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CASES DETERMINED

IN THE

Supreme Court of Arkansas

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JUDGES AND OFFICERS

OF THE

SUPREME COURT

DURING THE PERIOD OF THIS VOLUME

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CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

BLANTON *v.* DAVIS.

Opinion delivered February 10, 1913.

1. INFANTS—GUARDIAN AD LITEM—DEFENSE OF INFANT.—Where an infant has no statutory guardian, in an action against the infant, proof can not be taken in the action prior to the appointment, either by the court, or the clerk in vacation, of a guardian *ad litem*. (Page 8.)
2. SAME—SAME—SAME.—Where infants, who are parties to an action, have a regular statutory guardian, when proof in the action was taken, although the guardian, who was the infants' mother, made no answer for the infants, but the cause was defended by the mother of the infants who was a party defendant, a judgment against the mother and infants will be affirmed. (Page 9.)
3. MORTGAGES—DEED ABSOLUTE ON ITS FACE.—A deed absolute on its face will be treated as a mortgage if so intended by the parties. (Page 10.)

Appeal from St. Francis Chancery Court; *Edward D. Robertson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This suit was instituted as an action to redeem from a deed, absolute on its face, which, it is alleged, was intended as a mortgage. The complaint was filed on February 10, 1908, and alleged that on February 17, 1897, one T. A. R. Davis was the owner of a certain eighty-acre tract of land in St. Francis county, Ark., and on that date executed a deed of trust to the land which, by successive assignments, became the property of Mrs. M. E. Blanton, on December 7, 1904. That said note being past due and unpaid, the said Davis executed to J. P. Blanton a deed of conveyance for the land described in the deed of trust, except twenty acres thereof, for

$1,800, reserving a lien on the land for the payment of the purchase price; that this deed was executed and intended to be security to the said J. P. Blanton, who assumed and agreed with the said T. A. R. Davis to pay off and discharge the note secured by the deed of trust, and on February 10, 1901, delivered said note and deed of trust to the said Davis and endorsed on the back of said deed of trust an agreement in the following words, towit: "I, J. P. Blanton, agree to let T. A. R. Davis's children have the land, sixty acres, back in seven years for the same I gave, $1,800.

J. P. Blanton.
T. A. R. Davis.

February 16, 1901.

The complaint further states that J. P. Blanton went into possession of the sixty-acre tract January 8, 1901, and continued in possession until his death and that his widow has been in possession since his death, enjoying the rents and profits thereof. That the said Davis was dead and had left him surviving these plaintiffs, who were his widow and children. The widow and infant children of the said Blanton were made defendants and there was a tender of the amount due under the mortgage.

The answer denied there was any agreement for a redemption, but alleged the deed was an absolute conveyance, as it purported to be.

The court found that the deed was a mortgage, and appointed a master to state an account between the parties and the appeal is from the final decree rendered in this cause.

It appears, however, that the plaintiff's proof was taken May 3, 1910, and filed May 7, 1910, but that no guardian *ad litem* was appointed for Blanton's infant children until June 20, 1911, when the appointment was made by the court and he filed his answer on June 29, 1911. The decree was rendered October 26, 1911. It is not claimed that any fraud was practiced upon them, but that this proof should not have been read against

them, and without it the decree was unsupported by the evidence. Was it necessary to appoint the guardian *ad litem* before taking the proof?

W. W. Hughes, for appellant.

The court erred in permitting testimony to be read in evidence which was taken before the appointment of a guardian *ad litem* for the infant defendants. 40 Ark. 56.

S. H. Mann and *J. W. Morrow* for appellee.

The mother and co-defendant of the infant defendants was their regular guardian and defended for them. No objection was made to the reading of the testimony, and the defense was full and *bona fide* at all stages, and that is all that was necessary. 90 Ark. 44.

SMITH, J., (after stating the facts). The following provisions are found in Kirby's Digest:

Section 6023. The defense of an infant must be by his regular guardian, or by a guardian appointed to defend for him, where no regular guardian appears, or where the court directs a defense by a guardian appointed for that purpose. No judgment can be rendered against an infant until after a defense by a guardian.

