the essence. Appellants were to have three years within which to completely perform, but they were to begin within a reasonable time and proceed expeditiously to complete performance.

It is insisted that appellee waived the breach of the con-

tract by giving appellants notice on December 1, 1907, to cut timber on certain tracts. The contract gave appellee the right to require, by notice of thirty days, the cutting of timber on any "forty or forties" of the land. He is not obliged under the contract to select the particular tracts from which the timber should be cut, but had the right to do so. He had not, up to December 1, 1907, elected to exercise his privilege of selecting the particular tracts from which timber should be cut, and had given no notice of his desire to make such election, but had been insisting generally on performance of the contract, without claiming the right to name any particular tract.

If appellants had accepted the notice and proceeded within a reasonable time to comply with it, the prior delay would have to be treated as waived. But they failed to do so. Under those circumstances they can not claim a waiver.

It is unimportant to determine whether the sum of money paid in advance under the contract was intended as liquidated damages or as penalty for nonperformance, or either. The contract specified that the money should be advanced "as security for the compliance with the contract."

The evidence warranted a finding that appellee sustained damages in excess of that sum on account of appellant's failure to perform the contract. This according to the rule laid down by this court as to the correct method of measuring damages for breaches of contracts. *Spencer Medicine Co.* v. *Hall*, 78 Ark. 336; *Singer Mfg. Co.* v. *W. D. Reeves Lumber Co.*, 95 Ark. 363.

Under those circumstances, appellants can not claim a recovery of the sum paid in advance as security for their performance of the contract. *Nelson* v. *Hirschberg*, 70 Ark. 39.

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

MILLER *v.* PLUMMER.

Opinion delivered December 23, 1912.

1. FORCIBLE ENTRY AND DETAINER—GIST OF ACTION.—Under Kirby's Digest, § 3629, providing that if any person shall enter into or upon any lands, tenements or other possessions and detain or hold the same

without right or claim of title, or who shall enter by breaking open the doors and windows or other parts of the house whether any person be in or not, or by threatening to kill, maim or beat the party in possession, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors or carrying away the goods of the party in possession, or by entering peaceably and then turning out by force, or frightening by threats or other circumstances of terror, the party to yield possession * * * shall be deemed guilty of a forcible entry and detainer," *held*, that actual force is the gist of the action, and in the absence of it the action can not be maintained. (Page 634.)

2. SAME—WHEN UNLAWFUL DETAINER LIES.—An action of unlawful detainer, under Kirby's Digest, § 3630, can be maintained only where the relation of landlord and tenant subsists, or at least where the possession has been obtained by defendant with plaintiff's consent. (Page 635.)

3. SAME—TITLE NOT INVOLVED.—In neither forcible entry nor unlawful detainer can the title to land be called in question, further than to show the right of possession and the extent thereof. (Page 637.)

4. SAME—DEFENSE.—While one can not, in an action of forcible entry or unlawful detainer, by proof of ownership, defend possession of land taken by actual force or justify refusal to restore possession taken by permission of another, yet where possession is obtained peaceably, it may be defended by proof of actual ownership. (Page 637.)

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

W. P. Strait, for appellant.

The object of the statute under which this action is brought, Kirby's Dig., § 3629, is solely to restore possession forcibly taken and detained. Force is the gist of the action. 38 Ark. 257; 13 Ark. 448. An instruction which ignores actual force in making the entry is reversible error. 69 Ark. 34; 41 Ark. 535.

Before plaintiffs are entitled to maintain the action, they must show that either the original taking or subsequent holding was with force and strong hand. The force must be actual, and is not implied from the wrongful taking. 27 Ark. 46; 38 Ark. 257; 41 Ark. 535, and cases cited; 93 Ark. 421; 119 U. S. 608.

Sellers & Sellers, for appellees.

Appellant's argument and authorities cited may be applicable under the statute under which he assumes the action is brought; but appellees do not rely upon that statute. This

action is brought under Kirby's Digest, § 3630. Actual force is not necessary to entitle plaintiffs to their remedy. 24 Ark. 575; 66 Ark. 145, 148.

McCULLOCH, C. J. This is an action of forcible entry and detainer instituted by appellees against appellant to recover possession of a strip of land about eighty feet wide, alleged to be a part of a certain twenty acre tract owned by appellees, and which it is alleged appellant, "without right, forcibly and unlawfully entered upon and took charge of, * * * and still continues to forcibly and wrongfully hold possession thereof after due and legal demand thereof."

Appellants answered, denying that appellees were the owners of the strip of land in controversy, but alleged that the strip formed a part of an adjoining tract owned by appellant; and also denied that she had unlawfully entered upon said tract with force or had held the same wrongfully or with force.

The trial of the case before a jury resulted in a verdict and judgment in favor of appellees for the possession of the tract of land in controversy.

Appellant and appellees were the owners of adjoining tracts of land, that owned by appellant containing eighty acres, and that owned by appellees containing twenty acres. Both tracts were occupied as farm lands, though there were no houses on either tract, nor any fences, as they were within the limits of a fencing district. The lands had been in cultivation for many years, and the strip in controversy lies along the line between the two tracts. Both parties claim title to the strip by reason of a dispute as to the correct survey. Originally, appellant had possession of this strip, and it was conceded to be within the limits of her boundary; but it seems that some years ago appellees caused the land to be resurveyed by the county surveyer, who made a change in the boundary which placed this strip in controversy. Either the surveyor, or appellees themselves, or some one for them, moved the stone markers and placed them on the line as corrected by the surveyor, and thereafter appellees claimed the land and asserted that they have been continuously in possession since that time. Appellant testified that she knew nothing about the re-survey and had no notice of the change in the possession, supposing that the tenant who rented from both parties was still paying

her rent on the land. During the summer before the commencement of this action she received information of appellees' claim of title and possession. Early in the spring of 1912, after appellees, through their servants or agents, had made some preparation toward the cultivation of the land by knocking the stalks, appellant, through her servants, went upon the land in controversy and took possession and began plowing the land preparatory to planting it. During the time that appellant's servants were plowing the land, some of the appellees come to the place and made objection to further acts of possession. There is a controversy in the testimony as to whether there was any show of threats and force. One of the appellee testified that he went there while appellant's agents were plowing the land and protested against it, and that appellant's brother, who was there, replied that "if he didn't cultivate it, no d..... man would." The witnesses for appellant who were present at the time testified that no such conversation occurred, and that there was no force or threats of any kind used; in other words, that the possession was taken and held in an entirely peaceable manner.

The court gave the following instruction over appellant's objection, which is assigned as error.

"If you believe from the evidence that plaintiffs were in the peaceable possession of the premises sued for, and that while they were so in possession defendants entered upon such possession without the consent and against the will of the plaintiffs, and still holds such possession, you will find for the plaintiffs."

The court also gave the following instruction, which is assigned as error:

"It is not necessary to maintain this cause that the defendant should actually use force against the person of the plaintiffs or either of them."

The court also refused the following instructions requested by appellant:

"1. Constructive possession or evidence that plaintiffs are entitled to possession is not enough to justify a recovery by them in this suit. It must appear that the taking of possession or the subsequent holding was with force and strong hand. This force must be actual and not implied."

"2. If you believe from the evidence that the defendant took and held possession peaceably, though unlawfully, claiming to be the owner of the land, then the plaintiff can not recover in this suit."

"4. You are instructed that if you believe, from the evidence in this case, Mrs. Miller took peaceable possession of the land and not by force or violence, and that she thereafter held it, claiming to be the owner of the land, then the plaintiff can not recover in this action."

It will be observed from the language of the complaint that the action was brought under Kirby's Digest, § 3629, which provides that "if any person shall enter into or upon any lands, tenements or other possessions and detain or hold the same without right or claim of title, or who shall enter by breaking open the doors and windows or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors or carrying away the goods of the party in possession, or by entering peaceably and then turning out by force, or frightening by threats or other circumstances of terror, the party to yield possession, * * * shall be deemed guilty of a forcible entry and detainer."

It has been uniformly held in all the decisions of this court that actual force is the gist of the action under this section, and in the absence of it the action can not be maintained. *McGuire* v. *Cook*, 13 Ark. 448; *Dortch* v. *Robinson*, 31 Ark. 296; *Hall* v. *Trucks*, 38 Ark. 257; *Littell* v. *Grady*, 38 Ark. 587; *Johnson* v. *West*, 41 Ark. 535; *Towell* v. *Etter*, 69 Ark. 34.

Counsel for appellees seek now to sustain the judgment under the italicised clause of Kirby's Digest, § 3630, as follows:

"Every person who shall wilfully and without right hold over any lands, tenements or possessions after the determination of the time for which they were demised, or let to him or the person under whom he claims, *or who shall peaceably and lawfully obtain possession of any such and shall hold the same wilfully and unlawfully after demand made in writing,* * * * shall be deemed guilty of an unlawful detainer."

It has been held in may cases that the action of unlawful

detainer can only be maintained where the relation of landlord and tenant subsists, or at least where the possession has been obtained by the defendant permissibly, that is to say with the consent of the party who seeks to maintain the action. *Bradley* v. *Hume*, 18 Ark. 284; *Dortch* v. *Robinson, supra*; *Necklace* v. *West*, 33 Ark. 682; *Mason* v. *Delancy*, 44 Ark. 444; *Towell* v. *Etter, supra*; *Prioleau* v. *Williams*, 104 Ark. 322.

Some changes have been made in our statutes on this subject since they were originally enacted at an early day, but, so far as they affect the question now before us, the statutes remain without substantial change.

In *Dortch* v. *Robinson, supra*, Chief Justice ENGLISH, speaking for the court, said:

"Under the law as it stood in Gould's Digest, ch. 72, it was decided that an unlawful detainer would not lie on the right of possession merely, but the relation of landlord and tenant, express or implied, must exist between plaintiff and defendant to entitle the former to maintain this form of action against the latter."

In *Hall* v. *Trucks, supra*, speaking of the two forms of action provided by this statute, the court said:

"It can only be resorted to in the case of a forcible entry, or a turning out by force, or when the plaintiff parted with the possession under some contract or agreement, express or implied, that the possession should be restored to him. Force is the gist of the action for a forcible entry and detainer; but implied force as when the defendant entered peaceably, though unlawfully, is not sufficient; it must be actual and hostile."

In *Johnson* v. *West, supra*. Mr. Justice SMITH, speaking for the court, said:

"Unlawful detainer is a remedy provided by statute for the benefit of landlords against tenants who hold over after the expiration of their terms. It is founded on the breach of a contract, implied by law, if not expressed, that the tenant shall restore a permissive possession to the hands from which it was received. * * * But a forcible entry and detainer is a tort, pure and simple. Force is the gist of the action. It is a remedy designed to protect the actual possession whether rightful or wrongful. It must accordingly be shown that the defendant did enter without the consent of the person having

the possession in fact of the premises; and that such original entry or subsequent holding of possession was with force and strong hand. Constructive possession or evidence that the plaintiff is entitled to possession is not sufficient. And implied force, as when the defendant enters peaceably, though unlawfully, is not sufficient."

In *Towell* v. *Etter, supra*, the court, referring to the decision in *Winn* v. *State*, 55 Ark. 360, where it was said that "a landlord, entitled to re-enter for condition broken, who took possession peaceably in the absence of his tenant from the premises, * * * has the right to protect his possession by force, if necessary," said:

"This is to the effect that one having title and right to possession may get possession peaceably and defend his possession by force, if necessary, and if he does so he will not be guilty of forcible entry and detainer."

In *Prioleau* v. *Williams, supra*, in speaking of the action of unlawful detainer, we said:

"The right of action is based upon a contract, either expressed or implied, whereby the relation of landlord and tenant arises and exists between the parties."

Appellees rely entirely upon the case of *Keller* v. *Henry*, 24 Ark. 575, holding that that part of the section of the statute giving the remedy of unlawful detainer, which at that time read: "or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force," etc., authorized the action of unlawful detainer where possession was obtained without any contract, either express or implied, or without the permission of the owner.

The court there held that the word "lawfully" is used in the statute synonymously with the word "peaceably" and meant any possession obtained without actual force, even without the consent of the owner. The reasoning of the case is that any other construction of that part of the statute would render the clause useless and superfluous. It might have been said with equal force that that construction renders the preceding clause of the section superfluous, for the reason that if a peaceable entry without the consent of the owner, either express or implied, will support the action of unlawful detainer, then it was entirely unnecessary to insert the pro-

vision giving the remedy against one who holds the premises "after the determination of the time for which they were demised or let to him." In other words, if the last clause is to be construed as broadly as the court did in the case referred to, then it included the preceding clause and rendered the latter superfluous. The doctrine in that case has never been referred to in any subsequent decision of this court, though all of the cases we have herein cited are entirely inconsistent with that rule. The decision on that point has never, so far as we can discover, been referred to in any other decision. There is no escape from the conclusion that the doctrine of the later decisions of this court, holding that the action of unlawful detainer can only be maintained where the possession obtained was permissive, is inconsistent with the ruling in *Keller* v. *Henry*, and to that extent overrules it. We now adhere to the doctrine of those cases, rather than to that announced in *Keller* v. *Henry*, and the latter case is expressly overruled.

In neither of the actions prescribed by the statute can the title to the land be called in question further than to "show the right of possession and the extent thereof." Kirby's Digest, § 3648. One of the forms of action, of which force is the gist, is created to protect the actual possession of the occupant; and the other is to compel restoration of a permissive possession after the period for which possession is yielded has terminated. It would not do to say that one claiming to be the owner of land could not peaceably take possession of it, and then defend his possession by showing that he was, in fact, the owner. One can not, by proof of ownership, defend possession taken by actual force, or justify refusal to restore possession taken by permission of another; but where the possession is obtained peaceably, it may be defended by proof of actual ownership. *Towell* v. *Etter*, *supra*.

The ruling of the trial court in this case put appellant in the attitude of having obtained possession peaceably, and yet denied her the right to defend that possession by showing that she was in fact the owner. At least, the instructions given permitted the jury to find against her for the possession of the controverted strip of land, even though she acquired possession peaceably and under a just claim of ownership. Such was not the design of the statute.

On account of the error of the court in giving the two instructions hereinbefore quoted, and in refusing those requested by appellant, the judgment is reversed and the cause remanded for a new trial.

S. H. KRESS COMPANY v. MOSCOWITZ.

Opinion delivered December 23, 1912.

1. CONTRACT—CONSIDERATION—COMPROMISE.—A compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a contract. (Page 640.)
2. LANDLORD AND TENANT—FIXTURES—RIGHT TO REMOVE.—Where a landlord agreed that a tenant, upon expiration of his lease should own certain fixtures in a building, a third person to whom the building has been leased can not object to the former tenant removing such fixtures. (Page 640.)
3. FRAUDS, STATUTE OF—PLEADING.—The statute of frauds can not be availed of unless pleaded. (Page 641.)

Appeal from Garland Circuit Court; *C. T. Cotham*, Judge; affirmed.

Rector & Sawyer, for appellant.

A. J. Murphy, for appellee.

HART, J. Appellees occupied a store room in Hot Springs, Arkansas, as tenants of S. H. Stitt, under a lease from him to them for a term of three years from the 15th day of June, 1908, to the 15th day of June 1911. It contained the following provision:

"At the termination of this lease, the parties of the second part (Moscowitz & Zucker) are to have the privilege of renewing this lease on such terms and conditions as may be mutually agreeable."

Appellees leased the premises for a store house and put a new front in it consisting of four plate glasses, one plate glass door, clamps, frames, transoms and four marble base slabs. The front was not fastened in the building with nails but was attached to it by the clamps and frames. On the 3d day of September, 1910, Stitt executed to appellant, a foreign corporation, a lease on this property to take effect at the expiration of appellees' lease. Appellees upon learning

of the execution of the lease to appellant contended that they had a right of renewal of their lease of three more years under the clause above referred to. They say that Stitt verbally agreed with them to renew the lease for three more years at a rental of one hundred dollars per month, and that this verbal contract was made about one month before he executed the lease to appellant. Appellees testified that it was finally agreed between them and Stitt that they should abandon their contention for a renewal of the lease, and that they should have the new front which they had put in the store house. They say that Mr. Quigley, the manager of appellant, knew of the compromise that they made with Mr. Stitt, and agreed to its terms. They testified further that they remained in the store house a few days after their lease expired, but that this was done by agreement with Mr. Stitt and with the assent of Mr. Quigley. That it was understood and agreed that they should not take the front out until after they had moved out and Mr. Quigley had taken charge of the building and had removed the front. They say it was understood that they should have the glass front when Mr. Quigley detached it from the store room. Mr. Stitt admitted this, and says that he has never claimed the glass front, and does not do so now. On the other hand, Mr. Quigley testified that the agreement was that appellees should have the glass front provided they moved out by the time their lease expired. He claimed that, because appellees remained in the store house a few days after the expiration of their lease, they forfeited their rights to the glass front.

When appellant took possession of the building, they took out the glass front and put in a new front of their own. Appellees demanded the glass front which they had put in, after it had been detached from the building by appellant, and appellant refused to deliver it to them. Appellees brought suit in replevin against appellant before a justice of the peace to recover the same. Appellant made default in the justice's court, and judgment was rendered in favor of appellees. Upon appeal in the circuit court, the case was tried upon the facts which we have stated above, and the jury returned a verdict in favor of appellees. The case is here on appeal.

It is not necessary to decide whether the property in ques-

tion was a trade fixture. Appellees contended that they owned the front which they had put in, and also that they had a right to renew the lease. To settle this dispute, it was agreed between appellees and Stitt, the owner of the building, that appellees should have the front, and that they should be entitled to the possession of it when appellant detached it from the building, and that appellant assented to the terms of this agreement.

In the case of *Gardner* v. *Ward,* 99 Ark. 588, we held that a compromise of a disputed claim furnishes sufficient consideration to uphold the terms thereof, even though the claim be without merit.

Appellees testified that, in consideration they should abandon their claim for a renewal of their lease, Stitt, the owner of the building, recognized their claim of ownership to the plate glass front, and agreed that they might take it away after it was detached from the building. Stitt admits this, and says that he has recognized the claim of title of appellees to the plate glass since the agreement was made, and that he does not now claim it. Appellant admits that this agreement was made between appellees and Stitt, and that it assented thereto, but its contention is that the plate glass front was only to become the property of appellees provided they moved out of the storehouse by the time their lease expired, and that, if appellees had done so, appellant would not now claim the plate glass and the frames and fastenings. Appellees and Stitt both say that appellees remained in the store a few days after the expiration of their lease by a mutual agreement assented to by appellant, and the jury was certainly warranted in so finding. Appellant had decided to put in a new front, better adapted to its business, and removed the plate glass, frames and fastenings now in dispute for that purpose. There is nothing in the terms of its lease whereby the glass front which was removed should become its property.

Then, according to appellant's own contention of the law, the plate glass and fastenings became the property of Stitt; and if he has relinquished his claim to appellees, certainly appellant is in no position to complain. See *Searle* v. *Roman Catholic Bishop of Springfield,* 203 Mass. 493, 17 A. & E. Ann. Cas. 340.

Moreover, if it be held that the agreement in question was void under the statute of frauds, and that appellant had a right as the lessee of Stitt to plead the statute of frauds, it does not appear from the record that the statute of frauds was pleaded, and we have held that the statute of frauds can not be availed of unless pleaded. *St. Louis, I. M. & S. Ry. Co.* v. *Hall,* 71 Ark. 302; *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184; *Dierks Lbr. & Coal Co.* v. *Coffman.* 96 Ark. 505.

The assignments of error of appellant are covered by what we have already said, and it is therefore unnecessary to take up and discuss separately the several assignments of error relied upon for a reversal of the judgment.

The judgment will be affirmed.

WALES-RIGGS PLANTATIONS *v.* CASTON.

Opinion delivered December 23, 1912.

1. CORPORATIONS—AUTHORITY OF OFFICERS.—Where a business corporation impowers its president to act as general manager, or permits him to act as such for a length of time, it is estopped to deny that its president has the powers with which it has qualified him, or which it has customarily permitted him to exercise. (Page 645.)
2. SAME—AUTHORITY OF AGENT.—Where the president and general manager of a corporation held out a certain person as authorized to make contracts on behalf of such corporation, contracts made by such person on behalf of the corporation will bind it. (Page 646.)