Section 6024. The guardian to defend shall be appointed by the court, or by the judge thereof. The appointment can not be made until after service of the summons in the action. No party or attorney in an action can be appointed guardian to defend therein for an infant or person of unsound mind. During the vacation of the courts, the clerk of the circuit and chancery courts shall have the same power of appointing guardians *ad litem* for infant defendants, who have been summoned in the action, that their respective courts or the judges thereof have; but the court or judge shall have the power to change the guardians so appointed by appointing others in their stead, whenever the interests of the infants require such change. The court shall indorse the name of the guardian and the date of his appointment upon the complaint.

Section 6025. The appointment may be made upon the application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons. If he is under the age of fourteen years, or does not so apply, the appointment may be made upon the application of any friend of the infant, or on that of the plaintiff in the action.

Certainly these three sections mean something more than that a decree may be rendered when a summons has been served on an infant and an answer filed by a guardian *ad litem*. If the filing of an answer was all that was required, why give an infant fourteen years of age the right to select this guardian, what necessity is there for a choice to be made? One guardian as well as another could file a general denial of the allegations of the complaint, but if no more was required, why file an answer at all, why not treat the allegations of the complaint as being at issue without the empty formality of filing a general denial? Is it not a more reasonable construction of the statutes quoted to say that the Legislature intended the infant should have an actual and not a fictitious defense?

Section 6023 provides that the defense of an infant must be by his regular guardian, if he has one, but if not, the court shall appoint him one for him for that purpose; and for that particular case, he has the same responsibilities and duties that a regular guardian would have.

Section 6024 provides that when the service is complete, the clerks of the courts shall have the power to appoint guardians *ad litem,* but such guardians are subject to removal by the court, whenever the interests of the infant require a change. What interest would require this change except a failure to make a substantial defense? The court could permit an answer to be filed at any time and could require it to be done at any time before trial, if nothing more than the filing of an answer was required. This section, 6024, contemplates that there shall be no unnecessary delay in the preparation of the cause for submission, and to avoid that delay, provides

that the clerk of the courts may appoint a guardian to represent the infant, and yet for the infant's protection, provision is made for the removal of this guardian if the infant's interests requires that action by the court.

It is no doubt true in this case that the appointment of a guardian *ad litem* before the proof was taken would not have any more fully protected the rights of the infants than they were protected. Their mother was sued with them and a vigorous and able defense was made, but this does not suffice. The law directs the procedure against a minor and in this case, its requirements were not met.

In the case of *Ryan* v. *Fielder,* 99 Ark. 376, an infant was sued with his father for a tort and after a vigorous defense there was a judgment for the plaintiff. A motion in arrest of judgment was filed and was treated as a motion for a new trial and granted for the sole reason that no guardian *ad litem* had been appointed, upon the theory that no defense, with whatever good faith or zeal conducted, can supply the failure to observe the statute. The case was affirmed on appeal.

In *Martin* v. *Gwynn,* 90 Ark. 47, in an opinion by Justice WOOD, it was held that the defense of a minor might be made by a foreign guardian, but that case does not conflict with the views here expressed. There a full defense was made, under the directions of the foreign guardian, and it was said that while the law guarded with jealous eye the rights of an infant defendant, this defense was treated as being in accord with the spirit of the statute and a substantial compliance with it.

Infant litigants, whether plaintiff or defendant, are under the care of the court, and in the case of *Nashville Lumber Co.* v. *Barfield,* 93 Ark. 359, which was a case where the court below had removed a next friend by whom suit was brought and had appointed another, the court said: "It is the duty of the court to protect the infant fully in the progress of the cause and to see that he is not prejudiced in the trial by any act or omission of the person by whom the suit is brought."