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

Charles E. Robinson, for appellant.

1. The transactions and declarations of an agent are not of themselves evidence of his agency. 96 Ark. 510. A party dealing with an agent of a corporation must, at his peril, ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority. 52 Mich. 87; 19 L. Ed. 173.

2. The president of a corporation has no authority as such to make contracts or to approve or ratify the making of contracts in the name of the corporation. 84 Ark. 453;

Kirby's Dig., § 841; 92 Ark. 332. His authority to contract or ratify contracts must come from the board of directors and this fact must be proved. It will not be presumed. 80 Ark. 67; 62 Ark. 33.

3. Before appellant can be held liable for any act of Mrs. Cross, it must be made to appear that it actually authorized her to do the act, or that it is estopped to deny her authority by having knowingly permitted her to act, or by ratifying her act, or by knowingly receiving the benefits thereof. 62 Ark. 37, 42; 3 Cook on Corp. 2224, 2234, 2277.

L. C. Going, for appellee.

1. There was no plea nor contention that the acts of the president of the appellant were *ultra vires*. If there had been such plea, the burden would have been on the appellant to prove it. Thompson on Corp., § § 7617, 7619; 80 Ark. 67.

2. The acts of Mrs. Cross were in line with the ordinary duties of agents engaged in renting and handling land, and it can not be said that her acts were beyond the scope of the corporate powers of appellant. Taylor on Corp., § 193.

3. Even though, under the terms of the contract with the corporation, Mrs. Cross may have been limited in her powers, yet strangers to that contract with no knowledge of its terms would not be bound by the limitations upon the agent contained therein. 96 U. S. 84; 12 Cush. 1; 165 Mass. 565. See also, 49 Ark. 320; 48 Ark. 138; 42 Ark. 97.

HART, J. This was an action instituted by attachment to enforce a landlord's lien for rent, in which appellant was the plaintiff, and appellee the defendant. The rent contract was in writing, and the amount of rent was evidenced by a promissory note for $141.50, given by appellee to appellant. Appellee admitted executing the contract and note, but claimed that both were abrogated by a subsequent parol contract whereby he rented less land for a rental of $50. The parol contract was claimed to have been made by appellee with Mrs. G. K. Cross as agent for appellant.

Appellee filed his counterclaim in the sum of $80 for damages for noncompliance with the contract. The justice of the peace dismissed the attachment, and found that appellant was entitled to recover of appellee in the sum of $50 for its

rent, and that appellee was entitled to recover damages against appellant in the sum of $80, leaving a balance in favor of appellee in the sum of $30, for which judgment was rendered against appellant.

On appeal in the circuit court the case was tried *de novo* before the court sitting as a jury, and the same judgment was there rendered as in the justice's court. The appellant introduced the note and written contract sued on. The note was for $141.50, and was due November 15, 1910. The date of the note and written contract was May 31, 1910. On the 18th day of November, 1909, appellant and Mrs. G. K. Cross entered into a written contract wherein it was recited that appellant employed her for the term of one year to act as its agent for the general management of its lands located in Cross County, Arkansas, as provided and stated in the contract. Her duties, among other things, were to secure tenants for the cultivation of the improved lands of appellant in Cross County, Arkansas, and for the enforcement of all contracts and leases in regard thereto. It was provided that she should always act under written orders from appellant, and that all contracts in regard to the lands or leases of same, in order to become binding on appellant, should be in writing and signed by 'Wales-Riggs Plantations, by C. W. Riggs, President.' The Wales-Riggs Plantations was a corporation organized under the laws of New Jersey, April 27, 1899, and C. W. Riggs has been its president since the day it was organized.

He testified that Mrs. Cross had no authority to act for the incorporation except that given her by the written contract referred to above, and that she had no authority to cancel or abrogate any contract made with said corporation, and particularly stated that she never had any authority to cancel the note and contract sued on in this suit. He stated that all contracts were to be submitted to the corporation for signature, and were to be signed 'Wales-Riggs Plantations, by C. W. Riggs, President.' He stated that this had been the invariable rule since the organization of the corporation. He also said: "It has always been perfectly understood by our numerous tenants that no one had authority to make a contract binding on us unless it was reduced to writing and signed by us with the corporate name of its president."

Mrs. Cross also testified that she had no authority to abrogate or change the contract in question, and that she did not do so.

Appellee admitted that he signed the contract and note in question, but stated that he was unable to get any one to furnish him supplies to make his crop with, and that, upon reporting this fact to Mrs. Cross, it was agreed between them that the contract should be abrogated, and a new one was made whereby he rented less land and was to pay rent therefor in the sum of $50. He also testified as to the amount of his counterclaim, but, as this is not in dispute, there is no use to abstract the testimony upon that question. On cross examination he stated that previous to making the contract he had a talk with C. W. Riggs about what Mrs. Cross was there for, and that Captain Riggs said "any business that Mrs. Cross does is legal." Another tenant of appellant testified that Captain Riggs told him that whatever arrangements Mrs. Cross made about renting the lands was satisfactory to him; that she was his agent.

It was admitted by appellant that J. H. Hammett, if present, would testify that Mrs. G. K. Cross from and after the month of October, 1909, was the agent of appellant, charged with the duties of making contracts for sale and rent of lands belonging to it, and that he had letters from Capt. C. W. Riggs to this effect.

The court, sitting as a jury, found the facts to be that Mrs. Cross was in fact the agent of appellant with authority to act in the transactions had between the parties to this litigation, and rendered judgment in favor of appellee as above stated.

It is conceded by counsel for appellant that there is evidence tending to support the finding of the court that Mrs. Cross abrogated the written contract and note sued on and made the subsequent contract above referred to. Therefore it is not necessary to discuss this phase of the evidence. It is earnestly insisted, however, that Mrs. Cross had no authority to abrogate or change the contract and note sued on and make a new one for appellant. Counsel for appellant relies on the case of the *Fort Smith Wagon Co.* v. *Baker,* 84 Ark. 453, to support his contention. In that case we held

that the president of a business corporation has no power to enter into a contract whereby the entire *corpus* and business of the corporation is sold to another. The principle announced is sound, but has no application to the facts of this case.

The testimony in the case is quite voluminous, and it would have extended the opinion unduly to have set it out in detail. It is evident, however, from the testimony of C. W. Riggs himself that all contracts executed by appellant should be signed by himself, and that he had authority to make contracts for his company. In addition to this, the testimony of tenants on the place shows that he came there and exercised control and superintendence over the affairs and business of appellant. Mrs. Cross in her testimony speaks of talking with C. W. Riggs about the affairs of the company and getting directions and instructions from him about what she should do. It is a very common custom now for the president of a business corporation to be its active manager, and we think the court might well have found from all the facts and circumstances adduced in evidence that C. W. Riggs was not only the president of appellant corporation, but was also the active manager of its business. The acts of a president done in the management of the business and within the scope of his authority are held to be the acts of the corporation itself. 2 Thompson on Corporations, (2 ed.), § 1465, page 515; *Ib.* § 1493. The same author in section 1491 says:

"Third persons and strangers dealing with the president of a corporation under ordinary circumstances, and especially where he has the management and control of the business, are protected. The law shields such persons in so many different ways as to make it comparatively, if not absolutely, safe to deal with the president of a corporation under such circumstances. In the first place, where a corporation qualifies the president with the power of the general management of the corporate affairs, or where it permits him to act as general manager for a length of time, it is estopped from denying, in such instances, that its president has the powers with which it has qualified him, or which it has customarily permitted him to exercise. Hence, in any conflict between such third persons and the corporation, it is sufficient to prove the president's authority in the usual way of proving the author-

ity of other agents, either that he was especially appointed to conduct the business or that the corporation held him out to the public as possessing the power which he actually exercised.''

The appellee in this case testified that a short time before he made the contract with appellant he had a talk with C. W. Riggs about the authority of Mrs. Cross, and that Captain Riggs told him any business Mrs. Cross did was legal. Another tenant on the place testified that Captain Riggs told him that whatever arrangements Mrs. Cross made concerning the renting of the land was satisfactory to him, and that she was his agent.

It was admitted that J. H. Hammett would testify, if present, that Captain Riggs had written to him that Mrs. Cross was the agent of appellant charged with the duty of making contracts for the rent and lease of lands of appellant. As we have already seen, the testimony abundantly establishes the fact that Captain Riggs himself had the authority to make contracts for the rent and lease of lands of appellant. Therefore his admissions and representations concerning the authority of Mrs. Cross to make such contracts was within the scope of her authority and concerning matters intrusted to her, and are therefore binding upon appellant. 3 Cook on Corporations, § 726, page 2363; 2 Thompson on Corporations, § 1479, page 544.

The judgment will be affirmed.

SMITH, J., disqualified.

FLETCHER v. JOSEPHS.

Opinion delivered December 23, 1912.

1. ADVERSE POSSESSION—COLOR OF TITLE.—Although an administrator's sale for the payment of debts was void for want of jurisdiction in the court to order same, and although no confirmation of the sale was made, the administrator's deed is such an "appearance of titie" as to constitute color of title. (Page 652.)
2. HOMESTEAD—WIDOW'S RIGHT.—The rights of a widow in her husband's homestead are personal and can not be transferred; and by conveying the homestead to another she will be held to have abandoned her rights therein, and the homestead thereupon becomes vested in the minor children. (Page 652.)

3. DOWER—EFFECT OF CONVEYANCE OF UNASSIGNED DOWER.—A widow's right to hold her husband's dwelling house and the farm attached until dower be assigned is a personal privilege, and not an estate in the land which can be transferred to another, and in case she does transfer it the right of entry of the heirs is complete, subject only to the right to have dower assigned. (Page 653.)

4. ADVERSE POSSESSION—TITLE ACQUIRED.—One in adverse possession of land under color of title for more than seven years acquires title. (Page 653.)

Appeal from Lawrence Chancery Court; *Charles D. Frierson,* Chancellor; affirmed.

J. N. Rachels, H. L. Ponder and *Jno. W. & Jos. M. Stayton,* for appellants.

1. The land was the homestead of James Fletcher and, after the order of sale, but before the sale, was set apart to the widow as a homestead. The sale by the administrator, and the deed executed by him to Shirey three days later, conveyed no title to Shirey, because (1) it had been set apart as a homestead. 79 Ark. 410; 56 Ark. 563; 50 Ark. 329; 49 Ark. 75; 47 Ark. 445; (2) The sale was incomplete for lack of confirmation, and the deed could convey no interest. 34 Ark. 346; 38 Ark. 80; 47 Ark. 419; 48 Ark. 250; 55 Ark. 307; Such a deed is no evidence of title. 47 Ark. 215. Neither is it color of title. 67 Ala. 441; 15 Ill. 178.

2. Shirey did not attempt, however, to go into possession under the administrator's deed, but admits that he knew that Mrs. Fletcher's dower right was outstanding, and that he bought it in order to get her off the land and himself go into possession. At that time, her dower not having been assigned, she had no interest that she could convey to a stranger. She only had a mere right of occupancy of the mansion house and farm attached thereto until her dower should be assigned, which was personal to her. 62 Ark. 61; Kirby's Dig., § 7204; 44 Ark. 490; 48 Ark. 230.

3. Mrs. Fletcher's deed did vest in Shirey an equitable title to an undivided portion of the land, a right to have her dower ascertained and set apart to him for his use during her lifetime. 79 Ark. 412; 62 Ark. 61. And, upon the execution and delivery of her deed, she forfeited her rights, the heirs became entitled to enter, they being seized in fee of an undi-

vided two-thirds of the land, with remainder in fee of the remaining one-third after the termination of her life, and Shirey and the heirs from that time on were tenants in common of the whole tract. 2 Blackstone, Com. 191-192; 2 A. K. Mar. (Ky.) 388.

The fact that Shirey was put into possession and remained in possession of the entire tract until the widow's death did not destroy the tenancy. The possession of one tenant in common is the possession of all. 61 Ark. 540. His possession would not necessarily ripen into title. 99 Ark. 87; 3 Sharswood & Budd, Leading Cases, Real Prop. 128.

4. Shirey's claim of title by adverse possession must be worked out through the rules governing adverse possession as against tenants in common. His proof must show something that evidences an intention to claim a greater right than that conveyed by the widow's deed, and in a way so notorious as to have brought home notice, actual or constructive, of such intent, to the heirs, equivalent to a re-entry and claim of the fee. 39 Wis. 538.

Placing the administrator's deed to Shirey on record did not have the effect of constructive notice to the heirs. The constructive notice of a recorded deed is notice only to those in the line of title of that deed. The administrator's deed was that of a stranger to the title. 99 Ark. 446; 76 Ark. 525; 69 Ark. 95; Devlin on Deeds, (2 ed.), § § 712-13; 100 Ill. 581; Pomeroy, Eq. Jur., § 658. There was nothing in Shirey's occupancy or his pernancy of the rents and profits, his improvements, if any, or his payment of taxes, inconsistent with the character of his interest as tenant in common. 99 Ark. 87; 29 Wis. 249; 39 Wis. 538; Wood, Limitations of Actions, 509.

5. Shirey will not be permitted to reap the benefit of his own wrongful acts. He is estopped by the deliberate concealments and deceit practiced towards the widow and heirs of Fletcher. 35 Ark. 376; 43 Ark. 28; 51 Ark. 61;

J. N. Beakley, Stuckey & Stuckey and *Campbell & Suits*, for appellees.

The administrator's deed is such as to constitute color of title. 67 Ark. 184; 1 Cyc. 1093; 2 Enc. Pl. & Pr. 513; 2

Words & Phrases, 1264. The question of faudulent misrepresentation is disposed of by the chancellor's finding that the evidence is not sufficient to establish it and thereby prevent the running of the statute of limitations. The following authorities fully sustain the court's decree. 62 Ark. 313; 65 Ark. 68; 72 Ark. 446; 79 Ark. 408; 83 Ark. 196; 84 Ark. 160; 87 Ark. 428; 89 Ark. 168; 92 Ark. 143; *Id.* 625; 95 Ark. 256.

SMITH, J. On the 18th day of April, 1903, the appellants, Wm. Fletcher and others, sole heirs at law of James Fletcher, deceased, filed their complaint in the Lawrence Circuit Court against A. W. Shirey, claiming to be the owner of east one-half southwest quarter section 22, township 17 north, range 1 east, Lawrence County, Ark. The cause was transferred to the equity side by consent of all parties, and the plaintiffs filed an amended complaint, the substance of which is as follows: That on the 14th day of December, 1872, James Fletcher died seized and possessed of the above-described land, which was his homestead, leaving him surviving Harriet Fletcher, his widow, and the plaintiffs, who were his children and grandchildren.

The complaint further alleged that, on the death of said Fletcher, one A. B. Israel was appointed administrator of his estate on the 30th day of January, 1873, and that he applied to the probate court of said county for an order to sell said lands for the payment of debts, and that the land was ordered sold by the court, and in pursuance of said order, the administrator sold the land on December 6, 1873, to A. W. Shirey, and on the 9th day of December, 1873, executed to him a deed therefor.

The administrator made no report of this sale, and it was never approved or confirmed. Plaintiffs further alleged that the defendant knew he had acquired no title, and failed to have the sale confirmed, because he knew the court had no right to confirm it, but took the deed to have some color of title, and conceived the plan of defrauding plaintiffs of their rights, and, in pursuit of said plan to defraud, he purchased from the said Harriet Fletcher her right of dower and homestead in said land, her dower then not having been assigned, and at the same time advised her, and induced her to believe, that the

rights of her children would be fully protected by him, and that at her death said land would go to them, and that he was only endeavoring to buy her life interest therein; and, relying upon said assurances so made by defendant, she conveyed to him on January 22, 1874, all her right of dower therein. And the complaint further alleged that, desiring to conceal the effect of the conveyance of the said Harriet Fletcher, the defendant withheld said deed from record.

The complaint further alleged that some of the plaintiffs were present when the trade was made and heard the assurances given their mother that the defendant desired to buy only her life interest, and that as soon as she died the land would become the property of her children, and that the only effect of the deed he desired was to enable him to have the use of the land and its rents until the death of their mother; and that all this occurred before the deed was executed, and until recently plaintiffs understood defendant was claiming only the life estate of their mother, and that only by reason of the fraudulent assurances of defendant have they allowed him to occupy said land through all of these years, without making any claim therefor, or asserting their rights.

The answer of the defendant Shirey specifically denied the allegations of the complaint and set up adverse possession for seven years, and for more than three years after all minor heirs had attained their majority.

Before the final hearing, the death of defendant A. W. Shirey was suggested and proved, and the cause revived in the name of Louis Josephs, his executor.

At the final hearing, a copy of the petition of the administrator to the probate court was offered in evidence, showing the personal property was exhausted and praying a sale of the lands to pay debts. There was also offered in evidence the order of the court directing the sale of the land, which order was made on October 3, 1873. There was also offered the petition of the widow, filed on the 17th day of November, 1873, praying that the land be set aside to her as a homestead and the order of the court, made on the same day, granting the prayer of that petition. The certificate of the county clerk was also offered, showing there had been no report of said administrator's sale and no confirmation thereof.

The deed from the administrator to Shirey was not recorded until the 8th day of February, 1878.

The deed from Harriet Fletcher was made on the 22d day of January, 1874, and the material portion of the same is as follows: "I, Harriet Fletcher, do hereby relinquish all of my right of and title to dower to the following land, towit: east one-half, southwest quarter, section 22, township 17 north, range 1 east, for the consideration of the sum of $400, paid to me by Arthur W. Shirey, and he is to have and to hold the same forever, and I do hereby warrant and defend the same to him and his heirs forever against the lawful claim of all persons."

For proof of the allegations of misrepresentation and fraud, the plaintiffs relied principally upon the evidence of two of the sons, who testified they heard the conversation between Shirey and their mother. One of these witnesses was eleven or twelve years old at the time, and the other was eight or nine. Another witness testified that at the time he was between seventeen and eighteen years old, and that he overheard a conversation between Mr. Shirey and a Mr. Henry, for whom witness was picking cotton, in which Shirey said: "I just bought the old lady's lifetime dower." A daughter of Harriet Fletcher, who was older than her brothers, also testified and substantially corroborated their statement.

The defendant denied all the material statements of the plaintiff, and the chancellor accepted his version of the transaction as the truth, and, after careful consideration of the evidence, we can not say that his finding is contrary to the preponderance of the evidence.

Shirey stated that this was his first land transaction, although he afterwards became a large land owner. He stated that he bought the land at a public sale, as he was the highest bidder; that he did not look to see that the sale to him was reported and confirmed for the reason that he did not know this was necessary, and that he supposed it was only necessary for him to pay his money and get his deed; and that he did this, and that the $600 which he paid the administrator for the land was a fair price for the land at the time it was sold, under the circumstances. He supposed he had a perfectly good title to that land, subject to the widow's dower, and he pro-

cured the deed from her to get possession of the land, and he had occupied it for nearly thirty years without suspecting that any one questioned his title. Mrs. Fletcher died January 20, 1902.

We are of opinion that, although the administrator's sale for the payment of debts was void for want of jurisdiction in the court to order the same, and although no confirmation of the sale seems to have been made, yet the administrator's deed is such an "appearance of title" as to constitute color of title. *White* v. *Stokes*, 67 Ark. 184, and cases cited; 1 Cyc. 1093; 2 Enc. L. & P. 513; 2 Words & Phrases, 1264.

It is urged with great force that the language of Shirey to the widow amounted to such fraudulent misrepresentation as would prevent the running of the statute, but we do not think the evidence sufficient for this purpose, and we concur in the chancellor's finding that, "during the many years that have elapsed since the alleged conversation, these plaintiffs, all of whom have grown to manhood or womanhood long ago, should have made some further investigation as to the rights claimed by Shirey, who during all the time was openly in possession of the land under a recorded deed from the administrator of their father's estate. No claim of fraud could be based upon the failure to record the widow's deed, because all admit that they knew of that deed at the time it was made."

But appellants insist here that Shirey's possession could not be adverse for the reason that the deed of the widow put him in possession of the whole tract, and that this deed gave him that right of occupancy which in equity he was entitled to have under Mrs. Fletcher's deed, and that such possession would not ripen into title because he was a tenant in common with the heirs.

The fallacy of this argument grows out of a misconception of the effect of the deed from the widow to Shirey. Many cases have held that the widow's rights in the homestead are personal and can not be transferred, and that by conveying the homestead to another she will be held to have abandoned her rights therein, and the homestead thereupon becomes vested in the minor children. *Gatlin* v. *Lafon*, 95 Ark. 256, and case there cited.

It was held in the case of *Griffin* v. *Dunn*, 79 Ark. 412,

that the widow's right to hold the dwelling house and the farm attached until dower shall be assigned is a personal privilege, and not an estate in the land which can be transferred to another. She may rent out the farm and receive the rents and profits, but can not convey it or transfer her rights. If she does, she thereby abandons it, and the right of entry of the heirs becomes complete, subject only to the right to have dower assigned. The same case holds, upon the authority of the case of *Weaver* v. *Rush*, 62 Ark. 57, that the conveyance by the widow carried with it an equitable transfer to the grantee of her unassigned dower right, but this outstanding right to have dower assigned did not postpone the heir's right of entry.

"A widow's dower in the realty of her deceased husband, before it is assigned to her as the statute directs, is a mere 'thing in action' that can not be the subject of a conveyance by her to a stranger, so as to confer on him any rights that he can enforce in a court of law." *Weaver* v. *Rush, supra.*

Shirey's possession, both in fact and in law, was adverse to the heirs, and the cause of action here sued upon was barred many years before the suit was instituted. *Carnall* v. *Wilson*, 21 Ark. 62; *Padgett* v. *Norman*, 44 Ark. 490; *Barnett* v. *Mecham*, 62 Ark. 313; *Garibaldi* v. *Jones*, 48 Ark. 230; *Killeam* v. *Carter*, 65 Ark. 68; *McAndrews* v. *Hollingsworth*, 72 Ark. 446; *Griffin* v. *Dunn*, 79 Ark. 408; *Gannon* v. *Moore*, 83 Ark. 196; *Stubbs* v. *Pitts*, 84 Ark. 160; *Harris* v. *Brady*, 87 Ark. 428; *Burrel* v. *Boken*, 89 Ark. 168; *Smith* v. *Scott*, 92 Ark. 143; *Gatlin* v. *Lafon*, 95 Ark. 356; *Felton* v. *Brown*, 102 Ark. 658.

The findings of the chancellor are supported by the evidence, and are in accordance with the law as declared in the above cited cases, upon the subjects here discussed, and the decree is accordingly affirmed.

SMITH *v.* MACK.

Opinion delivered December 23, 1912.

1. USURY—COMMISSION TO LENDER'S AGENT.—To sustain the plea of usury, it must appear that excessive interest was paid to the lender, or that a bonus or commission was paid to the agent of the lender

with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest paid or to be paid to the lender, would exceed the lawful rate. (Page 661.)

2. SAME—BURDEN OF PROOF.—The burden of proof is upon the party who pleads usury to show clearly that the transaction is usurious. (Page 662.)

Appeal from Greene Chancery Court; *Charles D. Frierson*, Chancellor; affirmed.

STATEMENT BY THE COURT.

C. A. Mack brought this suit against appellants to recover $10,642.50 on two promissory notes and interest, and to foreclose a mortgage upon lands in Greene and Poinsett counties, given to secure the payment thereof.

The answer admits the execution of the notes and mortgage, and pleads usury in bar of the recovery, alleging that appellee agreed to make said loan, charging interest at the rate of 10 per cent. per annum from date until paid and an additional sum of $1,000 as bonus for the forbearance and use of the money, which was paid to his agent and attorney, who delivered the amount of the loan to appellants, the money having been deposited by Mack with his said agent, D. G. Beauchamp; the said Mack having full knowledge and consenting for his said agent to demand and receive said $1,000; alleged further that the notes sued upon are void for usury and the mortgage likewise, and prays that the same be surrendered up and cancelled, and the cloud upon their title removed.

It appears from the testimony that appellants had been trying to procure a loan of about the sum of money which they finally borrowed, with which to purchase certain lands in Greene and Poinsett counties, the acreage of which had not been exactly determined; that J. A. Smith had offered to pay, to any one who would procure them the loan of the amount upon five year's time, $1,000 for the service; that G. W. Cox had been attempting to procure the loan, but none of them had succeeded in doing so. J. A. Smith testified that he had been in Memphis, trying to negotiate the loan, and it occurred to him that he could procure it from C. A. Mack. That he went to him upon his return from Memphis, told him he desired the loan for the purpose of buying certain lands, which

were worth $10 or more per acre; that he would secure the loan by mortgage upon the lands, and, in addition, upon the farm of one of the appellants, Virginia Thompson, in Greene County. That Mack intimated that he was favorable to the proposition, and, after an hour's absence, returned, when they had another conversation. Mack said he had investigated the matter a little during the time, and one or two people told him it was a good loan, and he said further: "I understand, Joe, that you have offered a bonus of $1,000 to anybody that will loan you this money." "I looked at him a short time, long enough to get his expression, and saw that he knew something about this $1,000, and I told him yes. He said: 'That $1,000 looks good to me, and if I make the loan you will have to give it to me.' I told him all right." That thereafter Mack went to the bank to make the necessary arrangements, returned, and said the money would be forthcoming when the title was approved by Mr. Beauchamp, who was not then in the city. That it was arranged that evening or the next morning that Beauchamp, in Mack's behalf, and Williams, in behalf of his associates, should go to Harrisburg, and investigate the title of the land that was about to be purchased. That they went there. George Cox informed the witness that Beauchamp had telephoned from Harrisburg for him to tell Williams to have the $1,000 placed in the bank and inform him by 'phone that it had been done, or that matters at that end of the line would not be fixed up. This was done. Witness made no arrangement with Mack how the $1,000 should be paid, and at no time had he had any conversation with Beauchamp about this $1,000 or asked him to assist him in procuring the loan. The next day the notes and mortgages were executed and delivered in Mr. Beauchamp's office, the check for the $1,000 having been first turned over to him; that witness had never made any agreement with Beauchamp, nor had any conversation with him relating to any compensation to be paid to him for procuring the loan, and in answer to this question said:

"Q. Did you know who was getting the $1,000 at the time you were making the check to Beauchamp? A. Mr. Mack was the man I was paying this money to, and the reason I gave it to Beauchamp was that Mack told me that Beau-

champ was his attorney, and would attend to the matter for him, and that is why I gave the check to Beauchamp. Otherwise I would have given it to Mr. Mack."

Witness said further that he had never had any conversation with Cox at any time in which he was told that Beauchamp would procure the loan, and that he must be paid for it.

The lands were purchased. and the deed of conveyance made to C. A. Mack, for a consideration of $10.642.50. He later, for the same consideration, made a quitclaim deed to appellants at the time of the execution of the mortgage.

J. W. Williams, another appellant, testified that the lands were purchased from J. H. Vandever for something in excess of $10,600, and the title was taken in the name of C. A. Mack; that he went to Harrisburg to close out the trade with Beauchamp, who gave Vandever his personal check to cover the consideration. It was witness' understanding that they were to pay Mack $1,000 additional, to be embodied as a part of the principal in the mortgage, and he didn't understand, until he returned from Harrisburg, that the transaction had been arranged otherwise. He then joined with the others in executing a note for $1,000, but did not know to whom the money realized thereon had been paid. That he represented the firm when he went with Mr. Beauchamp to look up the titles, and supposed that Mr. Beauchamp represented Mack. Didn't remember that Beauchamp said anything about who he represented. That he didn't represent witness, and that he had never spoken to him about representing him, nor with his associates, nor agreed to pay him anything, nor had he spoken to him about procuring a loan from Mack. This witness admitted that he had offered a bonus to other parties if they would get the money for appellants, but that he had never had any conversation with Mack or Beauchamp in regard thereto, and could not recall any conversation with Mack to the effect that he refused to make the loan after reconveying the lands for the additional $1,000. He understood Mack to refuse to make the loan because it had originally been for five years, but consented to do so if it was to be for one and two years. He denied that Cox had any conversation with him, in which he stated that he thought Beau-

champ could get the loan if he would pay him $1,000 to do so, and also that he had any conversation in his office, or Cox's, in which Cox told him the $1,000 they put up goes to Beauchamp. The only thing said about $1,000 in his presence was that they were paying Clyde Mack $1,000 more than he was paying for the land. That he knew nothing of what became of the $1,000, other than what they told him. He had never employed Cox to represent him. He acknowledged he and his associates were ready to pay any one $1,000 that secured the money for them, and he believed the bonus was to be included in the principal and mortgage.

Wright also denied any conversation with Cox, in which he had been informed that they could procure the loan through Beauchamp by paying him (Cox) $1,000.

Mack testified that he had not employed Beauchamp in this or any other matter as his agent, and he made the deal to loan the money with Beauchamp; that he never got any part of the $1,000 paid to Cox and Beauchamp for procuring the loan, and answered further as follows:

"Q. Did you ever have any understanding, tacit or expressed, in any way that you were to have any part of it? A. Most emphatically not. Q. Have you ever received any part of it from Mr. Cox or me? A. Not a penny."

He said first the appellants wanted the money for five years, and he felt that was too long a time, and afterwards when Beauchamp came to see him about it he agreed to let them have it on two years' time. The check covering the consideration for the land was given by Beauchamp personally, because the exact acreage was not known at the time Beauchamp and Williams departed for Harrisburg, and the title was taken in witness' name to protect him until the mortgage was executed. He denied ever having had any conversation with Smith relative to the making of the loan about the bonus, and said it was first broached to him by G. W. Cox about three weeks before the loan was made. In this conversation, Cox said they would give $2,000 personal security and a bonus of $500 in addition to secure the loan. He rejected this and all other propositions after he learned that this would be usurious, and said J. A. Smith had called on him twenty-five or thirty times before the loan was pro-

cured to see if some arrangement could not be made which was satisfactory. He told him if he could get things on a satisfactory basis he could make the loan, and thought he could get the money, if he could cash his time deposits at the bank. This was all he ever said to appellant about getting the money from the bank. That he agreed with Mr. Beauchamp to make the loan on Saturday night between 7 and 9 o'clock, and it was closed on Monday or Tuesday following. That he saw the bank on Monday and made the arrangement that he could draw the money at that time. That ordinarily he would have given them a few days' notice before drawing such a large amount, but didn't on this, as the deal went on through then.

He didn't see the bank as stated by Wright at the time. He told Beauchamp he would make the loan at the time the deal was closed. He could only recall one instance when an attorney other than Beauchamp did anything for him during four or five years before he was testifying. He had submitted both the propositions of $1,000 and a purchase and resale of the lands at an advanced price of that purchase proposed by appellants to Beauchamp, and upon discovering that it would be usurious had declined to have anything further to do with the loan. About a week before the deal was consummated, he offered to lend the money for one year, to be secured by a mortgage on the lands bought and on Mrs. Thompson's farm. He denied any conversation with J. A. Smith on Saturday before making the loan, and stated the only proposition advanced by Smith or any of the other appellants had been rejected by him. Beauchamp told him the night of the loan that he represented the appellants. Witness never received anything, either directly or indirectly, other than the stipulated interest in the notes. He refused to make the loan on the basis proposed by appellants, because they wanted it for five years, and not until the time was reduced to one and two years would he agree to consider it. He was willing to accept Beauchamp's opinion as to the title to the land as a basis for the loan, and appellants never told him that Beauchamp was representing him, and he wasn't present when the papers were executed and delivered.

During the time of the negotiations, he consulted with

Beauchamp about the legal phase of the transaction, but all conversations related to matters that arose prior to the Saturday night conversation with Beauchamp, in which he dealt with him as the agent of appellants and agreed to make the loan.

Beauchamp testified that he was an attorney, and advised Mack that to make a purchase and resell at an advance of $1,000 would be but a cover for usury, and G. W. Cox told him after that that appellants were not satisfied because the deal had fallen through. He suggested to Cox that if the defendants would give them the $1,000 that it was currently rumored would be paid to any one procuring a loan for them, he and Cox would attempt to procure it. That Cox went to see the defendant's attorney about 7:30 Saturday evening, and informed him that they would pay the money. Witness at once went to see Mack, and, after suggesting various deals, all of which were rejected, finally induced him to agree to let them have the money on one and two years' time. Sunday morning, Cox informed him that appellants had accepted the terms, and witness was to accompany Williams to Harrisburg to examine the records. Before their departure, witness had arranged with Mack that he should give his personal check for the consideration, which Mack promised to order paid. He further arranged with Cox to be assured the money would be paid over in the event the title was accepted. Having satisfied himself as to the title, he took a warranty deed from the vendors to plaintiff, Mack, who in turn afterwards quitclaimed to defendants. That evening he delivered the deed to appellant, Smith, who gave him a check for $1,000, one-half of which he paid to Cox. Further:

"Q. Were you representing the defendants in getting this loan for them? A. I thought I was. I represented them either knowingly or unknowingly, I don't know which. I thought I was representing them, and I know they accepted what I did, and the deal went through just that way, and they paid me the $1,000, and Clyde Mack never had a cent of that money, or any other money of mine, except whatever store account I had down there. I have paid that, just like anybody else does."

Said further that he had never been general attorney for Mack; that there was no understanding then, nor had

there been that he was his attorney; that he transacted some business for Mack, who didn't have much business. On cross examination, he stated that he made all arrangements with Cox, who stated he was representing appellants, which was borne out by the manner in which the arrangements were carried out. He took the title in Mack's name, at the time the land was bought, being fearful that appellants, if they got the title in their name, would refuse to pay the bonus. The only conversation he had with any of the appellants about the matter was on Sunday, and he remarked to Smith: "This is a big transaction, Joe, and I don't like to assume the responsibility of passing on the title." Smith replied that it was all right.

Cox testified that he was at first a partner with appellants, but dropped out about two weeks before the loan was procured. After he learned that Mrs. Thompson's farm would be included as security, he tried to get Mack to lend the money, but he refused when he found the transaction would be usurious. On Saturday night in a conversation with Beauchamp he said defendants were willing to pay the $1,000, and that he (Beauchamp), should try to get the money for them. Accordingly, Beauchamp induced Mack to make the loan on one and two years' time, which terms the appellant accepted after some hesitancy. They understood that the $1,000 was to go to Beauchamp, who afterwards divided it with the witness. Witness did not represent Mack, nor did he give him any part of the $1,000. While Beauchamp was at Harrisburg, he telephoned witness to get up the money, which, as they then agreed, was later done.

On cross examination, he stated he told Smith, on his return from Memphis, that he could get the money from Mack. That he did not tell them he would procure it for them for $1,000. That his suggestion was gratuitous at the time. That he did not know whether any of them talked to Mr. Beauchamp and agreed to pay him any sum of money. That Beauchamp fixed up the papers for Mack. In reply to the question if he had not told one of the attorneys that Beauchamp was Mack's agent, and he represented appellants, he said, "You asked me that question, if me and Beauchamp were these people's agents, and I said you could call it anything

you wanted to. They told me to get this money, if I could. Q. Did you not say this: 'I was these people's agent and Beauchamp was Mack's agent?' Or did I not ask you if you were their agent, and Beauchamp was Mack's agent, and you said, 'Yes sir?' A. That may have been what I said. I don't know what arrangement Mr. Mack or Mr. Beauchamp had."

He gave defendants to understand that the $1,000 for Beauchamp must be paid in cash. He had nothing to do with closing out the transaction.

Another witness testified that Smith was very anxious about the loan and came into the store to see Mack twelve or fifteen times shortly before it was made; sometimes several times a day. Another clerk testified about to the same effect.

The court rendered a decree for the amount due upon the notes, and a foreclosure of the mortgage and a sale of the lands, dismissed the cross complaint, and from the judgment appellants appealed.

Block & Kirsch, for appellant.

This case turns upon the question whether Beauchamp was the agent of appellants or of appellee. If he received the $1,000 bonus while the agent of appellee, and the latter had knowledge thereof, or if the circumstances are such that it can be presumed that he had such knowledge, the transaction was usurious. 54 Ark. 40; 51 Ark. 535; 51 Ark. 547.

M. P. Huddleston, for appellee.

The burden of proof is upon the person who pleads usury to show clearly that the transaction is usurious. Usury will not be inferred where from the circumstances the opposite conclusion can be reasonably and fairly reached. 74 Ark. 241; 68 Ark. 162; 91 Ark. 458; 54 Ark. 573. To affect a loan with usury on account of a commission paid to an intermediary, it must appear that he was the agent of the lender and took commission under authority, expressed or implied, from his principal. 54 Ark. 573; 57 Ark. 251. See also, 66 Ark. 10; 51 Ark. 535, 544; 83 Ark. 31.

KIRBY, J., (after stating the facts). The sole question in this case is one of fact. The law is well settled that, "to sustain the plea of usury, it must appear that

excessive interest was paid to the lender, or that a bonus or commission was paid to the agent of the lender with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest paid or to be paid to the lender, would exceed the lawful rate." The burden of proof is upon the party who pleads usury to show clearly that the transaction was usurious. *Banks* v. *Flint,* 54 Ark. 40; *Vahlberg* v. *Keaton,* 51 Ark. 535; *Thompson* v. *Ingram,* 51 Ark. 547.

In *Leonhard* v. *Flood,* 68 Ark. 162, the court said:

"Our law visits on a lender, who contracts for usurious interest, however small, a forfeiture of his entire loan and the interest thereon. It follows from the plainest principles of justice that such a defense shall be clearly shown before the forfeiture is declared. Usury will not be inferred from circumstances when the opposite conclusion can be reasonably and fairly reached."

If Beauchamp acted as the agent of the borrowers alone in procuring the loan, it makes no difference whether he received the bonus or not, for what the borrower pays to his own agent for procuring the loan is no part of the sum paid for the loan or for forbearance of money. *Vahlberg* v. *Keaton, supra.*

"To constitute usury, there must be an agreement on the part of the lender to receive and on the part of the borrower to give for the use of money a greater rate of interest than 10 per cent." *Banks* v. *Murphy,* 83 Ark. 36.

As already said, the sole question in this case in one of fact. The lender denied positively any agreement to make the loan upon receipt of $1,000 bonus above the amount of the interest agreed to be paid, and stated that he absolutely refused to make the loan at all when he learned that such a transaction as proposed to him would be usurious. That, later, he was approached by Beauchamp, who insisted upon his making the loan and agreed to do the work of getting up the papers for nothing, if the loan could be arranged. He refused then to make the loan for the time proposed, but later agreed to and did make it for two years. He denied receiving any bonus, and that any one else was acting as his agent in receiving one.

Appellants do not deny that they offered to pay the bonus to any one who could procure the loan, and both Cox and Beauchamp stated positively that they procured the loan and received the bonus, Cox insisting with Beauchamp that appellants were still willing to pay the $1,000, and that the loan should not be permitted to fall through, and that he ought to be able to procure it, and that he would pay him half the bonus if he would assist in procuring the loan or get Mack to make it. These witnesses both testified that they did procure the loan from Mack, that they received the bonus and divided it between themselves, and that Mack had nothing to do with it and did not receive any part of it.

Of course, if appellants were believed, the transaction was usurious, but the evidence is in direct and irreconcilable conflict, and it was passed upon by the chancellor, and we can not say that his finding and decision is against a preponderance of it. Such being the case, the decree is affirmed.

CARMICAL v. ARKANSAS LUMBER COMPANY.

Opinion delivered December 23, 1912.

1. ABANDONMENT—REAL PROPERTY.—At common law, the title to real property is not lost by abandonment, unless the abandonment is accompanied by circumstances of estoppel and limitation; and this without regard to the formality of abandonment, if it was short of a legal deed of conveyance. (Page 666.)
2. QUIETING TITLE—LACHES.—So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within the limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith become so changed that he can not be restored to his former state if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. (Page 667.)
3. SAME—LACHES.—In order to bar a suit to remove a cloud upon the title to wild and unimproved land on the ground of laches, a purchaser under a void tax title and his privies must have, prior to the commencement of the suit, paid the taxes upon the land under color of title for at least seven years. (Page 668.)

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

STATEMENT BY THE COURT.

Ollie Carmical, by her guardian, and Emma Drummond, brought suit against appellee to remove the cloud from their title to the west one-half, northwest quarter, section 31, township 15 south, range 10 west,74.37 acres of wild and unimproved lands in Bradley County, Arkansas, and cancel a deed from the State, conveying same, as forfeited tax lands, to appellee.