In the case of *Varner* v. *Rice,* 44 Ark. 244, Justice EAKIN, speaking for the court, said: "The answer of the guardian *ad litem* denies generally such of the allegations as it may be important to controvert, and submits the rights of the minor, Wm. I. Varner, to the court. This pleading is not to be approved. It amounts to no answer at all, and is useless. If all that may be required, is to simply file such a paper in a perfunctory way, the satute might just as well have declared the issue to be made in all cases by the allegations of the complaint, without any answer by a guardian, as allegations of new matter in an answer are put in issue without reply. It is the duty of the guardian *ad litem* to make a full defense without regard to the truth of the denials as to anything which might be prejudicial to the minor. That is illustrated in this case. One of the allegations is that a partition was desirable and might be fairly and justly made. It may not be true that it could be, at this time. It might be detrimental to the interest of the minor. The court made no inquiry as to that because no adverse pleading seemed to require it, and no proof on the subject was taken before the partition was decreed. It is better that the answer of a guardian should specifically deny material allegations. It need not be verified by oath." The same learned jurist wrote the opinion in the case of *Evans as Guardian* v. *Davis,* 39 Ark. 235, which was a continuation of the case of *Cannon* v. *Davis,* reported in 33 Ark., p. 56. Upon the remand of the case, the death of the defendant Cannon was suggested, and not denied, and upon the motion of his counsel in the cause, the suit was revived against his heirs by name, all of whom were described as infants under fourteen years of age, having no guardian. Their appearance was entered by counsel, and upon his further motion, a guardian *ad litem* was appointed, who by leave of the court, adopted the answer made by their ancestor while living, and the cause proceeded. The court there said: "It was error to proceed with the cause at all, until the heirs of Cannon had been brought in as required by law, that is by proper service.

The provisions of the code are very plain, and this court has time and again insisted that it is the duty of the judges and chancellors to permit no agreement of attorneys, or guardians *ad litem,* to dispense with statutory regulations for the protection of the rights of infants. With regard to these, the courts should either refuse to move until they are complied with, or move in the first instance to compel compliance without any discussion of their policy. It may seem absurd to require personal service upon an infant in arms, but there may be a very wise policy in having intelligent children of twelve or thirteen years of age, made acquainted with proceedings affecting their rights, and laws must be considered with regard to their general effect * * * No appointment of a guardian *ad litem* to defend for an infant can be made, at all, until there be service, and such guardian, when duly appointed can admit nothing in his answer, the burden of proof of which would otherwise be on the plaintiff, but must put in issue every material fact, which he may well do, as he is not required to answer on oath. In these respects the Code practice is much more rigid than the old practice in equity, and this rigidity is justified by the shipwrecks of infants's estates, which have so often resulted from the carelessness of friends and relations. If this court should indulge itself in making exceptions, all would be again at sea. The rights of infants can in no case be judicially affected, except upon proper issues and proof, and upon statutory service, where they are defendants, and ought not to be on their own application by next friend or guardian, without reference to the master's or the chancellor's own careful examination, to ascertain whether or not the thing asked be really for the benefit of the infant."

The same wise jurist in the case of *Pinchback* v *Graves,* 42 Ark. 227, said: "The business and judicial history of America is strewn with the wrecks of infants's fortunes. The courts and relatives of infants are culpable in this, not the Legislature. The laws are wise and careful. The true spirit of them should be kept in