They claim the lands as the surviving heirs of H. M. Edrington, their father, who acquired the title thereto by patent from the United States Government and died intestate, leaving plaintiffs and Selvyn Edrington, his only heirs at law.

Selvyn Edrington died in 1901 intestate, leaving appellants, his sisters, his only heirs. The lands were sold for taxes of 1873 and 1874 to the State and again in May, 1876, for the taxes of 1873, and 1874 and 1875. The lumber company purchased from the State, paying therefor $1.25 per acre, and same was conveyed to it by its quitclaim deed on March 18, 1904, and paid taxes thereon for the first time in 1905.

The answer alleged the purchase from the State that date; that it had before been donated by the ancestor of appellant to a railroad and abandoned by him, and that it was purchased by the Arkansas Lumber Company, and pleaded laches and estoppel in bar of appellant's right to recover.

There was some testimony tending to show that H. M. Edrington made a donation of the land to the Fort Scott, Natchez & Mississippi Railroad Company, to assist in the construction thereof, but there was no conveyance shown to have been made to said company, and there was also some evidence of declarations made by said Edrington, thirty or forty years before the purchase by the lumber company, that the lands were worthless, and that he was not going to pay taxes further upon them; that he had abandoned them. The testimony shows further that he paid taxes on other lands in the same section and township until 1879.

The lands have greatly enhanced in value since their forfeiture to the State, it being claimed by appellee and stated by some of its witnesses, that the increase in value was due to the efforts and expenditures of appellee company in erecting

a large sawmill and building a railroad and tramroads into the country near the lands.

On the other hand, there was testimony to show that the increase in value of the lands was natural and in proportion to the increase in value of all other lands like situated in the county, and that the value had been enhanced by the construction of the Rock Island Railroad within a mile and a half or two miles of them, and would have so increased in value without regard to the improvements and expenditures of money by appellee, which would have been made without regard to the purchase of this tract of land, in order to develop its other lands and manufacture the timber thereon. There is no question that the lands are wild and unimproved.

The court found that the lands were acquired from the government by H. M. Edrington, father of the plaintiffs, who died intestate, leaving them and Selvyn Edrington, his only heirs at law. He died intestate, in 1901, without issue, leaving his sisters his sole heirs; that the lands were sold for taxes in 1873 to the State and again in 1876 for the taxes of 1873-4 and 5, and that the tax sales were void. That Edrington, nor his heirs, had paid taxes on the lands since 1871. That he had paid taxes on other lands in the same township and section to 1879. That H. M. Edrington had abandoned the lands as worthless at the time they were forfeited to the State for taxes. That it remained of little value until after it was purchased by the lumber company in 1904, since which time it has increased from $7.50 to $12.50 per acre, and that this increase in value was brought about by the said lumber company in the expenditure of money and the erection of a sawmill and railroad near the lands. That the company bought the land from the State, understanding it had been abandoned by Edrington, and built its mill and railroad under that belief, and that the actions and declarations of Edrington were such as to warrant the belief that he had abandoned the lands; that it had paid all the taxes on the lands since its purchase, in March, 1905; declared the claim of Emma Drummond stale and barred by laches, and permitted Ollie Carmical to recover a one-third interest in the land as the heir of her father and one-sixth as the heir of her brother, adjudging that she pay one-half the taxes, with interest, which was declared a lien against

her interest in the land. From this decree both Emma Drummond and the lumber company appealed.

Williamson & Williamson, for appellant.

At the common law the title to real estate could not be lost by abandonment, and that law obtains in this State.

An abandonment, however formal it may be, if unaccompanied by circumstances of estoppel or limitation, and if it falls short of a deed of conveyance, has no effect upon the legal title; and the owner may re-enter and eject any one who, in reliance upon the abandonment, may have entered into possession. Tiedeman on Real Property, § 739.

Abandonment will not amount to laches, short of seven full years payment of taxes, unless there are supervening equities in favor of the holder of the tax title. 81 Ark. 154; 83 Ark. 154, 161.

Fred L. Purcell, for appellee.

The chancellor's decree is right under the facts. The case is controlled by 81 Ark. 352, and 72 Ark. 101.

KIRBY, J., (after stating the facts). It is undisputed that the lands are unimproved and uninclosed, and have been since they were acquired by plaintiff's ancestor from the Government; also that Ollie Carmical and Emma Drummond acquired all the title of their ancestor to the land. Neither is it contended that the lands were not forfeited to the State, as alleged, nor that the tax sales are not void. The sole question for determination is whether appellant can be barred by laches from the assertion of her claim to this land, the lumber company not having paid taxes thereon under color of title for the statutory period of seven years.

The lands were wild and unimproved and in the actual possession of no one, but necessarily in the constructive possession of the true owner all the time from their illegal forfeiture, and the owners could not be barred of their right thereto, except by limitation or by laches.

It is not disputed that the lumber company paid taxes for the first time on the lands after their purchase on March 24, 1905, and that the suit was filed on December 29, 1910, less than six years thereafter. The company, not having paid

taxes for seven years under its color of title, did not acquire title thereto by limitation.

At the common law, which is in force in this State, the title to real property is not lost by abandonment, unless the abandonment is accompanied by circumstances of estoppel and limitation, and this without regard to the formality of abandonment, if it was short of a legal deed of conveyance; the title being in no wise thereby affected nor the owner thereafter prevented from re-entering and ejecting any who had entered into possession in reliance upon the abandonment, Tiedeman on Real Property, § 739.

The contention that appellant is barred by laches from asserting her title, because of the failure to pay taxes on the lands from their forfeiture to the State to the beginning of the suit, and that they had meanwhile greatly enhanced in value, is not well founded nor sufficient to support the plea of laches.

In *Fordyce* v. *Vickers*, 99 Ark. 500, the court said: "Before the doctrine of laches can be invoked, the delay of the true owner must mislead and work a disadvantage to the party making this defense," and also "the true owner of the land can not be divested of a title thereto by the mere failure to pay taxes and the enhancement of it in value. The doctrine of laches is founded upon the principle, not only that there had been such a delay in the payment of taxes by the owner, indicating either that he considers his claim to the land worthless, or a total abandonment of his right to the property, and in the meanwhile a great enhancement in the value thereof, but also upon the ground that the party asserting a claim to it has good reason to believe that the alleged rights are worthless or have been abandoned and, acting upon such belief, has paid taxes on the lands under color of title at least the period of time named by the statute of limitations, and that because of the change of conditions during such period of delay and the enhancement of the value it would be inequitable to permit the owner to assert his title thereto. The party setting up the equitable defense of laches must show that he and those under whom he claims have paid the taxes on the land under a color of title thereto."

In *Osceola Land Co.* v. *Henderson*, 81 Ark. 432, 100 S. W.

896, it is said: "Mere laches does not of itself bar the plaintiff. Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within the limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has in good faith so changed that he can not be restored to his former state if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right."

In *Herget* v. *McLeod*, 102 Ark. 60, the court, following the rule laid down in *Chancellor* v. *Banks*, after a discussion of it and the prior decisions of the court, said: "It will thus appear that, before the plea of laches can be available to deprive the true owner of his land, it must be shown that the party claiming the same and his grantors have, prior to the commencement of the suit, paid the taxes on the land under color of title for at least seven years, the statutory period of limitation. The fact that the true owner had failed to pay the taxes on the land for a period longer than seven years will not alone bar him, but it must appear that during such period the defendant, or those under whom he claims, have previously paid the taxes thereon for at least seven years prior to the institution of the suit before the true owner can be declared barred by laches."

There is no claim of any statement or conduct of appellants relative to the ownership of this land that would estop them from asserting their title thereto against the Arkansas Lumber Company, nor is there shown any such conduct on the part of their ancestor, through whom they acquired title, as would have estopped him from making any such claim. All statements attributed to him relating to the lands and their worthlessness were made long years before their purchase by the lumber company, and furnished no inducement for such purchase, nor were they relied on in the making of it. Such being the case, it can make no difference how greatly the lands have been enhanced in value, no improvements being made thereon by appellant, even if some of the enhancement in value be properly attributable to the expenditure of money and effort by the lumber company for the development and man-

ufacture of the timber upon its other lands in the immediate vicinity. This suit having been brought after the purchase and before said lumber company had paid the taxes thereon, under its color of title for seven years, appellants are not barred by laches. *Fordyce* v. *Vickers, supra; Herget* v. *McLeod, supra*; *Tatum* v. *Ark. Lumber Co.*, 103 Ark. 251.

It follows, the court erred in rendering the decree, which is reversed, and the cause remanded, with directions to enter a decree cancelling the tax deed to the lumber company as a cloud upon the title of appellants, and quieting their title, and that appellants be required to pay the taxes for 1873, 1874 and 1875, and the taxes paid by the lumber company on the lands since its purchase thereof, with 6 per cent. interest, which shall be declared and fixed as a lien against the land.

APPLE *v.* APPLE.

Opinion delivered December 23, 1912.

APPEAL AND ERROR—OBJECTIONS NOT RAISED BELOW.—Where, at the time his wife was given a divorce, appellant verbally agreed that she should retain a carriage and mare, and subsequently she filed a petition in the same cause asking that such verbal agreement be enforced, objections that the verbal agreement was not enforceable, that equity had no jurisdiction, or that there was no consideration for the agreement, can not be raised for the first time on appeal.

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

J. H. Harrod, for appellant.

Bradshaw, Rhoton & Helm, for appellee.

SMITH, J. Appellant was the defendant in the court below in a suit for divorce and alimony. The complaint was filed on January 22, 1912, and there was a prayer for divorce "and for all and complete relief." A decree was entered March 20, 1912, which provided that in lieu of dower and alimony, the plaintiff, Hattie B. Apple, shall during her life, or until her marriage, if she should remarry, have possession of their residence in Little Rock, and of certain personal property, and that defendant should pay thirty dollars each month for the support of plaintiff and their children, and the decree

further provided: "The foregoing decree as to property rights is made by consent and agreement of the parties. The court doth retain control of this cause for such further orders and proceedings as may be necessary to ascertain definitely and enforce the rights of the parties hereto in the property and the childern herein referred to." After the close of the term at which this decree was rendered, the plaintiff on June 6, 1912, filed a petition in this same cause in which she alleged that at the time the agreement was entered into between plaintiff and defendant in reference to the disposition of the property involved in this action, the defendant agreed that plaintiff should have and keep possession of a carriage and a mare which had been used as the family driving horse, and that this agreement was a part of the arrangement by which the property was divided and she given the property to which she was entitled, under section 2684 of Kirby's Digest, upon being awarded a decree of divorce from her husband.

There is no intimation here that there was any collusion between the parties in the suit for divorce, and no objection was made by the defendant to the form of action which plaintiff brought to recover the possession of the carriage and mare. The answer merely said: "That he denies that plaintiff is entitled to the horse and surrey, states that the same is now his own individual property, and denies that he ever made any agreement with the plaintiff by which she should be given such property." The cause was heard upon the depositions of the plaintiff and the defendant, and the evidence presented a very close question of fact, and we can not say the findings of the chancellor are contrary to the clear preponderance of the evidence. The order of the chancellor recites that, after hearing the evidence, he "doth find that the plaintiff, Hattie B. Apple, is entitled to the horse and carriage involved in this controversy."

Appellant insists here that the whole foundation of plaintiff's cause of action was a disputed agreement in relation to a division or disposition of property in connection with a proceeding for divorce; that a court of equity will not carry into effect the private arrangements of parties to a divorce case in regard to their property matters, except by the agreement of the parties, and that, as there was no consideration for the

agreement made, she could not have maintained replevin for the property; and that, if she could not maintain replevin for the property, she could not secure it by the order of the chancery court.

But none of these questions were raised below, and will not be considered here. *Blake* v. *Scott,* 92 Ark. 46; *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81. Had fraud or duress been practiced upon the plaintiff in making the agreement for the division of the property, the court could have reconsidered its order in regard to the property, even though a proceeding for that purpose was not instituted until a subsequent term of court. So that the court might have had jurisdiction of the subject-matter of the controversy at the subsequent term, just as it had at the term at which the decree for divorce was rendered. The parties here litigated the property rights without raising any question in the court below as to the form of action, and we do not feel called upon to decide whether petitions in regard to the division of property can ordinarily be heard and granted by a chancellor under the circumstances here recited. *Talbot* v. *Wilkins,* 31 Ark. 422; *Moss* v. *Adams,* 32 Ark. 562; *King* v. *Payan,* 18 Ark. 583; *Hicks* v. *Hogan,* 36 Ark. 303; *Kampman* v. *Kampman,* 98 Ark. 328; *Organ* v. *Memphis & L. R. Rd. Co.,* 51 Ark. 235; *Mooney* v. *Brinkley,* 17 Ark. 340; *Sexton* v. *Pike,* 13 Ark. 193; *Daniels* v. *Street,* 15 Ark. 307; *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326; *Gerstle* v. *Vandergriff,* 72 Ark. 261; *Burke* v. *St. Louis, I. M. & S. Ry. Co.,* 72 Ark. 256; *Love* v. *Bryson,* 57 Ark. 589.

The plaintiff testified that she and her husband had agreed that she should have the horse and the carriage; that the carriage was already in her possession, and the defendant gave her the horse, but told her not to take possession of it until a Mr. Pye, to whom it had been loaned, was through with it.

The plaintiff further testified that "when we came up here in the court room, when the decree for divorce was given, I asked in the presence of the judge and the lawyers, how about the horse? and Mr. Apple said: "That is all right; you can have the horse and carriage." The chancellor may have treated the property here in controversy as disposed of under

this arrangement prior to his decree, and that it was therefore unnecessary to make any order in reference to it.

The appellant does not deny that he agreed that appellee might have the use of the horse and carriage, and that she had possession of them pursuant to this agreement. But he says this agreement was a conditional one, and the conditions were not performed and that he therefore took the property back into his own possession. The existence of these conditions was denied by appellee; besides they were improper.

Upon the while case, we think the findings of the chancellor are correct, and the decree will be affirmed.

FLORENCE COTTON OIL COMPANY *v.* ANGLIN.

Opinion delivered December 23, 1912.

AGRICULTURE—REGULATION OF FERTILIZERS.—In an action on a promissory note given for the purchase of a commercial fertilizer for an agreed price, it is a good defense that the sale of the fertilizer was made in this State, and that the fertilizer had never been analyzed by the Commissioner of Mines, Manufactures and Agriculture nor tags affixed to the bags as required by law.

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

Marsh & Flennikin and *Gaughan & Sifford*, for appellant.

Under the circumstances of the case, it was error to hold that as a matter of law the sale was illegal. Appellant had in good faith done all it could do under the circumstances, had perpetrated no fraud, and the purchaser in effect waived the question of the tags. The thing required by the act was impossible of performance by reason of the failure of the State's representative to have on hand a supply of tags. 85 Ark. 422; 84 Ala. 93.

E. O. Mahoney, for appellee.

The sale was unlawful because of the failure of the seller to comply with the fertlizer inspection and tagging law, the note sued on was invalid and not enforceable, and the court properly directed a verdict for the defendant. Kirby's Digest, § § 824, 825, 832, 833; Acts 1907, p. 999; *et seq.*, § § 6, 10, 16; 47 Ark. 378; 32 Ark. 619-631; 43 Ark. 66;

HART, J. Appellant brought this suit against appellee to recover upon a promissory note for $166.69. The note was dated August 9, 1910, and was payable to the order of appellant on or before November 1, 1910. Appellee answered and averred that the note was given for the purchase of commercial fertilizer; that appellant was a foreign corporation, and at the time the fertilizer was sold to appellee and the note executed appellant had not complied with the laws of the State in regard to foreign corporations doing business here. Appellee also says that the note sued on was given for the purchase price of certain fertilizer sold to him by appellant in Union County, Arkansas, and avers that at the time of the sale the fertilizer had not been inspected and tagged in compliance with the laws of the State. Wherefore he claims that the note sued on was void and unenforceable. The facts are as follows:

Appellant is a corporation organized under the laws of the State of Alabama. In the spring of 1910 it shipped a carload of fertilizer to its agent at Upland, in Union County, Arkansas, and its agent there sold and delivered the fertilizer to various parties, among whom was appellee. Appellant offered to prove that before the sale of the fertilizer it sent one hundred dollars to the Arkansas State Commissioner of Mines and Agriculture for tags and was advised by him that he had no tags on hand; that the commissioner advised him to proceed with the sale, and that later on he would furnish it with tags covering the fertilizer already sold; that after receiving the tags appellant sent them to its agent with instructions to furnish the tags to each of the purchasers of fertilizer, which had already been sold. The court refused to allow this testimony to go to the jury, and its action in so doing is now assigned as error.

Appellee testified that the fertilizer purchased by him from appellant for which the note sued on was given was not tagged in compliance with the statute pertaining thereto at the time he purchased the same. He said that the fertilizer was injurious to his crops, and was of no use as a fertilizer. Other witnesses testified that they bought fertilizer out of the same lot sold to appellee; that they used it as directed, and that it was of no benefit to their crops.

J. M. Smith testified that he was one of the State inspectors of fertilizer, and that Union County was in his district; that he did not sample any fertilizer in Union County, Arkansas, during the year 1910, and was not notified by appellant or any one else to come there and take samples of fertilizer that was being offered for sale.

Appellant in rebuttal introduced testimony to show that the fertilizer was good, and would have been beneficial to the crops of appellee, had it been used as directed.

The court held as a matter of law that the sale of the fertilizer by appellant to appellee was unlawfully made because the laws of the State of Arkansas in regard thereto had not been complied with, and gave a peremptory instruction in favor of appellee. The case is here on appeal.

It is first insisted by counsel for appellant that the case at bar is controlled by the principles of law announced in *Woolfort* v. *Dixie Cotton Oil Co.*, 77 Ark. 203, and cases of like character, where it was held that a foreign corporation may recover upon a contract made by it in this State, although it failed to file a copy of its articles of incorporation and the required statement in compliance with the statute of the State. We do not think the principle there announced is controlling here. There the contract was only remotely and incidentally connected with the failure of the foreign corporation to comply with the statute of the State in regard to permitting it to do business in this State. The contract sued on was independent of the illegal conduct of the corporation in not complying with the laws of the State providing the terms upon which it might do business here, and was not designed to aid or promote such transactions. So it may be said that in the character of cases of that kind the illegality occurred in a matter collateral to the contract, and the contract is not thereby rendered illegal, unless it is expressly made so by the statute itself. In the case at bar the sale of fertilizer, unless the statute is complied with in regard thereto, is prohibited on grounds of public policy. The Legislature of 1907 passed an act to provide for and regulate the registration, sale, inspection and analysis of commercial fertilizer in the State of Arkansas. See Acts of 1907, page 995. Section 5 of the act provides for inspection fee and inspection.

Section 6 provides that it shall not be lawful to sell or offer for sale in this State any fertilizer or fertilizer materials that have not been registered with the Commissioner of Mines, Manufactures and Agriculture, as required by the act. It also provides that the fact that the purchaser waives the inspection and analysis shall be no protection to the party selling the same except under certain restrictions which it is not necessary to notice under the facts of this case. Section 10 prescribes the duties of the inspectors. Section 12 provides for an analysis of the fertilizer. Section 16 makes it a misdemeanor for any person to sell or offer for sale any fertilizer or fertilizer material without having first complied with the provisions of the act and prescribes the punishment at a fine of not less than one hundred, nor more than five hundred dollars.

The undisputed evidence shows that the fertilizer sold to appellee by appellant, for which the note sued on was given, was not inspected and analyzed, and was not tagged in compliance with the provisions of the statute. The statute makes the failure to do this a misdemeanor, punishable at a fine of not less than one hundred nor more than five hundred dollars. The general rule is that where a statute provides that a violation thereof shall be a misdemeanor it would seem clear that it was the intention of the Legislature to render illegal contracts violating such statute. 15 A. & E. Ency. of Law, (2 ed.) page 939.

In the case of *Compagionette* v. *McArmick*, 91 Ark. 69, we held in effect that where a statute provides that a violation thereof shall be a misdemeanor it is manifest that the Legislature intended to make contracts violating the statute illegal, and the courts will not enforce them. This is in accord with the adjudicated cases on this question. See case note to 1 A. & E. Ann. Cas. 333.

Counsel for appellant also rely upon the case of *Steiner* v. *Ray*, 84 Ala. 93, to reverse the judgment. There the court held that one who sells a fertilizer omitting at the request of the purchaser to tag each package sold, as required by the statute, but delivers tags for each package to the purchaser, he promising to attach them, does not violate the statute, and a note given for the purchase price of such fertilizer is

valid. The facts in that case show that the agent of the seller had had the fertilizers inspected, and it had procured the tags required by the statute, and was proceeding to attach the tags to the several packages when at the request of the buyers he delivered the tags to them and permitted them to depart upon their promise to attach them. The court said that this was a substantial compliance with the statute. Here the facts are essentially different. The undisputed evidence shows that the fertilizer was never inspected and analyzed, as required by the statute, and that the agent of the seller did not have the tags as required by the statute at the time he sold the fertilizer to appellee. The sale was made at Upland, in this State. As we have already seen, the statute denounces a heavy penalty against any person who sells or offers for sale in this State commercial fertilizer without first complying with certain provisions. Therefore, this case is distinguishable from *Steiner* v. *Ray, supra,* and is controlled by the principles of law in the case of *Campbell* v. *Segars,* 81 Ala. 259, where the court held that, in an action on a promissory note given for the purchase of a commercial fertilizer for the agreed price, a plea averring that the sale was made in this State, and that at the time of the sale the commercial fertilizer had never been analyzed by the Agricultural Commissioner, nor tags affixed to the packages and bags as required by the State, is a full and complete defense.

The judgment will be affirmed.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF ARKANSAS *v.* DREHER.

Opinion delivered December 23, 1912.

APPEAL AND ERROR—SUFFICIENCY OF BILL OF EXCEPTIONS.—Where a bill of exceptions contained a direction to the clerk to insert testimony, meaning that the clerk should insert the official stenographer's minutes of the testimony, which was not submitted to the trial judge for approval but was subsequently filed in the clerk's office, such transcribed testimony did not become a part of the record on appeal.

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

Carmichael, Brooks & Powers, for appellant.

Pettit & Pettit and *Moore, Smith & Moore*, for appellee.

The judgment should be affirmed. There is nothing in the record to show what testimony the verdict was based upon nor what testimony the instructions of the court were based upon. The purported testimony upon which appellant relies and bases its argument is not identified as a part of the record, and is not properly before the court. 100 Ark. 244; 45 Ark. 485; 101 Ark. 555.

HART, J. Appellee brought this suit against appellant in the circuit court to recover the amount of a beneficiary certificate issued January 6, 1899, to her husband, Nicholas Dreher, deceased. Appellant filed an answer in which it stated that it had issued the certificate upon an agreement with Nicholas Dreher that the same was issued to him subject to the laws of the order then in force or which might thereafter be adopted. The answer further states that Nicholas Dreher failed and neglected to pay his dues and assessments for the month of October, 1905, and refused to pay any dues and assessments from and after that time; that he thereby forfeited all rights of a beneficial member, and that he was never reinstated at any subsequent time; that at the time Dreher applied for his benefit certificate there was a law of the order in force to the effect that any member who should enter into the business of selling by retail intoxicating liquors as a beverage should be expelled, and that Dreher in disregard thereof entered into the occupation of selling intoxicating liquors as a beverage about the month of July, 1905, and continued until in October 1905, in the city of Stuttgart, where he resided. Wherefore it was claimed that he had forfeited all rights as a beneficial member of the association prior to the time of his death, and that Christina Dreher, as his wife and beneficiary, was not entitled to recover on the certificate.

The jury found for appellee in the sum of one thousand dollars, the amount named in the certificate, and the case is here on appeal.

The transcript in this case purports to consist of two separately bound packages of paper, both of which appear to have been filed with the clerk of this court on the same day. The first, which is properly the transcript, contains the plead-

ings, a skeleton bill of exceptions, containing the charge of the court, the motion for a new trial, orders and judgment. The only testimony in the skeleton bill of exceptions consists of seven preliminary questions and the answers thereto propounded to Mrs. Christina Dreher, appellee. Then we find a direction as follows: "Clerk here insert testimony."

The case was tried at the November term, 1911, of the Arkansas Circuit Court, and the order overruling the motion for a new trial was made November 7, 1911. In that order it appears that sixty days was allowed appellant in which to file its bill of exceptions. The skeleton bill of exceptions shows that it was approved and signed by the circuit judge on the 6th day of January, 1912, and on the same day was filed in the office of the circuit clerk. What purports to be the testimony consists of one hundred and twenty typewritten pages which was filed in the office of the circuit clerk on February 1, 1912. It does not appear to have been examined, approved or authenticated by the circuit judge.

It is now contended by counsel for appellee that the one hundred and twenty pages of typewritten matter purporting to be the testimony taken at the trial is not properly a part of the bill of exceptions, and is therefore not a part of the record on this appeal.

The grounds upon which appellant seeks to reverse the the judgment can not be reviewed on this appeal without a consideration of the testimony taken at the trial. Therefore it is insisted by counsel for appellee that the judgment should be affirmed. They rely on the case of *Dozier* v. *Grayson-McLeod Lumber Co.*, 100 Ark. 244. There the court held: "Where a bill of exceptions recited: 'The following testimony was introduced before the court and jury, which was all the evidence introduced by either party (insert testimony)' meaning that the clerk should insert the official stenographer's notes of the testimony, and the certificate of the stenographer shows that the testimony was subsequently transcribed, and it does not appear that the transcribed testimony was ever presented to the circuit judge for examination, it did not become a part of the bill of exceptions, and can not be considered on appeal. See, also, *International Order of 12* v. *Jackson*, 101 Ark. 555.

That case is squarely in point. There was no sufficient

call for the testimony in the skeleton bill of exceptions. It is certain that nothing that is not reduced to writing can be embodied in the bill of exceptions by reference to it alone. Any other rule would make the final record of a case as uncertain as the memory or the will of the clerk to whom its final making up might be referred, and would place the rights of parties, who have judgments of record, entirely in the power of the person who eventually makes up the bill of exceptions for this court. In the case at bar the call for the testimony does not identify it, and the one hundred and twenty pages of typewritten matter which purport to be the testimony taken at the trial were not approved by the judge, and were not even filed by the clerk until after the time given for filing the bill of exceptions had elapsed. The reason for the rule is aptly stated by Mr. Justice Brewer in the case of *A. & N. Railroad Co.* v. *Wagner*, 19 Kan. 335, as follows:

"And in this we appropriate the language of the Supreme Court of the United States in the case of *Leftwich* v. *Lecann*, 4 Wall. 187, in which the court says: 'If a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions.' And these means of identification must be obvious to all. No mere memorandum, intelligible it may be to a single person, even the clerk, but indicating nothing to any one else, will be sufficient. They must be such that any one going to the record can determine what document is to be inserted, or, after insertion, that the clerk has made no mistake. The record must prove itself, and not the record and the testimony of the clerk. The clerk changes; the record endures. And, long after judge and clerk are both gone, the record, if good, must carry on itself the evidence of its own integrity."

Therefore the judgment will be affirmed.

SIMS v. ST. JOHN.

Opinion delivered December 23, 1912.

1. AGENCY—DELEGATION OF AUTHORITY.—An agent employed for a special purpose can not delegate his authority to some one else. (Page 683.)
2. BROKERS—RIGHT OF SUBAGENT TO RECOVER COMMISSION.—Where a sale of real estate is made by an agent with the assistance of a subagent under an agreement to divide his commission with him, such subagent is not entitled to recover a commission for the sale from the owner of the land, there being no privity of contract between them. (Page 684.)
3. SAME—RATIFICATION OF SUBAGENT'S EMPLOYMENT.—Where the owner of land employed a broker to effect a sale thereof, the mere fact that the land owner knew that such broker employed a subagent to assist will not constitute the subagent an agent of the former, so as to entitle the subagent to look to the former for his compensation. (Page 685.)

Appeal from Woodruff Circuit Court, Southern District; *J. S. Thomas*, Special Judge; affirmed.

STATEMENT BY THE COURT.

This is a suit by appellant, a real estate broker, against appellee for commission on a land sale. Appellant alleged that appellee owned 2,800 acres of land in Woodruff County; that these lands were placed for sale with him by one J. T. Black, who was the appellee's agent; that appellant procured a purchaser who bought the lands, and that he was entitled to compensation for his services in the sum of $1,500.

The appellee answered, denying that Black was his general agent, and denying that he knew the appellant or ever had any business transactions with him. He admitted that he listed his lands with Black to sell, but denied that Black made any sale of the lands.

The court, when the testimony was concluded, directed a verdict in favor of the appellee, and rendered judgment in his favor.

The facts upon which appellant relies to reverse the judgment are stated by his counsel as follows:

"Some years prior to the transaction involved in this controversy, A. A. St. John, appellee, then a resident of Indiana, bought 2,800 acres of land and timber in the southern district

of Woodruff County, paying therefor the sum of $50,000. About a year before this suit was instituted, appellee engaged one J. T. Black, a real estate agent at Brinkley, Arkansas, to sell said land and timber upon terms of $100,000 net to appellee, with the agreement that said Black should have for his commission all sums over and above that amount, for which he might procure a purchaser. Black, it seems, put forth some effort to sell the land, and among the other things he did was to employ S. C. Sims, appellant, a real estate broker at Hazen, Arkansas, to sell said lands upon terms of $100,000 net to appellee and the commissions made to be divided between the appellant and said Black. Appellant at once began advertising the land and induced several parties to go on it and inspect the timber, and in the meantime reported all his actions to Black, and Black reported them to appellee, who states in his testimony that he knew that appellant was endeavoring to sell the land. Appellee became anxious to dispose of the property, and modified the terms by offering Black $2,000 in the event he procured a purchaser at the price of $100,000, and this fact was made known by Black to appellant.

"Among those whom appellant interested in the sale of this land was the Interurban, etc., Real Estate Company, of Memphis, Tennessee, hereafter known as interurban company. This company expended considerable sums of money in placing the land and timber upon the market, having the timber estimated and sending parties to Woodruff County to look over the tracts. All of its acts in this respect were reported to Sims, Sims reported to Black, and Black reported to appellee.

"Among the parties before whom the interurban company placed the proposition was the McLean Lumber Company of Memphis, Tennessee, and immediately after the interurban company submitted the proposition to the McLean Lumber Company, the lumber company took the matter up direct with appellee, who came from his home in Indiana to Memphis to close up a sale of the oak and ash timber on the land for $70,000. Appellee then sold the remaining timber for $25,000 and stated that the land was worth $28,000. Immediately upon submitting the proposition to the McLean Lumber Company, the interurban company reported that fact to appellant, appellant reported it to Black, and Black reported

it to appellee, according to appellant's testimony, although the fact is denied by appellee."

In addition to the above, the appellant testified that he had never had any correspondence with appellee, and never saw him before the transaction was consummated.

Manning & Emerson and *J. G. & C. B. Thweatt,* for appellant.

1. In considering whether or not the court was correct in directing a verdict against the appellant, the evidence is to be given its strongest probative force in his favor. 95 Ark. 560. And if, having done so, there is any testimony upon which a verdict of the jury might have been sustained, or which would have required the court to submit the issues to the jury, then the court erred in directing the verdict.

2. Where a broker has performed services, and a sale has been made, the law favors a construction of the contract, if any, and an interpretation of the facts and the acts of the parties, most favorable to the broker. 59 Pac. 60-61; 65 Atl. 930-32. The existence of the agency and the nature and extent of the agent's powers are questions of fact to be determined by the jury from the evidence, under proper instructions. *Id.*; 19 Cyc. 286.

3. Appellee errs in his contention that appellant can not recover because he was not employed by appellee, but was a mere subagent. A subagent, or an agent or broker employed by an agent or principal, where he renders the services and is the procuring cause of the sale, may recover commissions from the principal. 81 S. W. 574; 9 N. W. 367; 45 S. E. 413; 79 S. W. 486; 70 N. W. 120-22; 83 Ark. 404. Appellee is bound also because he ratified the acts of appellant in acting as his agent and procuring him a purchaser. 83 Ark. 404; 11 Ark. 192, 205; 23 Am. & Eng. Enc. of L. 900-903. An agent is entitled to commissions if in any way, by advertisements, exertions or otherwise, he is instrumental in causing the sale. 89 Ark. 195-203; 76 Ark. 375-6; 53 Ark. 49, 52.

Harry M. Woods and *Allen Hughes,* for appellee.

1. Appellant can not maintain his action because there is no privity of contract between him and appellee. This case does not fall within the exception to the general rule

that an agent can not delegate his authority. Black, the agent, lived in Arkansas, and near the land that was to be sold, hence the cases relied on by appellant are not in point. The question of commission on the transaction growing out of Black's agency was one wholly between Black and St. John. If appellant performed services entitling him to compensation, his right of action was against Black. 1 Clark & Skyles on Agency, 971; 54 Pac. 129; 106 Ky. 410; 71 Wis. 292; 53 Miss. 458; 7 Mo. App. 22; 33 Fed. 915; 31 Mont. 314; 95 S. W. 562.

2. Appellant never assumed nor professed to be the agent of St. John. Ratification will not be implied. 1 Clark & Skyles on Agency 340; 30 L. R. A. (N. S.) 347; 124 N. W. 538.

WOOD, J., (after stating the facts). The facts stated do not show any privity of contract between the appellant and the appellee. There is nothing in the facts to warrant the conclusion that appellee authorized his agent, Black, to employ the appellant in connection with the business or procure a purchaser for the land about which the contract was entered into. There is nothing to show that the appellee and Black, when they entered into the contract, contemplated that it might be necessary for Black to employ agents in order to procure a purchaser. Certainly, nothing to show that if Black did employ such agents appellee would be liable for their compensation.

The uncontroverted facts, as stated, did not take the case out of the operation of the general rule that an agent employed for a special purpose can not delegate his authority to some one else. *Bromley* v. *Aday*, 70 Ark. 354; *North American Trust Co.* v. *Chappell*, 70 Ark. 508.

We find nothing in the facts stated to bring appellant's case within any of the exceptions to the general rule. There are cases where, from the circumstances surrounding the principal and agent at the time of entering into the contract of agency, authority may be implied for the agent to employ subordinates who are to represent the principal and for whose compensation the principal would be liable. For instance, where a nonresident owner of land employs an agent who is also a nonresident to procure a purchaser for the land or to sell the same for him, it might be implied from the circumstances that the agent was authorized by the principal to

employ a subagent where the land is situated in order to enable him to procure a purchaser and to effect a sale. Such was the case of *Eastland* v. *Maney*, 81 S. W. 574, and *Hurt* v. *Jones*, 79 S. W. 486. In the former case the owners of the land and the agents enployed to sell the same were residents of California, and the land was situated in Texas. The agents employed a subagent living in Texas to procure a purchaser. The court, in that case, after recognizing the general doctrine that an agent, in the absence of any authority, expressed or implied, has no power to employ a subagent, said: "There are, however, exceptions and modifications of the rule, growing out of the necessities and exigencies of a case, or based upon the custom or usage of trade in like cases. There are instances where the employment of subagents is essentially necessary in order to execute the agency, and the authority of the agent will be construed to include the necessary and usual means to properly execute it. * * * It is a fair presumption, growing out of the exigencies of the transaction, that it was contemplated that a purchaser should be obtained through a subagent."

We recognized the principle in *Arkadelphia Lumber Co.* v. *Thornton*, 83 Ark. 403. In that case the owners of the land were residents of Texas, and they authorized an agent, who was also a resident of Texas, to sell the same. The land was situated in Arkansas. The agent authorized to sell employed a subagent to assist him in finding a purchaser. In determining whether the principal was bound by the acts of the subagent with reference to finding a purchaser and assisting in the consummation of the sale we said: "The land being situated in Arkansas and Head, the agent authorized to sell same, being in Texas, it may be fairly presumed that the owners in executing the power of attorney contemplated that W. B. Head would employ a subagent to find a purchaser, and to perform the other merely incidental and ministerial acts necessary to consummate the sale of the land if made to a purchaser in this State." And, further, "Pledger (the subagent) was not vested with any authority or discretion of his own, but only acted as the exponent of Head to do the things which, on account of the exigencies of the situation, Head could not do in person." That case, however, was not

a suit by the subagent against the principal to recover compensation for his services.

There is nothing in the facts stated in the present case to bring it within the doctrine of the above cases. Here the owner of the land lived in Indiana, and employed Black, who lived in an adjoining county to where the lands were situated, as his agent, and there are no exigencies in the case showing that the parties to the contract contemplated that it would be necessary for Black to employ the appellant or any one else as subagent, Appellant lived at Hazen, Prairie County, and was further away from the land than Black. Certainly, there is nothing to indicate that, if Black did employ subordinates to assist him in procuring a purchaser, they should look to the appellee for their compensation.

In *J. B. Watkins Land Mortgage Co.* v. *Thetford,* 96 S. W. 72, it is held that (quoting syllabus): "Where a sale of real estate is made by agents with the assistance of a broker under an agreement to divide their commissions with him, such broker is not entitled to recover a commission for the sale from the owners of the land." See also *Smith* v. *Jarvis,* 105 S. W. 1168.

In our opinion the facts stated show that Black had no authority, either expressed or implied, to employ appellant to act as the agent of appellee so as to render appellee liable for his services. Under the facts of this record there is no privity of contract except between him and Black.

2. The facts stated in the record do not show that appellant at any time throughout the transaction claimed to be the agent of the appellee in procuring a purchaser for the land. On the contrary, the facts all show that he was only claiming to represent Black. He looked to Black for directions. He had no correspondence with St. John, and never saw him before the transaction was consummated. He reported all his actions to Black, and Black reported them to appellee. In none of the transactions of the appellant with reference to procuring a purchaser do we find him professing or assuming to have been employed by the appellee. It nowhere appears that appellee recognized the appellant as his agent, nor that appellee knew that appellant claimed to be his agent. Under the facts stated, it may be said that

appellee knew that his agent Black had the appellant employed, and that appellant performed services in procuring a purchaser for the land. But it nowhere appears that appellee knew that the appellant expected the appellee to pay for those services. The interurban company, whom the appellant interested, and who, according to his statement, procured the purchaser, reported its acts to the appellant, and the appellant in turn reported to Black, and Black in turn reported to the appellee.

These facts fall far short of showing that appellant was looking to appellee for compensation for his services. On the contrary, they do show that he recognized that he was the agent of Black, and not the agent of appellee.

When appellee made the sale under these circumstances, he did not, in so doing, recognize any relation of agency existing between himself and the appellant. At most, his conduct could only be taken as a recognition of the relation of the agency between Black and appellant.

In *Benham* v. *Ferris*, 124 N. W. 538, the court held: "Where an owner employed a broker to procure a purchaser for a commission in excess of the specified sum received for the property and the broker without authority, employed a third person and brought about a sale for more than the specified sum, and the owner accepted from the broker the specified sum, and conveyed the land without knowing that the third person had claimed to act as his agent, the owner was not liable to the third person for commissions."

In 1 Clark & Skyles on Agency, 340, it is said: "The doctrine of ratification properly applies to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to original authority."

The judgment is correct, and it is therefore affirmed.

APPENDIX

IN MEMORIAM

WILLIAM W. MANSFIELD

On October 28, 1912, at a regular meeting of the Supreme Court, the Hon. Sam R. Chew, of Van Buren, Arkansas, a member of the bar of this court, presented the following:

RESOLUTIONS.

"Judge William W. Mansfield was born at Scottsville, in the State of Kentucky, on the 15th day of January, 1830. At an early age he came to Arkansas and located in Ozark, Franklin County, and entered upon the practice of law, his chosen profession, at which he labored for sixty years. He departed this life in the little city of Ozark on the 27th day of July, 1912, dying amongst a people who loved and respected him for his sterling worth and many attributes of splendid manhood.

"The close of this man's life was grand, calm, serene, and as beautiful as an unclouded sunset. In his last days, free from the exacting duties of his profession and the absorbing and exacting claims of public office, his life was a manifestation of those generous impulses and transcendent qualities of soul and mind that are an exponent of the highest, purest and best type of manhood.