view and administered. Our statutes require not only service on an infant, but that his defense must be made by his guardian if he has one; or if he has not, by one specially appointed. In making this appointment, the court should take care that it be not done until after service on the infant, that he may be heard upon this point if he should desire it, and must take care, further, that no attorney nor party in the action be selected. No judgment should be rendered affecting the interests of an infant until after defense by guardian and this defense should not be a mere perfunctory and formal one, but real and earnest. He should put in issue, and require proof of every material allegation of a complaint prejudicial to the infant, whether it be true or not. He is not required to verify the answer and can make no concession on his own knowledge. He must put and keep the plaintiff at arms length. These are wise provisions, and they are so far imperative. I think too that a guardian *ad litem,* fails in his duty, and does not apprehend the true obligation which he voluntarily assumes, if he contents himself with simply putting in a general denial, as is commonly done, and then leaves the infant to the mercy of the rude stream of the ensuing contest. His interests, after issue, require protection as well as before. Proof may be required in his behalf; witnesses against him may require cross examination. Points on error must be duly saved. With regard to these matters, the statutes are not mandatory, but the caution of the Legislature would fall far short of its design and be nullified in its effect, indeed be but an empty pretense, if it be not further understood that the guardian *ad litem* should watch the interests of the infant throughout the litigation, and see to it that a vigorous and real defense throughout be made by attorney. It is a moral obligation of the imperfect sort, perhaps, which can not be enforced, but it is none the less in contemplation of the law, which aims only to be as practical as possible."

The advantages to accrue to an infant from having the presence of an acting guardian at the taking of the

proof which fixes his rights or liabilities, with reference to the subject-matter of the litigation, are manifest, and the appointment of this guardian before the taking of this proof is evidently a part of the defense which the statute contemplated he should have before judgment is rendered against him.

It might happen that this duty would not be performed even though the appointment were made in apt time, but it would at least be possible for the infant to have the benefit of the presence of his acting guardian at the taking of the proof, if he felt disposed to render that service.

The decree is therefore reversed and the cause remanded for further proceedings in accordance with the practice here announced.

McCULLOCH, C. J., dissents.

SMITH, J. (on re-hearing). Upon the original submission of this cause, the point was made that the proof was taken before the guardian *ad litem* had been appointed and the cause was briefed upon the question of the regularity of that practice and the necessity for that appointment, and we held in the original opinion that where there was no statutory guardian, proof could not be taken prior to the appointment, either by the court or the clerk in vacation, of a guardian *ad litem*. We adhere to that opinion. Attention is now called to the fact that the record shows that appellant, Mrs. Blanton, was the statutory guardian of her infant children, having been appointed before the institution of this suit. She did not answer in that capacity, however, and the defense of the infants was made by their guardian *ad litem*. No question is made as to the sufficiency of the service. The defense of the widow of the said J. P. Blanton and his infant children was a common one and was vigorously and ably made and this fact was not questioned in the original opinion. We undertook merely to define the practice in such cases. As there was a regular guardian when the depositions were taken, the reason for which the cause was reversed, does not exist.

The transcript in this cause is in two parts, one of the parts consisted of the exhibits which were used at the trial. The principal question involved in the trial below was the genuineness of the agreement for the redemption of the land, signed by Blanton and Davis. No question is made that the agreement is a conditional sale and not a mortgage, in fact the amount necessary to be paid in either event is practically the same, but the exhibits which consist of a number of known, genuine signatures with the depositions of the witness in reference thereto, make an interesting study in chirography, and upon a consideration of all the evidence, we are of opinion that the chancellor's finding, that the signatures were genuine and the agreement for the redemption of the land had in fact been made, is not contrary to a clear preponderance of the evidence. There was reference to a master to state an account between the parties and while both sides filed exceptions to his report, neither now question its accuracy as approved by the court.

Upon a consideration of the whole case, the motion for a rehearing is granted and the order reversing the cause is set aside and the decree is affirmed.

HART, J., dissents.

HARPER v. McGOOGAN.

Opinion delivered February 10, 1913.

1. MARRIED WOMEN—MORTGAGE—SEPARATE PROPERTY.—A wife may mortgage her separate property to secure the payment of a debt of her husband. (Page 16.)
2. DEED—ACKNOWLEDGMENT OF MARRIED WOMAN—IMPROPER INFLUENCE OF HUSBAND.—No fraud or undue influence, actually exercised over the wife by the husband, can vitiate the conveyance if the grantee be no party to the improper influence, and has no knowledge of it. (Page 16.)
3. DEED OF TRUST—WIFE'S SEPARATE PROPERTY.—Where a husband executed a deed of trust to land belonging to his wife as though it were his property, to secure the payment of his note, and the wife joined in the deed in the recital that, "And I, M. J. McGoogan, wife of John McGoogan, for the consideration and purposes afore-

said, do hereby join with my husband in the execution of this deed," and both acknowledged the same before a proper officer, in order to give any effect to the act of these parties in executing the instrument and acknowledging it, it will be *held* that a valid deed of trust was executed upon the land of the wife. (Page 17.)