"Judge Mansfield lived during a history-making epoch of our beloved State, and was a distinguished factor in the maintenance of order, law and justice in this State during its stormy period immediately succeeding the Civil War. All who knew him had unbounded confidence in his uprightness of character, sincerity of purpose and purity of life. He had so schooled himself to love justice and right that no one who knew him could conceive of his knowingly committing a wrong. Such was the love and confidence of the people in him that all the positions of honor and trust that he held were rather of the people's choosing than of his own seeking.

"The deceased represented Franklin County, Arkansas, in the General Assembly in 1856; was a member of the Constitutional Con-

ventions of 1861 and 1874; Judge of the Fifth Judicial Circuit from 1874 to 1878; Reporter of the Supreme Court of Arkansas from 1887 to 1890; Digester of the Statutes of Arkansas in 1884, and Associate Justice of the Supreme Court of Arkansas from 1891 to May 5, 1895.

"So much of the Constitution of 1874 of this State was the product of the labor and brain of the deceased that he was generally acknowledged to be the Nestor of that convention. The provisions of that instrument were so carefully prepared, so perfectly adapted to the needs and requirements of the people of this State, and so thoroughly safeguarded the rights, privileges and liberties of the people of Arkansas, that when it was finished the opinion was expressed that the State of Arkansas had a Constitution that would last and serve her a hundred years.

"Judge Mansfield's mind was cast in the judicial mold, possessing extraordinary talents, a grasp of thought and powers of analysis that held in mind and simplified without apparent effort intricate and complicated problems of law. His opinions, while a member of the Supreme Court of Arkansas, are models of clearness, accuracy and thoroughness. Every public duty that the deceased was called upon to perform was assigned to him because of his superior qualification for the discharge of that duty. He belonged to that rare class of men who always met the highest expectation in every position of honor and trust; every official task was so accurately and thoroughly performed by him that the most exacting critic could find nothing omitted and nothing that could be added that would have made the task more complete.

"Some one has said 'the simplicity that is a virtue is something sublime; every one loves and admires it.' The deceased exemplified that simplicity in his life. Throughout a long professional career at the bar of this State, he always relied upon the law and merits of his cause for success, and never attempted to mislead court or jury by the practice of those little arts and subterfuges that directly or indirectly distort the truth.

"As a lawyer and jurist the deceased ranked among the foremost of this or any other government. In private and public life his record is without spot or blemish. Therefore, as an expression of our appreciation of this noble man's life and service—

"Be it resolved:

"1. That the bar of the State of Arkansas in the death of William W. Mansfield has lost one of its brightest ornaments and greatest lawyers; the State of Arkansas one of its most valuable and eminent citizens; Franklin County, Arkansas, a great leader and benefactor, and the family of the deceased an irreparable and inestimable loss.

"2. That a part of the common-law records of this court be dedicated and set aside to the memory of Judge William W. Mansfield,

deceased, and that these resolutions be spread at large by order of this court, upon said record.

"Respectfully submitted,

"J. D. BENSON,
"SAM R. CHEW,
"L. R. A. WALLACE,
"T. A. PETTIGREW,
"G. W. BARHAM,
"J. P. CLAYTON,
"W. G. STOCKTON,
"G. C. CARTER,
"J. D. McILROY,
"Committee."

In presenting these resolutions, Mr. Chew made the following remarks:

"If the court please, at the September, 1912, term of the Franklin Circuit Court, within and for the Ozark District thereof, myself, together with other members of that bar, were by the Honorable Jeptha H. Evans, Judge, present and presiding, appointed to prepare and present to this court for its adoption and record resolutions commemorating the life, labor and accomplishments of our departed and lamented friend and brother, Judge William W. Mansfield.

"In discharging that duty, I must say that, while it is a sad one, yet it is a pleasant one for me in my humble way to bear witness to the high esteem and regard with which Judge Mansfield was held in the hearts and minds of those with whom he associated and who knew him best.

"The resolutions just read faintly recite the accomplishments he had acquired and possessed and the intelligent labor and work he performed for the moral, intellectual and financial good of the State of Arkansas—the State of his adoption—while pursuing the practice of law, his chosen profession and life's labor. It is now a little more than a third of a century since I had the good fortune to locate at Ozark, yet it seems to me that it was but yesterday. Soon after locating there, I had the pleasure and good fortune of meeting and coming in contact with two of her most prominent and splendid citizens, one of whom was our lamented friend, Judge Mansfield, the other Dr. Wallace A. Carter, who yet lives there. My coming in contact with these two splendid men has had, I am glad to attest, an influence on my uneventful life for naught else but good.

"Soon after locating at Ozark, I came in contact with Judge Mansfield, who at that time was the presiding Judge of the old Fifth Judicial District of this State. At that time I heard nothing from his neighbors and friends about him but words of the highest praise for his personal and public worth. The unanimous expression of all who

knew him best was that he was honest, sincere, loyal, just and true in all the avenues of life, both public and private. From this it was evident that he had adhered to that Biblical admonition that a good name is rather to be chosen than great riches.

"Judge Mansfield was not a man easy to approach in a social or personal way. He was rather retiring and secluded in his nature. I can not claim a personal intimacy with him, yet when I came to know him better I found him easy, simple and democratic in manner. He was merciful, lenient, kind and considerate in his judgments. Slow to arrive at a conclusion, but usually his deductions and conclusions on any point or question were right and just.

"In his conduct as a presiding trial judge, while he was stern and firm, yet it can be truthfully said that it was beyond criticism, censure or reproach. Judge Mansfield labored as a lawyer at a time when there were few decisions and precedents to guide him and direct him in his conclusions, yet with his power of investigation and intellectual thought he usually worked out all questions submitted to him to a just and correct conclusion as will be attested by the many decisions of this court in which he participated as an appellate judge.

"When it became apparent to him that his dissolution was pending, and would inevitably take place in a few days, he gave utterance to a sentiment that is touching and pathetic, and at the same time evidences his unyielding love for his devoted wife. For I am told that a few days before his demise he called a friend to his couch and said to him: 'When you come to dig my grave, dig it as close to my wife's grave as you can without digging into it, so that my dust may mingle with hers.'

"That we may preserve something of this great and good man's life and in a meager way perpetuate our appreciation of his labor and life's work, I respectfully move, Your Honors, for an order and judgment setting apart the necessary number of pages of the law record of this court, and that these resolutions be spread at large upon those pages in honor of the life lived and work performed by this just and good judge, William W. Mansfield."

Judge Joseph W. House seconded Mr. Chew's motion, and addressed the court in appreciation of the character of Judge Mansfield, as likewise did Mr. John M. Moore. The Chief Justice responded, and ordered that the resolutions be spread upon the record.

NATHAN WILLIAM NORTON

On November 4, 1912, at a regular meeting of the Supreme Court of Arkansas, the Hon. Robert J. Wil-

liams, a member of the bar, presented the following resolutions:

On March 6, 1912, N. W. Norton of Forrest City, Arkansas, a member of the bar, died. At a meeting of the bar of St. Francis County, held in the courthouse on March 21, 1912, a committee was appointed to prepare appropriate resolutions of respect to his memory, who submitted the following report:

RESOLUTIONS.

Whereas, Death has severed from us our brother, Nathan William Norton, we now, in testimony of our esteem and affection for him in life, and deeply sensible of the loss which the courts, the bar and the whole community have sustained in his death, have prepared the following resolutions as our report:

Resolved, That we who have been associated with him at the bar for many years, have always observed in the professional life and labors of N. W. Norton the beautiful traits of intellect and character which attend the life of a true man and a great lawyer.

Resolved, That we will as the years pass call to mind and remember with affection the moral qualities which actuated our deceased brother in his professional services, his kindness and justice to all, and his fidelity at all times to the courts, to the bar and to every obligation.

Resolved, That we sincerely deplore his death and will always wear in our hearts and minds the memory of his many virtues and sterling qualities; he was conscientious in all relations, of a kindly disposition to all men, and his strict moral excellence remains an inspiration and a most striking example.

Resolved, That we extend to his family our sincere sympathy, and request the secretary of this meeting to present them with a copy of these resolutions.

Resolved, further, That a copy be presented to the United States Courts, the State Supreme Court and the Circuit and Chancery Courts, with the request that they be spread upon their respective records.

S. H. MANN,
R. J. WILLIAMS,
J. M. PREWETT,
JOHN GATLING,
W. J. LANIER,
Committee.

Mr. Sam H. Mann, a member of the bar of Forrest City, Ark., spoke as follows:

"May It Please the Court:

"For many years it was my privilege to have the pleasure and benefit of daily association with our deceased brother, N. W. Norton.

I confess that my fondness for the man would probably conceal from my view any imperfections of character, if any, he may have possessed.

"Formal eulogy should not be indulged in when speaking of such a man. A plain statement of his life and deeds suffices.

"His success at the bar was pronounced. Possessing a capacity for work that was rarely excelled by any one, he applied himself with zeal and energy to his profession. I have frequently heard him say that for many years of his actual practice he never felt fatigued. It seems inconceivable that a man with such physical power should so soon pass from the stage of life when yet in his prime. His mental attainments were of the highest order, his mind worked rapidly and went immediately to the real issue involved. When once he assumed the responsibility of any litigation, he focused all of his great ability on what he conceived to be the real point in the case, and his judgment was so accurate, and he was so capable of presenting his ideas to the courts, that often a weak cause was developed to such proportions as to make it dangerous to his adversary.

"His diligence and untiring efforts in searching for authorities to sustain his theory has to my knowledge on many occasions turned the decision in an otherwise doubtful case to his way of thinking. He was a strong and vigorous advocate, yet never so aggressive as to be disagreeable or offenisve to opposing counsel. With him personal controversy was extremely displeasing, and he was never known to indulge in it. In the preparation of his cases he was painstaking; and when a cause in which he was interested came on for trial, he was perfectly familiar with the facts, and was well fortified to sustain his theory of the case. When associated with other lawyers in the trial of a cause, he was pleased to occupy any position assigned to him, and never desired to play a conspicuous part, and yet it usually resulted in his taking the lead in the case. This was by common consent of counsel associated with him, and was due to his superior judgment. One of the most striking traits of his mind was its absolute independence. He never adopted an idea because some one else entertained such a view. It must have appealed to his reason, and it was necessary that he be convinced of the truth or fallacy of the proposition. Always ready to learn the truth and to gain information, it was never difficult to convince him of the right. Being high-minded and free from smallness in his dealings, he pitied, rather than condemned, any one who indulged in trickery and deception in any form. His sense of fairness in the trial of a case was one of his marked characteristics. He was never known to take an unfair advantage of any adversary or in the slightest degree intentionally deceive the court. His disposition to respect the rights of others was so pronounced that he sometimes suffered at the hands of those less considerate, yet of course in the end his was the victory.

"Mr. Norton never desired political honors, but preferred to advance the cause of the profession of his choice, in which he stood at the head in the eastern portion of the State, and had few, if any, superiors in the State. He was an incessant reader of the works of his profession, and possessed a large fund of information on general topics. He made no pretensions of oratory, yet was a forceful and convincing speaker, went straight to the point under discussion, and rarely, if ever, strayed from it. It is not difficult to find a lawyer to testify to the effectiveness of this trait.

"Many who knew him well and had the opportunity to feel the force and power of his great mind believed him to be the greatest lawyer the State has ever produced, and certainly the profession will accord to him a place among her ablest.

"While Mr. Norton was a great lawyer, his ability as such did not represent the strongest side of his character. Personally, he was a most lovable man, his refinement of feeling and fondness for his friends and those he loved were not surpassed by any one. His devotion ran so deep that there was little display and surface indications of it. He was what might be termed in many respects a timid man, not in the sense that he hesitated to advocate the right and to vigorously espouse any just cause, but he at all times hesitated to intrude upon others his views in any matter that did not directly concern him. He held it to be a duty incumbent upon every man to diligently avoid interference into the affairs of others. He was very willing that men should think and act as to them seemed best so long as their conduct did not interfere with the rights of their fellow-men. Holding this view, he had no thoughts in common with the professional reformer and the political demagogue. He believed that all questions affecting private rights and public interests should be settled on the merits and by those making a study of the questions, and was therefore opposed to any appeals to the passions and prejudices of the ignorant. Being clean and pure in thought, he never suspected deceit in others, or felt it necessary to flaunt his views, nor to correct any misstatement of his position on any question affecting him personally. Because of this inclination on his part to make his own position clear on such matters, may have an erroneous view of his attitude on many questions. It is true, he made no pretensions to holding any religious views; his was not a life of pretension but one of real thought and action. He respected all forms of religious worship, but held such matters to be with the individual. The basis of his religious views were entirely in accord with those held by his Christian friends, but beyond this he never went. His great respect for the forms of worship restrained him from any character of discussion of the subject. His master mind, having once reached a conclusion and found a resting place, held it without giving expression except to the fewest number.

"His relations to his family and friends was ideal, and his untimely death was a keen blow to them. With his family he was kind, affectionate and generous. It was refreshing to be in his home and observe how thoughtful and considerate he was of the comfort and pleasure of his family. He was as plain and simple in manner as a child, his children were his companions, and his wife was the object of his tenderest thoughts, and her wish his will. If all families had such a head, there would be little use for organized government, the fountain of society would be so pure the intermingling would not create friction.

"The young man, and especially the young lawyer, instinctively knew him to be his friend. His advice and counsel were more frequently sought by the young practitioner than that of any other lawyer perhaps in the State covering a given period of time. He gave aid cheerfully and with such spirit that the recipient knew it to be unselfish, and that it was prompted by a desire to render assistance where needed. He was not only charitable in the sense that he contributed to the needs of others and to such public institutions and enterprises that needed private aid, but he was charitable in his estimate of his fellow-man. His mind contained no place where malice and resentment could be harbored.

"We could continue without end, enumerating elements in the character of this great man that would more clearly reflect our high estimate of him, but to use a favorite phrase of his we say, 'What's the use?' "

Mr. John M. Moore, a member of the bar of Little Rock, Ark., spoke as follows:

"Mr. Norton was a native of Kentucky. He was born October 15, 1850, and died March 6, 1912, in his sixty-first year. He was survived by his wife and four children. His boyhood was spent in the State of Ohio, where his parents moved while he was quite young. There he attended the public schools, and obtained such educational advantages as they afforded. While he was yet a youth, his parents moved to Illinois, where he remained until 1869. When he was nineteen years of age, he, with one companion, started West. Their route lay through this State. Eastern Arkansas at that time was practically a wilderness, and the forests and streams abounded in game and fish. Attracted by his fondness for hunting and the opportunities the country afforded for the gratification of his tastes in that line, he located in the eastern part of the State, and spent ten years chiefly in trapping, his activities being confined principally to Little, Tyronza and St. Francis rivers in this State and Sunflower river in Mississippi. He made his home at Wittsburg, then the county seat of Cross County. During the seasons that he was not engaged in trapping, he spent part of his time in teaching school, in that respect following the

course of many successful lawyers of the older generation in the South and West. In the spring of 1878 he entered the office of the circuit clerk of Cross County as a deputy, and began the study of the law. He was admitted to the bar in 1881. In 1883 he was elected to the lower house of the General Assembly, serving one term in that body. He then moved to Forrest City, where he opened an office, and devoted himself exclusively to the practice of law during the remainder of his life.

"To the members of this court and bar there is no need to speak of his merit as a lawyer or his virtues as a man and a citizen, as he was for many years a member of this bar, and the records of this court attest his strength and ability as a lawyer, but we owe it to those who are to come after, as well as to him, to make some memorial of the high character and noble qualities exemplified in his personal and professional life.

"With few advantages in the way of early training, having begun the preparation for his professional labors rather late in life, and pursued his studies without the advantage of scholastic training, he became learned in the law and a leader in his profession by dint of labor and aptitude in the mastering and application of legal principles. He was endowed by nature with keen, incisive reasoning faculties, and possessed in a very large degree what we call a legal mind. He loved his profession, was a close student of the elementary principles as developed and expounded in the reported cases and the text books, and pursued his profession without the least taint of commercialism. His methods in the conduct of cases were open and fair, and he sought no advantage by indirection, preferring to win or lose on the merits of his case.

"He was for many years a leader of the bar in Eastern Arkansas, where his professional labors were chiefly centered. He enjoyed a large practice in the courts of that section, and was engaged in many cases of importance in the courts in which he practiced. His success was founded on merit and ability, and it came to him as the result of his great industry, ability and fidelity in the discharge of his duties to his clients. He made careful preparation both as to the law and the facts before going into trial, and was as a rule prepared to meet every emergency that might arise during the course of the trial.

"No man was ever freer from guile, hypocrisy or self-seeking in all the relations of life. While modest and unassuming in his deportment and without austerity either in his manner or disposition, he was yet somewhat reserved in manner, neither indulging in or inviting undue familiarity, but withal a warm-hearted and true and faithful friend. He possessed a singularly pure and refined nature, and was a most agreeable and interesting companion. He was never known by his most intimate associates to indulge in coarse or doubtful speech or conduct.

"He served at various times as Special Associate Justice of this court, and the opinions prepared by him constitute a monument to his learning and discrimination. He was elected President of the State Bar Association of this State in 1909, and at the annual meeting in 1910 delivered before the association an address on the "Initiative and Referendum" which attracted wide attention and commendation.

"His life was a shining example of purity and unselfish devotion to duty. In his intercourse with members of the bar, he was uniformly courteous, and held in a very high degree the love, esteem and confidence of his associates. His kindly nature was illustrated by his interest in the younger members of the profession. He was always ready to extend a helping hand to beginners and to aid in smoothing the rough places in their untried roads.

"He was in ill-health for something over two years before his death, which interfered with, but did not suspend, his activities in the practice of his profession. He exhibited a spirit of cheerfulness, fortitude and calm courage through that distressing period that was worthy of all commendation.

"The death of the good man is always a distinct loss to the State, to the community in which he lived, and to his fellows in his field of labor. His influence will survive and continue to work for good, but his personality—that which gives color and life to good deeds and gladdens and lends encouragement to the hearts of friends and loved ones—ceases to exist except as a cherished memory.

"By the death of our brother all who were privileged to know him and enjoy his friendship have sustained a personal loss that only the healing hand of time can alleviate, and in those closer and more sacred associations that cluster around the hearth and home there will ever be a vacant place."

The Chief Justice responded, and ordered that the resolutions be spread upon the records of the court.

II

OPINIONS NOT REPORTED.

Banks *v.* State; appeal from Crawford Circuit Court; Jeptha H. Evans, Judge; affirmed September 30, 1912; *per* Kirby, J.

Borah *v.* Borah; appeal from Lawrence Chancery Court, Eastern District; George T. Humphries, Chancellor; affirmed September 30, 1912; *per* Kirby, J.

Chas. F. Luehrmann Hardwood Lbr. Co. *v.* Zearing; appeal from Prairie Chancery Court, Southern District; John M. Elliott, Chancellor; affirmed July 1, 1912; *per* Kirby, J.

Savage *v.* Craig; appeal from Ashley Circuit Court; Henry W. Wells, Judge; affirmed October 7, 1912; *per* Wood, J.

Stubblefield *v.* Planters' Fire Ins. Co.; appeal from Ashley Circuit Court; Henry W. Wells, Judge; reversed October 7, 1912; *per* Wood, J.

Bankers Surety Co. *v.* William Miller & Sons Co.; appeal from Pulaski Circuit Court, Second Division; F. Guy Fulk, Judge; affirmed October 21, 1912; *per* McCulloch, C. J.

Fordyce *v.* Vickers; appeal from Arkansas Chancery Court; John M. Elliott, Chancellor; affirmed October 14, 1912; *per* McCulloch, C. J.

Richardson *v.* Cohen; appeal from Cleburne Circuit Court; George W. Reed, Judge; reversed October 21, 1912; *per* Wood, J.

Williams *v.* State; appeal from Pulaski Circuit Court, First Division; Robert J. Lea, Judge; affirmed October 21, 1912; *per* Wood, J.

Spann *v.* Spann; appeal from Mississippi Circuit Court, Osceola District, First Division; Frank Smith, Judge; affirmed on remittitur October 14, 1912; *per* Kirby, J.

Williamson *v.* King; appeal from Clay Chancery Court; Chas. D. Frierson, Chancellor; affirmed October 14, 1912; *per* Wood, J.