4. MORTGAGES—STATUTE OF LIMITATIONS—HUSBAND AND WIFE.—Where a wife joins with her husband in executing a deed of trust on land belonging to her to secure a debt of the husband, she is not a "third party" within the meaning of section 5399 of Kirby's Digest, and the statute of limitations can not be pleaded by the wife as between the parties to the trust deed when payments on the same have been made prior to the expiration of the statutory period but not endorsed on the margin of the record as required by section 5399 of Kirby's Digest. (Page 20.)

5. USURY—PLEA OF.—Where there is a conflict in the evidence and the testimony preponderates against a plea of usury, that defense will be unavailing. (Page 21.)

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

Patterson & Green, for appellant.

A mortgage by the wife of her lands to secure her husband's debt is valid. Kirby's Dig., § 740; 34 Ark. 17; 45 Ark. 117; 70 Ark. 516.

2. The evidence does not sustain the defense that Mrs. McGoogan was forced or unduly influenced by her husband to sign the mortgage. Moreover, it is not necessary that a married woman be examined separately or that she make any disclaimer of compulsion or undue influence in her acknowledgment to a conveyance of her separate property. 41 Ark. 421; 43 Ark. 160.

If the grantee was no party to the improper influence and knew nothing of it, the conveyance will not be vitiated even though there was actual fraud or undue influence on the part of the husband. 41 Ark. 426; 38 Ark. 377. See also 49 Ark. 85; 71 Ark. 517; 13 Cyc. 584; *Id.* 577; 70 Ark. 512; 71 Ark. 185.

3. The deed of trust is sufficient to convey the wife's fee in the lands. Article 9, § 7, Const. 1874; Kirby's Dig., § 740; 43 Ark. 28, 29; 53 Ark. 107; 70 Ark. 34; 53 Ark. 377; 87 Ark. 372; 90 Ark. 113; 94 Ark. 613; 91 Ark. 268.

In this case the deed of trust is sufficient without Mrs. McGoogan's acknowledgment at all. 41 Ark. 421; 47 Ark. 235; 49 Ark. 85; 71 Ark. 517. And if defective her acknowledgment is cured by subsequent curative acts of the Legislature. Acts 1907, p. 355; Acts 1911, p. 12.

4. The defenses that the mortgage is barred by the statute of limitations, and that it is void for usury, are not sustained by the evidence.

As to usury, the burden is on the party who pleads it, and it will not be inferred where from the circumstances the opposite conclusion can reasonably and fairly be reached. 57 Ark. 251; 59 Ark. 368-9; 68 Ark. 168; 74 Ark. 252; 9 Pet. 378; 25 Ark. 195; 54 Ark. 566.

E. O. Mahony for appellees.

Argument stated in the opinion.

SMITH, J. This action was begun by appellant in the Union Chancery Court to foreclose a deed of trust on a certain tract of land in that county, executed by the appellees to secure a note given by J. M. McGoogan, of even date with the deed of trust, and payable to the order of Doctor J. W. Harper. The complaint was filed August 14, 1911, and alleged in substance that on December 14, 1903, the defendant John M. McGoogan, executed and delivered to Doctor J. W. Harper, now deceased, his promissory note for $300 due and payable December 1, 1904, with interest at ten per cent per annum from maturity until paid and to secure the same, executed the deed of trust here sought to be foreclosed. That for a valuable consideration and before maturity, Doctor Harper transferred and assigned to plaintiff, Mrs. Mary Harper, said note and deed of trust, which were taken by said Doctor Harper as agent for plaintiff; and that the money loaned to and received by defendant, McGoogan, was the money of the plaintiff, Mrs. Mary Harper. The note and deed of trust read as follows:

EXHIBIT "A."

Three Creeks, Ark., Dec. 14, 1903.

On or by December 1, 1904, I promise to pay to the order of Doctor John W. Harper, the sum of three hun-

dred dollars, with ten per cent interest from due until paid. This note is given to secure mortgage of same amount and date. John McGoogan.

Endorsement: Received on this note $15, one-half interest for the year 1905. Amount due December 1, 1905, $315. Amount due, $315; interest 1906, $31.50; total, $346.50. Rec. April 25, 1910. Paid $5.

For value received I hereby assign and transfer to Mary Harper all right and title I may have to the within note. (Signed) J. W. Harper.

Three Creeks, Ark., November 23, 1905.

March 1, 1909, paid $40.

EXHIBIT "B."

(The essential portions of the deed of trust in controversy are as follows:)

This deed of conveyance, made and entered into this 14th day of December, 1903, by and between John McGoogan, party of the first part, and W. G. Pendleton, as trustee, of the second part. Witnesseth, that the said party of the first part, being indebted to the said Doctor John W. Harper in the sum of $300 dollars as evidenced by his note of this date, due and payable on the first day of December, 1904, with ten per cent interest thereon from due until paid, and being desirous of securing the payment of the said sum of money unto the said Doctor John W. Harper and in consideration thereof, and in the further consideration of $100 in hand to the said party of the first part, the said John McGoogan, party of the first part, doth hereby bargain, grant and sell unto the said W. G. Pendleton, party of the second part, the following lands and personal property, towit: (Certain personal property, describing it), "also northeast quarter of section 24, township 19, range 17, containing 160 acres, the same now being in possession of parties of the first part." * * * * Then follows the usual crop mortgage provisions in blank, also the usual covenant of ownership and freedom from encumbrances and liens, and warranty of title, followed by the usual conditions of ordinary deeds of trust as to forfeit-

ure and sale by trustee. The last provision of the deed of trust is as follows:

"And I, M. J. McGoogan, wife of the said John McGoogan, for the consideration and purposes aforesaid, do hereby join with my said husband in the execution of this deed, and do bargain, grant, sell and convey unto the said W. G. Pendleton, as trustee, his heirs, assigns and successors, all my right of homestead in said property, present and prospective, and for and on my own part and behalf do hereby freely and fully relinquish and release unto the said party of the second part all my right and claim to dower in and to the aforesaid granted and bargained premises.

In witness whereof, we hereunto set our hands and seals this, the 14th day of December, 1903.

John McGoogan, (Seal).
M. J. McGoogan, (Seal).

State of Arkansas,
County of Union.

Acknowledgment. Personally appeared before me, W. S. McAlpine, a justice of the peace in and for the county and State aforesaid, John McGoogan, party to the within and foregoing deed of trust, and to me well known, and acknowledged that he has executed said deed for all the purposes and considerations therein mentioned, expressed and set forth, and asked that the same be so certified, which is accordingly done. And I further certify that on this day also voluntarily appeared before me, a justice of the peace, M. J. McGoogan, wife of the said John McGoogan, to me well known as the person whose name appears upon the within and foregoing deed of trust, and in the absence of her said husband declared that she had, of her own free will, joined with him in the execution of the same as to her homestead rights therein stated, and had signed the relinquishment of dower therein expressed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand

and caused the seal of my office to be affixed. This done the 14th day of December, 1903. W. S. McAlpine, J. P."