Equitable Powder Mfg. Co. *v.* St. Louis & S. F. Rd. Co.; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; affirmed November 11, 1912; *per* Hart, J.

Henderson *v.* E. W. Emerson Co.; appeal from Cleburne Chancery Court; John M. Elliott, Chancellor; affirmed November 11, 1912; *per* Wood, J.

Manhattan Construction Co. *v.* Pratt; appeal from Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; affirmed October 28, 1912; *per* Kirby, J.

Marshall *v.* Patterson; appeal from Searcy Circuit Court; George W. Reed, Judge; reversed October 28, 1912; *per* Kirby, J.

Doniphan Lumber Co. *v.* Fix; appeal from Cleburne Circuit Court; James H. Fraser, Special Judge; affirmed November 11, 1912; *per* Kirby, J.

Ramsey *v.* St. Louis, I. M. & S. Ry. Co.; appeal from Faulkner Circuit Court; Eugene Lankford, Judge; affirmed November 18, 1912; *per* Wood, J.

Fellheimer *v.* Higgins; appeal from Garland Chancery Court; A. Curl, Special Chancellor; affirmed December 9, 1912; *per* McCulloch, C. J.

Jones *v.* State; appeal from Ashley Circuit Court; Henry W. Wells, Judge; affirmed December 16, 1912; *per* Wood, J.

White *v.* State; appeal from Lawrence Circuit Court, Western District; R. E. Jeffery, Judge; affirmed December 16, 1912; *per* Hart, J.

Williams *v.* State; appeal from Ashley Circuit Court; Henry W. Wells, Judge; affirmed December 9, 1912; *per* McCulloch, C. J.

Wright *v.* State; appeal from Carroll Circuit Court, Eastern District; J. S. Maples, Judge; reversed as to Ruth Wright and affirmed as to A. B. Wright December 9, 1912; *per* Kirby, J.

III

CASES DISPOSED OF ON MOTION.

Mrs. Nancy Crane, as next friend of her minor children, *et al. v.* Fort Smith Light & Traction Company; Sebastian Circuit Court, Fort Smith District; Daniel Hon, Judge; appeal dismissed September 30, 1912, for failure to serve summons within a reasonable time, and for noncompliance with rule 9; *per curiam.*

Federal Life Insurance Company *et al. v.* Isabella C. Terral; Lincoln Circuit Court; Antonio B. Grace, Judge; advanced and affirmed as a delay case, without penalty, October 21, 1912; *per curiam.*

Manhattan Zinc Mining Company *v.* Lou Brown, Administratrix of the Estate of John D. Brown, Deceased; Boone Circuit Court; George W. Reed, Judge; judgment of lower court affirmed by consent in the sum of $2,750, November 4, 1912; *per curiam.*

Stuttgart & Rice Belt Railroad Company *v.* J. W. Byrum; Prairie Circuit Court, Southern District; Eugene Lankford, Judge; appeal

dismissed on appellee's motion for noncompliance by appellant with rule 9, November 18, 1912; *per curiam.*

St. Louis, Iron Mountain & Southern Railway Company *v.* Rebecca Uhless; Independence Circuit Court; R. E. Jeffery, Judge; judgment entered in accordance with stipulations, affirming judgment of lower court in sum of $1,000, after remittitur of $500 by appellee; November 18, 1912; *per curiam.*

George Terrell *et al.* v. R. E. L. Eagle, Administrator of the Estate of Foster Terrell, deceased, *et al.;* Lonoke Circuit Court; Eugene Lankford, Judge; appeal dismissed on appellants' motion, November 18, 1912; *per curiam.*

Mrs. Sid King *v.* E. E. Rannals; Johnson Circuit Court; Hugh Basham, Judge; appeal dismissed on appellee's motion for want of proper authentication of transcript, November 18, 1912; *per curiam.*

Wyandotte & Southeastern Railway Company *v.* D. W. Pierce, a minor, by Mary Pierce, his next friend; Grant Circuit Court; W. H. Evans, Judge; settled and judgment entered pursuant to stipulations, January 6, 1913; *per curiam.*

Chicago, Rock Island & Pacific Railway Company *v.* J. E. Pratt; Saline Circuit Court; W. H. Evans, Judge; settled, and appeal dismissed by consent, January 6, 1913; *per curiam.*

Etta French, Ethel Griffin, Martha Martin, Belle Treece, Celia Wilhelm and Amanda Vanover *v.* State; Searcy Circuit Court; George W. Reed, Judge; appeal dismissed for noncompliance with rule 10, January 13, 1913; *per curiam.*

A. M. Keith *v.* Ella Smith *et al.;* Pulaski Circuit Court, Second Division; Guy Fulk, Judge; settled and appeal dismissed on appellant's motion January 13, 1913; *per curiam.*

St. Louis, Iron Mountain Southern Railway Company *v.* Fred Y. Baker; Desha Circuit Court; Antonio B. Grace, Judge; appeal dismissed January 13, 1913, on appellant's motion; *per curiam.*

INDEX

ABANDONMENT:

real property not abandoned at common law. *Carmichael* v. *Arkansas Lbr. Co.*, 663.

ABATEMENT AND REVIVAL:

time of revival of appealed case. *Temple* v. *Culp*, 222.

ACCOMPLICE:

effect of withholding information of crime. *Simms* v. *State*, 16.
whether witness was accomplice question for jury when. *Id.*

ACKNOWLEDGMENT: See MORTGAGES.

ADMINISTRATION:

necessity of verification of demands against estates. *Hayden* v. *Hayden*, 95.
term "demand" defined. *Id.*
sufficiency of verification of demand. *Id.*
to what claims statute of nonclaims inapplicable. *Fred* v. *Asbury*, 494.

ADVANCEMENT:

effect of conveyance to wife or child. *Keith* v. *Wheeler*, 318.
conclusiveness of presumption of. *Id.*
effect of conveyance procured by one *in loco parentis*. *Id.*

ADVERSE POSSESSION:

Kirby's Digest, § 5057, providing for constructive adverse possession by payment of taxes on wild land, construed not to apply to married women, infants or persons *non compos mentis*. *Deane* v. *Moore*, 309.
possession of stepfather not adverse when. *Keith* v. *Wheeler*, 318,
void administrator's deed may be color of title. *Fletcher* v. *Josephs*, 646.
title acquired by. *Id.*

AGENCY: See CORPORATIONS.

when authority of agent implied. *United States Bedding Co.* v. *Andre*, 111.
travelling salesman not authorized to contract for advertising. *Id.*

AGENCY:—*Continued.*

person dealing with agent must ascertain his authority. *Id.*
effect of authority to collect interest on note. *Koen* v. *Miller*, 152.
effect of acting for undisclosed principal. *Cooley* v. *Ksir*, 307.
termination of agency not authorized when. *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.*, 427.
how authority of agent proved. *Wales-Riggs Plantations* v. *Dye*, 446.
agent not authorized to delegate authority when. *Id.*

AGRICULTURE:

good defense to note that it was given for fertilizer not analyzed nor tagged. *Florence Cotton Oil Co.* v. *Anglin*, 672.

ALTERATION OF INSTRUMENTS: See GUARANTY.

APPEAL AND ERROR:

effect of printing entire record in abstract. *St. Louis & S. F. Rd. Co.* v. *Malone*, 22.
when rule 9 sufficiently complied with. *Id.*
sufficiency of showing that all the evidence has been brought up. *Roberts Cotton Oil Co.* v. *Grady*, 53.
rule requiring abstract of transcript not complied with when. *St. Louis & S. F. Rd. Co.* v. *Newman*, 63.
when time to file abstract extended. *Id.*
when objection to evidence waived. *Birones* v. *State*, 82.
time for appealing from local assessments. *Crandell* v. *Harrison*, 110.
effect of filing motion for new trial out of time. *Marshall Bank* v. *Turney*, 116.
when cause dismissed on appeal. *Id.*
judgment vacating default judgment held appealable. *Norman* v. *Cammack*, 121.
when bill of exceptions necessary. *Id.*
rule in reviewing order directing verdict. *Farmers' Bank* v. *Johnson*, 136.
effect of general objection to several instructions. *H. D. Williams Cooperage Co.* v. *Clark*, 157.
effect of objection in gross to instructions refused. *Id.*
when improper evidence harmless. *St. Louis, I. M. & S. Ry. Co.* v. *Chamberlain*, 180.
exclusion of evidence harmless when. *Fletcher* v. *Freeman-Smith Lbr. Co.*, 230.
misjoinder of causes waived when. *Burnett* v. *Turner*, 290.
order setting aside judgment by default is not appealable. *McPherson* v. *Consolidated Casualty Co. of Ark.*, 324.
mode of taking appeal from order granting new trial. *Id.*

APPEAL AND ERROR:—*Continued.*

specific objection to instruction waives other objections. *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 331.
objections to instructions and evidence waived when. *Thomas* v. *Jackson*, 353.
authority of special chancellor not questioned on appeal when. *Blagg* v. *Fry*, 356.
when giving of erroneous instruction harmless. *Johnston* v. *Fuqua*, 358.
necessity of objection to evidence. *Wilkerson* v. *State*, 367.
one can not complain because jury found him guilty of too low a degree of crime charged. *Id.*
conclusiveness of chancellor's findings of fact. *Medlock* v. *Owen*, 460.
remarks of court must be excepted to. *Jenkins* v. *Quick*, 467.
prejudicial argument cured when. *Id.*
erroneous instruction harmless when. *St. Louis, I. M. & S. Ry. Co.* v. *Brogan*, 533.
one can not complain of error in his favor. *Reeves* v. *Moore*, 598.
presumption from failure to bring up evidence. *Motley* v. *State*, 608.
objections which can not be raised on appeal. *Apple* v. *Apple*, 669.
direction to copy testimony in bill of exceptions insufficient when. *Grand Lodge A. O. U. W.* v. *Dreher*, 676.

BAILMENT: See EMBEZZLEMENT.

BANKRUPTCY:

when creditor's lien prior. *Goodrich* v. *Bagnell Timber Co.*, 90.

BILLS AND NOTES:

to whom payment may be made. *Koen* v. *Miller*, 152.
when owner not estopped to deny authority of bank to collect. *Id.*
effect of authority to collect interest merely. *Id.*

BILL OF REVIEW:

barred by laches when. *Miller* v. *Henry*, 261.

BOUNDARIES:

boundary fixed by parol binding when. *Reeves* v. *Moore*, 598.

BROKERS:

real estate broker not entitled to commission when. *Johnston* v. *Fuqua*, 358.
right of subagent to recover commission. *Sims* v. *St. John*, 680.
when subagent's employment ratified. *Id.*

BURDEN OF PROOF: See EVIDENCE; TROVER; MORTGAGES; TRUSTS; FALSE IMPRISONMENT.

BURGLARY:

sufficiency of proof of intent to commit grand larceny. *Monk* v. *State*, 12.
indictment for burglary of Nowlin's house sustained by proof of burglary of Nolan's house. *Birones* v. *State*, 82.
sufficiency of proof of intent. *Id.*
sufficiency of identification of accused. *Id.*

CANCELLATION OF INSTRUMENTS:

deed cancelled where grantor was incapable of managing affairs. *Morton* v. *Davis*, 44.

CARRIERS:

consignor can not sue for loss of goods when. *Roberts Cotton Oil Co.* v. *Grady*, 53.
when carrier not liable for loss in weight in transportation. *United States Express Co.* v. *Long*, 130.
what complaint for injury to passenger should allege. *St. Louis, I. M. & S. Ry. Co.* v. *Wright*, 269.
when evidence of injury to passenger raises jury question. *Id.*
instructions as to duty to stop trains for passengers approved. *Id.*
duty to allow passenger time for boarding train. *Id.*
instructions as to duty of carrier to passengers approved. *Id.*
care-taker of live stock is passenger. *St. Louis, I. M. & S. Ry. Co.* v. *Loyd*, 340.
presumption where passenger is injured by fall of iron rod. *Id.*
contributory negligence for jury when. *Id.*
instruction held erroneous in ignoring defense of contributory negligence. *Id.*
reasonableness of regulations for court when. *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.*, 406.
reasonableness of provision in bill of lading requiring notice of intention to claim damages. *Id.*
when notice of claim of damages unnecessary. *Id.*
meaning of statute requiring carrier to furnish transportation facilities. *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.*, 415.
effect of contract to carry peach crop of locality. *Id.*
effect of contract to furnish so many cars to certain shipper. *Id.*
liability for wrongfully ejecting passenger. *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 619.
not liable for arrest of passenger when. *Id.*
instruction defining drunken person disapproved. *Id.*
not liable for arrest of passenger at conductor's instance when. *Id.*

CONSPIRACY:

sufficiency of evidence to prove. *Dickerson* v. *State*, 72.

CONSTITUTIONAL LAW:

rule for construing constitutional amendments. *Ferrell* v. *Keel*, 380.
when repeal of constitutional provisions implied. *Id.*

CONTEMPT:

not contempt to disobey injunction after its dissolution. Ex parte *Simmons*, 19.
judgment fining one for contempt of court quashed for insufficiency of evidence. Ex parte *Winn*, 190.

CONTRACTS: See CORPORATIONS.

effect of executing contract under mistake. *Stewart* v. *Fleming*, 37.
when fraudulent. *Id.*
construction for court when. *Clouston* v. *Maingault*, 213.
meaning of contract to dig well. *Id.*
party first committing breach can not insist upon forfeiture. *Keopple* v. *Delight Lumber Co.*, 233.
when literal compliance with terms of contract waived. *Id.*
right to recover on contract after acceptance. *Thomas* v. *Jackson*, 353.
purpose of interpretation of contract. *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.*, 421.
breaches of contract waived when. *Id.*
contract binding upon one party when. *Oglesby* v. *Fort Smith*, 506.
contract binding though not reduced to writing when. *Skeen* v. *Ellis*, 513.
contract may rest in letters. *Id.*
when contract not binding. *Id.*
rule as to construing contracts. *Taylor* v. *Union Saw Mill Co.*, 518.
contract construed most strongly against party who prepared it. *Id.*
contract effective though not reduced to writing when. *Friedman* v. *Schleuter*, 580.
time for performance of building contract. *Id.*
time for payment. *Id.*
building contract held certain. *Id.*
when time of the essence of a contract. *Attridge* v. *Smith*, 626.
breach of contract not waived when. *Id.*
when party entitled to retain deposit as security for performance. *Id.*
compromise of disputed claim as consideration of contract. *S. H. Kress Co.* v. *Moscowitz*, 638.

CORPORATIONS: See LIBEL AND SLANDER.

right of foreign corporation to sue in State. *Hooker* v. *Southwestern Imp. Assoc.*, 98.

debt of dissolved corporation held a liability upon its assets when. *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.*, 421.

estopped to deny authority of officers when. *Wales-Riggs Plantations* v. *Caston*, 641.

contracts made by agent binding when. *Id.*

COSTS:

county liable for costs where defendant was indicted for a felony and convicted of misdemeanor. *Smith* v. *State*, 58.

effect of pardon upon. *Villines* v. *State*, 471.

COUNTIES: See COSTS.

COUNTY COURTS:

jurisdiction over liability of county treasurer for failure to pay county funds to county depository. *Adcock* v. *Coker*, 210.

CRIMINAL LAW: See BURGLARY; MORTGAGES; INDICTMENT AND INFORMATION; SCHOOLS.

effect of omitting to direct that accused be held until fine paid. Ex parte *Holdaway*, 1.

sentence directing that enforcement of fine be held up not invalid. *Id.*

burglary and petit larceny can not be joined. *Monk* v. *State*, 12.

where burglary and grand larceny are joined, defendant may be convicted of petit larceny. *Id.*

omission from sentence cured by *nunc pro tunc* amendment when. *Villines* v. *State*, 471.

nunc pro tunc order relates back when. *Id.*

CUSTOM AND USAGE:

when local custom binding as to contract. *Taylor* v. *Union Sawmill Co.*, 518.

DAMAGES: See DEATH.

instructions should require findings of damages to be based upon testimony. *St. Louis, I. M. & S. Ry. Co.* v. *Steed*, 205.

damages for personal injuries not excessive when. *St. Louis, I. M. & S. Ry. Co.* v. *Wright*, 269; *Oak Leaf Mill Co.* v. *Littleton*, 392.

when prospective profits recoverable. *Alf Bennett Lumber Co.* v. *Walnut Lake Cypress Co.*, 421.

burden of proving. *Id.*

damages for personal injuries not excessive when. *St. Louis, I. M. & S. Ry. Co.* v. *Brogan*, 533.

sufficiency of proof of life expectancy. *Id.*

instruction as to personal injuries approved. *Id.*

DEEDS: See CANCELLATION OF INSTRUMENTS.

void deed may be color of title. *Fletcher* v. *Josephs*, 646.

DEATH:

damages for death of infant son not excessive when. *St. Louis, I. M. & S. Ry. Co.* v. *Jacks*, 347.
elements to be considered in such case. *Id.*
relevancy of evidence of parent's dependence. *Id.*

DEFINITIONS:

bailee. *Tally* v. *State*, 31.
demand. *Hayden* v. *Hayden*, 95.
wholesale cost. *Finn* v. *Culberhouse*, 200.
wholesale price. *Id.*
such. *Freeo Valley Rd. Co.* v. *Hodges*, 317.
white oak. *Taylor* v. *Union Sawmill Co.*, 522.
drunken person. *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 619.

DIVORCE:

evidence of cruelty must be specific. *Bell* v. *Bell*, 194.
what does not amount to cruelty or indignities to the person. *Id.*

DOWER:

effect of conveyance of unassigned dower. *Fletcher* v. *Josephs*, 646.

DRAINS:

special statute creating drainage district held void for uncertainty. *Ferrell* v. *Keel*, 380.

EJECTMENT:

sufficiency of equitable title to maintain. *McCord* v. *Welch*, 119.

EMBEZZLEMENT:

indictment alleging embezzlement of thing bailed held insufficient. *Tally* v. *State*, 28.
one having horse and buggy held a bailee. *Id.*

EMINENT DOMAIN:

judgment in condemnation proceeding presumed regular when. *McDonald* v. *Fort Smith & W. Rd. Co.* 5.

EQUITY: See PARTIES; REMAINDERS.

equity regards that as done which should have been done. *Milwee* v. *Board of Directors*, 77, 82.
priority in time gives better equity when. *Miller* v. *Mattison*, 201.

EQUITY:—*Continued.*

has no jurisdiction over liability of county treasurer for failure to pay over county funds. *Adcock* v. *Coker*, 210.

jurisdiction supplied by cross complaint when. *Galloway* v. *Darby*, 558.

will retain jurisdiction for complete relief. *Id.*

ESTOPPEL:

corporation estopped to deny agent's authority when. *Wales-Riggs Plantations* v. *Vaston*, 641.

EVIDENCE:

incriminating letter written by defendant admissible when. *Monk* v. *State*, 12.

parol evidence inadmissible to vary writing when. *Outcault Advertising Co.* v. *Bradley*, 50.

when acts and declarations of accused admissible against him. *Dickerson* v. *State*, 72.

letters which passed between plaintiff and third persons inadmissible. *United States Express Co.* v. *Long*, 130.

negligence in furnishing defective appliances not proved by subsequent repairs. *St. Louis, I. M. & S. Ry. Co.* v. *Steed*, 205.

burden of proof of insanity. *Bailey* v. *State*, 228.

statement of fellow-servant held inadmissible as part of *res gestae*. *River, Rail & Harbor Construction Co.* v. *Goodwin*, 247.

when declarations of fellow-servant incompetent. *Id.*

oral evidence of consideration of written contract admissible when. *Little* v. *Arkansas National Bank*, 281.

parol evidence inadmissible to vary writing when. *Hearin* v. *Union Sawmill Co.*, 455.

parol evidence admissible to explain ambiguity in deed when. *Taylor* v. *Union Sawmill Co.*, 518.

FALSE IMPRISONMENT:

burden of justifying. *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 619.

FORCIBLE ENTRY AND DETAINER:

when error in unlawful detainer to direct verdict for plaintiff. *Reece* v. *Leslie*, 127.

actual force is gist of action of forcible entry and detainer. *Miller* v. *Plummer*, 630.

when unlawful detainer lies. *Id.*

title not involved in either action. *Id.*

when ownership good defense. *Id.*

FORGERY:

instruction as to uttering forged check not open to general objection when. *Moulton* v. *State*, 502.
forgery need not be utterer's handiwork. *Id.*

FORFEITURE: See CONTRACTS.