McGoogan and his wife filed their separate answers, and Mrs. McGoogan alleged that she thought the instrument signed was a mortgage on the crop; that the land in controversy was her own land and she had not intended to incumber it; that the note sued on was usurious; and that there was an agreement between Doctor Harper and her husband that the latter should have all the time he wanted to pay said note; she denied Mrs. Harper was the purchaser of the note for a valuable consideration or that it was assigned to her before maturity; and alleged that her husband had forced her to sign the deed and acknowledge it against her will; and that she had not signed the note; and had received none of the proceeds thereof; and she pleads the statute of limitations. Her husband in his answer admitted the execution of the note, but said that there was deducted $45 or fifteen per cent as interest and in addition, there was an agreement in the note to pay ten per cent, which made a total rate of twenty-five per cent which was charged, and agreed to be paid; denied that the credits on the margin of the deed of trust record were placed there within five years from the date of the mortgage. There was a decree for the defendant and the cause dismissed and the plaintiff appealed. The points in issue between the parties and which are discussed in the briefs are as follows:

First. That a mortgage by the wife of her lands to secure her husband's debt is invalid.

Second. That the wife was unduly influenced or forced by the husband to execute the deed of trust.

Third. That the wife did not sufficiently join in the execution of the deed of trust so as to convey the fee, and the instrument is invalid because the wife intended to convey only her dower interest in the lands, which in this case amounted to a conveyance of no interest at all.

Fourth. That action to foreclose the mortgage is barred by the statute of limitations.

Fifth. That the note secured by the deed of trust was usurious.

To discuss these points in their order it may be first said that, the right of the wife to mortgage her separate property to secure the payment of her husband's debt is well settled. *Collins* v. *Wassell,* 34 Ark. 17; *Scott* v. *Ward,* 35 Ark. 480; *Petty* v. *Grisard,* 45 Ark. 117; *Goldsmith* v. *Lewine,* 70 Ark. 516.

As to the duress of the wife, compelling her to sign and acknowledge the deed of trust, it is sufficient to say that no contention is made that Doctor Harper had knowledge of, or took part in, the exercise of this duress. "No fraud or undue influence, actually exercised over the wife by the husband, can vitiate the conveyance if the grantee be no party to the improper influence and has no knowledge of it." *Donahue* v. *Mills,* 41 Ark. 426; *Meyer* v. *Gossett,* 38 Ark. 377; see also 13 Cyc., p. 584.

The third proposition is that the wife did not sufficiently join in the execution of the deed of trust so as to convey the fee and the instrument is invalid, because the wife intended to convey only her dower interest in the lands. It is true that this deed was drawn as if the husband was the owner of the land, but the wife does join in these recitals; "And I, M. J. McGoogan, the wife of the said John McGoogan, for the consideration and the purposes aforesaid do hereby join with my said husband in the execution of this deed and do bargain, grant, sell and convey unto the said W. G. Pendleton, as trustee, his heirs, assigns, and successors, all my right of homestead in said property, present and prospective, and for and on my own part and behalf, do hereby freely and fully relinquish and release unto the said party of the second part all my right and claim to dower in and to the aforegranted and bargained premises." The question here is, whether or not the language here employed was sufficient to convey the interest owned by Mrs. McGoogan in the land in question. It could not convey the right of dower and homestead because the land belonged to her and not to her husband, but is the deed

void on that account? She undertook to make a conveyance of some interest in the lands described and what is the result of that attempt? It can not be said that she did not intend to convey anything for the existence of the instrument which she acknowledged she signed, is evidence that she intended to part with some interest in her lands, otherwise its execution would have been a futile formality. Neither can it be said that she intended to convey her homestead and dower interest for she owned neither of these rights or interests and her undertaking would likewise have been purposeless. If she conveyed anything, she conveyed the fee, for this was the interest she owned. In the formal granting clause, her husband undertook to convey, as if he was the owner, but in the conclusion of the deed, she formally adopted the language he had used as her own and made his act her act when she says, "And I, M. J. McGoogan, wife of the said John McGoogan, for the consideration and purposes aforesaid, do hereby join with my husband in the execution of this deed." The recitals in regard to his acts leave no doubt that he was undertaking to convey the fee and when she joined with him in the execution of the deed that purpose was made effective. The whole purpose of the conveyance was to secure the loan made to her husband and this was the consideration and purpose which must have been intended by the recitals of the acknowledgment.