FRAUD: See CONTRACTS; CANCELLATION OF INSTRUMENTS; GUARANTY.

FRAUDS, STATUTE OF:

part performance held to take contract without statute of frauds. *Fred* v. *Asbury*, 494.
contract for erection of building not prohibited by. *Friedman* v. *Schleuter*, 580.
must be pleaded. *S. H. Kress Co.* v. *Moscowitz*, 638.

FRAUDULENT CONVEYANCES:

when deed from husband to wife fraudulent. *Goodrich* v. *Bagnell Timber Co.*, 90.

GIFTS:

necessity of delivery. *Marshall Bank* v. *Turney*, 116.
when delivery of notes not established. *Id.*

GUARANTY:

effect of inserting name and date of execution in contract. *George Knapp & Co.* v. *Wilks*, 243.
authority of principal to fill up blanks. *Id.*
when guarantors not relieved by principal's fraud. *Id.*
defendant held liable as special guarantor when. *McCarroll* v. *Red Diamond Clothing Co.*, 443.
when guarantor not entitled to notice. *Id.*

GUARDIAN AND WARD:

exceptions to guardian's settlement not triable by jury. *Stubblefield* v. *Stubblefield*, 594.
conclusiveness of prior settlement on final settlement. *Id.*
interest chargeable against guardian. *Id.*
guardian entitled to credit for face of note when. *Id.*

HABEAS CORPUS:

proper method of bringing up case for review. Ex parte *Holdaway*, 1.

HIGHWAY:

how private right-of-way acquired. *Medlock* v. *Owen*, 460.

HOMESTEAD:

widow's right to, not transferable. *Fletcher* v. *Josephs*, 646.

HOMICIDE:

instruction as to self-defense approved. *Motley* v. *State*, 608.
province of court and jury as to dying declarations. *Id.*

IMPROVEMENT DISTRICTS:

extent of powers of board. *Board of Improvement, etc.* v. *Brun*, 65.
how variance between improvement asked for and that planned established. *Id.*
powers of paving district. *Id.*
complaint seeking to enjoin improvement demurrable when. *Id.*

INDICTMENT AND INFORMATION:

when objection to indictment waived. *Birones* v. *State*, 82.
variance between indictment and evidence not established when. *Id.*
allegation of value material when. *Kightlinger* v. *State*, 172.
indictment must allege facts which may influence punishment. *Id.*

INITIATIVE AND REFERENDUM: See CONSTITUTIONAL LAW; STATUTES.

INJUNCTION:

chancellor's control over temporary restraining order made by circuit judge. Ex parte *Simmons*, 19.
validity of order dissolving temporary injunction. *Id.*
effect of disregarding dissolved injunction. *Id.*
damages not assessed upon dissolution of temporary restraining order. *Adcock* v. *Coker*, 210.

INSANE PERSONS:

validity of judgment against. *McDonald* v. *Fort Smith & W. Rd. Co.*, 5.
burden of proof where defense in rape case is insanity. *Bailey* v. *State*, 228.

INSTRUCTIONS:

instruction as to reputation of accused properly refused when. *Monk* v. *State*, 12.
need not be repeated. *Birones* v. *State*, 82.
must be applicable to issues. *Norman* v. *Cammack*, 121.
effect of conflicting instructions. *Bailey* v. *State*, 228.
instruction held not to assume facts. *St. Louis, I. M. & S. Ry. Co.* v. *Wright*, 269.

INSTRUCTIONS:—*Continued.*

abstract instruction prejudicial when. *Johnston* v. *Pennington*, 278.

need not be repeated. *Delight Lumber Co.* v. *Henderson*, 334; *Thomas* v. *Jackson*, 353; *Johnston* v. *Fuqua*, 358.

instruction erroneous for ignoring evidence when. *Oak Leaf Mill Co.* v. *Littleton*, 392.

not error to refuse instruction which singled out testimony. *Jenkins* v. *Quick*, 467.

nor to refuse to repeat instructions. *Id; Moulton* v. *State*, 502; *Emerson* v. *Stevens Grocer Co.*, 575.

erroneous instruction cured by other instructions when. *St. Louis, I. M. & S. Ry. Co.* v. *Brogan*, 533.

when specific objection to instruction necessary. *Id.*

INSURANCE:

construction of statements of application for insurance. *Metropolitan L. Ins. Co.* v. *Johnson*, 101.

warranty in policy defined. *Id.*

effect of false representations in application. *Id.*

constitution and by-laws held part of benefit insurance contract. *Supreme Royal Circle* v. *Morrison*, 140.

policy issued to one having no insurable interest held void as a wager. *Little* v. *Ark. Nat. Bank*, 281.

JUDGMENTS: See CRIMINAL LAW.

judgment that is voidable merely can not be attacked collaterally when. *McDonald* v. *Fort Smith & W. Rd. Co.*, 5.

effect of want of jurisdiction. *Id.*

how question of notice in case of domestic judgment tried. *Id.*

when judgment presumed to be regular. *Id.*

validity of judgment against insane person. *Id.*

conclusive only upon parties and privies. *Biederman* v. *Parker*, 86.

effect as to strangers. *Id.*

effect of *nunc pro tunc* order. *Villines* v. *State*, 471.

conclusiveness of judgment as to matters that might have been adjudicated. *Ederheimer* v. *Carson Dry Goods Co.*, 488.

when foreign judgment conclusive. *Id.*

JUDGES:

authority of special chancellor not questioned on appeal when. *Blagg* v. *Fry*, 356.

JUDICIAL SALES: See REMAINDERS.

when no right of redemption exists. *Groves* v. *Keene*, 40.

sufficiency of description of land. *Id.*

JUDICIAL SALES:—*Continued.*

when right of redemption exists. *Id.*
conclusiveness of decree vacating sale. *Miller* v. *Henry*, 261.
indorsement of approval of deed not a confirmation. *Id.*
status and rights of purchaser. *Id.*
when incomplete. *Id.*

LACHES: See LEVEES; BILL OF REVIEW; QUIETING TITLE.

LANDLORD AND TENANT:

notice necessary to terminate tenancy by month. *Reece* v. *Leslie*, 127.
when error in unlawful detainer to direct verdict for plaintiff. *Id.*
when action lies for use and occupation. *Cooley* v. *Ksir*, 307.
right of tenant to remove fixtures. *S. H. Kress Co.* v. *Moscowitz*, 638.

LARCENY:

sufficiency of allegation of ownership. *Monk* v. *State*, 12.

LEVEES:

when owner of land sold for levee tax not entitled to redeem. *Groves* v. *Keene*, 40.
statute governing right to redeem. *Id.*
sale of land for levee taxes must be confirmed. *Miller* v. *Henry*, 261.
levee district not estopped from asserting title to land when. *Id.*

LIBEL AND SLANDER:

meaning of written words determined from entire instrument. *Skaggs* v. *Johnson*, 254.
words taken in natural meaning. *Id.*
when words not libelous *per se*. *Id.*
corporation not liable for slander committed by agent when. *National Packing Co.* v. *Boullion*, 326.

LIMITATION OF ACTIONS: See ADVERSE POSSESSION.

statute not suspended by oral promise or acknowledgment. *Burnett* v. *Turner*, 290.
oral waiver of statute need not be in writing. *Id.*
sufficiency of promise not to plead statute. *Id.*
effect of new promise on additional consideration. *Id.*
new promise held to be without consideration. *Id.*
when suit to quiet title barred. *Carmichael* v. *Arkansas Lbr. Co.*, 603.

LIQUORS:

effect of making several unlawful sales on same day. *Zaccanti* v. *State*, 60.
liability of one aiding in unlawful sale. *Bobo* v. *State*, 462.

MASTER AND SERVANT: See EVIDENCE.

happening of accident raises no presumption of negligence. *Denton* v. *Mammoth Spring Electric Light & Power Co.*, 161.
proof of master's negligence insufficient when. *Id.*
negligence in furnishing defective appliance not proved by subsequent repairs. *St. Louis, I. M. & S. Ry. Co.* v. *Steed*, 206.
instruction held erroneous in ignoring defense of contributory negligence. *Id.*
master only bound to use ordinary care in furnishing tools and appliances. *Id.*
effect of promise to repair defective appliance. *St. Louis, I. M. & S. Ry. Co.* v. *Swaim*, 224.
when servant held not to have assumed risk therefrom. *Id.*
burden on servant to show negligence of fellow-servant. *Fletcher* v. *Freeman-Smith Lbr. Co.*, 230.
evidence held insufficient to show negligence. *Id.*
duty of master to warn servant. *River, Rail & Harbor Const. Co.* v. *Goodwin*, 247.
when servant not guilty of contributory negligence as matter of law. *Delight Lbr. Co.* v. *Henderson*, 334.
risk of defective appliance not assumed when. *Id.*
instruction as to duty to furnish safe appliance disapproved. *Id.*
instruction as to assumed risk disapproved. *St. Louis, I. M. & S. Ry. Co.* v. *Jacks*, 347.
servant held guilty of negligence causing his death. *Mitchell* v. *Chicago, R. I. & P. Ry. Co.*, 364.
duty of master as to appliances and place to work. *Oak Leaf Mill Co.* v. *Littleton*, 392.
negligence in furnishing platform for jury when. *Id.*
defective platform as proximate cause of injury. *Id.*
risks not assumed by servant when. *Id.*
when rule of assumed risk inapplicable. *Fullerton* v. *Henry Wrape Co.*, 434.
when servant held to have assumed risk. *Id.*
liability of master where work is being done by independent contractor. *Arkansas Natural Gas Co.* v. *Miller*, 477.
effect of lending servant to another. *Id.*
liability for acts of such servant question for jury when. *Id.*
instruction as to master's liability disapproved when. *Id.*
duty of master to protect servant. *Barrentine* v. *Henry Wrape Co.*, 485.

MASTER AND SERVANT:—*Continued.*
complaint alleging negligence of fellow-servant held insufficient. *Id.*
master liable for injuries caused by defective machinery when. *Wortz* v. *Fort Smith Biscuit Co.*, 526.
when servant held to have assumed risk of injury. *Id.*
when fireman held to have assumed risk of collision of engine and car. *St. Louis, I. M. & S. Ry. Co.* v. *Brogan*, 533.
instructions as to assumed risk held not to ignore contributory negligence. *Id.*
assumed risk and contributory negligence distinguished. *Id.*

MECHANICS' LIEN:

lien enforced for improvement placed on adjacent property when. *Speer Hardware Co.* v. *Bruce*, 146.

MISTAKE: See CONTRACTS; REFORMATION OF INSTRUMENTS.

MORTGAGES:

indictment for selling mortgaged property must allege value. *Kightlinger* v. *State*, 172.
creditor taking mortgage not *bona fide* purchaser when. *Miller* v. *Mattison*, 201.
effect of failure to acknowledge. *Moore* v. *Ollson*, 241.
validity of record of unacknowledged mortgage. *Id.*
burden of proving absolute deed to be mortgage. *Edwards* v. *Bond*, 314.

MUNICIPAL CORPORATIONS: See IMPROVEMENT DISTRICTS.

resolution of council for employment of attorney properly passed when. *Oglesby* v. *Fort Smith*, 506.
committee appointed by council not authorized to delegate power when. *Id.*
unauthorized contract ratified when. *Id.*
power of council to ratify contract. *Id.*
when contract binding though not mutual. *Id.*

NEGLIGENCE: See RAILROADS; CARRIERS; MASTER AND SERVANT.

OFFICERS:

instructions in prosecution of police officers for failure to arrest mob approved. *Pennewell* v. *State*, 32.
when such officers not guilty of nonfeasance. *Id.*
instruction for failure to arrest mob not open to general objection when. *Id.*

PARDON:

effect of, upon costs. *Villines* v. *State*, 471.

PARTIES:

cross defendant must be summoned when. *Miller* v. *Mattison*, 201.
no right to substitute parties when. *Coleman* v. *Floyd*, 300.

PARTITION:

when solicitor's fee not taxed against estate. *Gardner* v. *McAuley*, 439.

PARTNERSHIP:

partner may mortgage firm's chattels. *Jacks* v. *Greenhaw*, 615.
partner may issue negotiable paper when. *Id.*

PLEADING:

effect of filing amended pleading. *Laser* v. *Forbes*, 166.
refusal to permit amendment of complaint discretionary when. *Cumbie* v. *St. Louis, I. M. & S. Ry. Co.*, 406.
when court may refuse to allow amendment. *Id.*

QUIETING TITLE:

bill to quiet title not barred by laches when. *Miller* v. *Henry*, 261.
when party guilty of laches. *Carmical* v. *Arkansas Lbr. Co.*, 663.
when suit barred. *Id.*

RAILROADS:

duty of traveller at crossing. *St. Louis, I. M. & S. Ry. Co.* v. *Chamberlain*, 180.
evidence held relevant in action against traveller at crossing. *Id.*
presumption where person is injured by operation of train. *Id.*
instructions in action where traveller was injured at crossing approved. *Id.*
finding of negligence after discovery of peril sustained when. *St. Louis & S. F. Rd. Co.* v. *Newman*, 284.
duty of to keep lookout. *Central Ry. Co. of Ark.* v. *Lindley*, 294.
motor car held to be a train. *Id.*
lookout statute as amended construed. *Id.*
evidence held to justify finding of negligence in killing of stock. *Id.*
not authorized to surrender charter. *Freeo Valley Rd. Co.* v. *Hodges*, 314.
liability for damages by fire question for jury when. *Kansas City So. Ry. Co.* v. *Harris*, 374.
contributory negligence no defense when. *Id.*

RAPE:

evidence insufficient to sustain conviction of assault with intent to commit rape. *Douglass* v. *State*, 218.

REFORMATION OF INSTRUMENTS:

instrument not reformed for mistake when. *Hearin* v. *Union Sawmill Co.*, 455.

REMAINDERS:

power of equity to sell contingent remainders. *Bedford* v. *Bedford*, 587.
control over reinvestment. *Id.*
power to order private sale. *Id.*

SALES OF CHATTELS:

contract for sale of stock of old goods at wholesale cost construed. *Finn* v. *Culberhouse*, 197.
effect of vendee accepting the goods and selling part of them. *Id.*
defects in maps sold held immaterial. *Kenyon Ptg. & Mfg. Co.* v. *Crosby*, 258.
evidence held admissible upon issue of acceptance of payment. *Emerson* v. *Stevens Grocer Co.*, 575.
how long offer to buy goods open. *Id.*
instruction as to sufficiency of acceptance of offer approved. *Id.*

SALES OF LAND: See CONTRACTS.

vendee entitled to rescind for breach of contract when. *Laser* v. *Forbes*, 166.
right of vendor to set off unpaid note waived when. *Id.*
vendor entitled to lien when. *Miller* v. *Mattison*, 468.
when contract of sale not binding. *Skeen* v. *Ellis*, 513.

SCHOOLS:

necessity of notice before annexing contiguous territory to school district. *McCray* v. *Cox*, 47.
repeal of statute empowering school districts to borrow money. *Milwee* v. *Board of Directors, etc.*, 77.
mortgage executed by majority of directors held valid when. *Id.*
employment of teacher by two directors invalid when. *School Dist. No. 22* v. *Castell*, 106.
when notice of directors' meeting required. *Id.*
intent as affecting crime of disturbing school. *West* v. *State*, 175.
one defending himself held not to disturb school. *Id.*

SHERIFF AND CONSTABLE:

liability of constable for wrongful seizure under attachment. *Biederman* v. *Parker*, 86.

STATUTES:

construction of proviso. *Zaccanti* v. *State*, 60.
when prior statute impliedly repealed. *Milwee* v. *Board of Directors, etc.*, 77.
sufficiency of enacting clause. *Adcock* v. *Coker*, 210.
enacting clause of statutes not changed by Initiative and Referendum Amendment. *Ferrell* v. *Keel*, 380.

STATUTES CITED:

KIRBY'S DIGEST:

§ 114 97
119 97
752 242
845 317
957 316
958 434
1080 *et seq.* 3
1188 326
1361 454
1839 30
1927 177
2013 174
2014 174
2231 14
2443 .....3, 476
2466 473
2469 59
2470 59
2524 34
2526 34
2528 34
2684 670
3393 22
3394 22
3629 634
3630 634
3648 637
3998 212
4425 9
4431 11
4971 148
4972 148
5056 .....311, 312
5057 311
5079 292

KIRBY'S DIGEST—*Continued.*

§ 5542 111
5667 68
5672 68
5706 111
5709 111
5793 440
6026 11
6029 11
6145 305
6307 223
6311 222
6313 223
6315 223
6662 475
6705 344
6992 454
7180 374
7540 .....49, 50
7695 .....48, 49
7696-9 19
8022 563

CONSTITUTION OF 1874:

Art. 5, § 1 ..382, 384, 388, 391
5, 19 .....
...383, 384, 386, 387, 388
7, 9 381
7, 15 21

Initiative and Referendum Amendment 382

SESSION ACTS:

1877, March 7..... 100
1893, April 12..... 317
1895, p. 36..... 454
p. 88 266
1903, c. 166, § 12..... 21

STATUTES:—*Continued.*

SESSION ACTS:—*Continued.*

1905, p. 308 143
c. 248 79
1907, March 8 545
May 10, p. 687..186, 187
May 29, § 1..... 100
p. 995 674
1909, p. 957..... 305

SESSION ACTS:—*Continued.*

1911, March 9..... 381
March 15 43
Act 97 of Special Acts 43
p. 275 298
c. 181 212
c. 204 454

TAXATION: See LEVEES.

when presumptions in favor of tax deeds conflicting. *Hooker* v. *Southwestern Improvement Assoc.*, 99.
certificate required in sale of land for taxes. *Id.*
necessity of warrant for collection of taxes. *Id.*
place of taxation of corporate personalty. *Beal-Doyle Dry Goods Co.* v. *Beller*, 370.
location of stock of goods for taxing purposes. *Id.*
who may complain of double taxation. *Id.*
effect of erroneous payment of taxes in wrong county. *Id.*
authority of courts to give relief from erroneous assessment. *Clay County Bank* v. *Knobel*, 450.
when appeals from orders of board of equalization taken. *Id.*
where relief had from erroneous assessment in Western District of Clay County. *Id.*

TRIAL: See INSTRUCTIONS.

effect of both parties asking a directed verdict. *St. Louis, I. M. & S. Ry. Co.* v. *McMillan*, 25.
error to direct verdict when. *Clouston* v. *Maingault*, 213.
when proper to direct a verdict. *Wortz* v. *Fort Smith Biscuit Co.*, 526.
objection to evidence insufficient when. *St. Louis, I. M. & S. Ry. Co.* v. *Brogan*, 533.
when error in argument of counsel cured. *Id.*
prejudice from improper argument removed when. *Mabley* v. *State*, 608.

TROVER:

evidence held insufficient to show conversion. *Johnston* v. *Pennington*, 278.
burden of proof of justification under impounding ordinance. *Id.*

TRUSTS: See ADVANCEMENT; WILLS.

effect of taking deed to third person. *Keith* v. *Wheeler*, 318.
burden of proving. *Id.*
how resulting trust established. *Id.*

USURY:

when contract usurious. *Smith* v. *Mack*, 653.
burden of proving usury. *Id.*

WATERS:

apportionment of accretions. *Reeves* v. *Moore*, 598.

WILLS: See EQUITY.

questions that may be raised on appeal from judgment admitting will to probate. *Coleman* v. *Floyd*, 300.
no right to substitute parties on appeal therefrom. *Id.*
will held to create express trust for daughter's support. *Hare* v. *Sisters of Mercy, etc.*, 549.
when such trust enforced. *Id.*
lapse upon death of legatee or devisee. *Galloway* v. *Darby*, 558.
"heirs and assigns" in will held words of limitation, not of substitution. *Id.*
when devise held to lapse. *Id.*
effect of lapse of devise. *Id.*
presumption against intestacy. *Id.*
when such presumption not overcome. *Id.*

WITNESSES:

affidavit of witness inadmissible to impeach him when. *Jenkins* v. *Quick*, 467.