In the case of *Malin* v. *Rolfe,* 53 Ark. 107, which was a suit in ejectment, there were exceptions to a deed which had been offered in evidence to the effect that the wife of the grantee named therein, who owned the fee to the land, joined in the deed only for the purpose of relinquishing dower to the land therein described as belonging to her husband, and it was contended that as she did not join in the granting clause of the deed that as to her separate property therein described, said deed was void as it contained no word sufficient to pass her title; and that the clause in the deed in refernce to the wife contained no description

of the property or reference to the property elsewhere described. The exceptions were sustained, but upon the appeal, Justice HUGHES, speaking for the court, said: "Did the deed operate to convey the estate or interest of Mrs. Head in the lot described therein? Since the adoption of the Constitution of 1874, a married woman can convey her separate property as if she was single. The law will construe a deed most strictly against the grantor; and that part of the deed will be construed to precede which ought to take precedence, no matter in what part of the instrument it may be found.

A deed is to be construed as, if possible, to give effect to the conveyance, hence it will be allowed to have this effect, although it may lack formal words, if it contains sufficient words to convey the estate. If a married woman joins her husband in a conveyance as grantor her estate passes, (*Johnson* v. *Parker,* 51 Ark. 420) we are of opinion that the words used by Mrs. Head in the trust deed were sufficient to convey her estate and that they referred to the property elsewhere described in the deed, and that the deed operated to convey her estate therein to the trustee." In the case of *Lanigan* v. *Sweany,* 53 Ark. 185, the court said: "The question as to what estate a deed to land was intended to convey must be determined by the intention of the parties to be ascertained from the contents of the deed and the relation of the grantor to the property affected."

The case of *Sledge and Norfleet Co.* v. *Craig,* 87 Ark. 371, was a proceeding to foreclose a mortgage upon a homestead where the name of the wife was not mentioned in the granting clause of the deed, nor in any part of the deed, which deed concluded with the statement that: "The parties of the first part have hereto set their hands and seals and etc. * * * * " and her name appears, subscribed thereto with the names of other grantors, and the deed contained no clause relinquishing the wife's dower, but the court said: "In order to give effect to her signature it must be construed to evidence an intention to join in the grant," and cited in support of that state-

ment, the case of *Pipkin* v. *Williams,* 57 Ark. 247. The court there further said, "The statute provides that no conveyance, mortgage, or other instrument affecting the homestead of any married man, shall be of any validity unless his wife joins in the execution of such instrument and acknowledges the same. Kirby's Digest, § 3901. This statute prescribes no particular form of acknowledgment and the court has held that the use of no particular form or words is essential in order to comply therewith, but that it is sufficient if the wife joins in the execution of a deed and acknowledges the same before an officer, authorized by law to certify acknowledgments, these being the substantive acts required by the statute in order to give validity to a conveyance of the homestead. The officer's certificate to the deed involved in this case does not conform to the general statute, prescribing the form of acknowledgments to deeds, but it does show that the wife acknowledged before the certifying officer that she executed the deed. This is all that is required by the statute, directed especially to the wife's execution of a conveyance of the homestead. But if we should hold that the certificate of acknowledgment is defective, the defect has been cured by a subsequent statute. Kirby's Digest, § 786."

It may be said of the acknowledgment in this case, that two curative acts have been passed since its date. Act No. 147 of the Acts of 1907; Act No. 24 of the General Acts of 1911. In the case of *Ward* v. *Stark,* 91 Ark. 273, Chief Justice MCCULLOCH, speaking for the court, said: "The only language purporting to create a lien is as follows: 'It is also understood and agreed by the parties hereto concerned, that this agreement is and shall be a lien upon said farm, upon which the trees are planted until said party of the second part shall receive of the said party of the first part the compensation above specified.' This language in the instrument unmistakably manifests the intentions of the parties that a lien shall be thereby created on the land and equity will give effect to this intention by enforcing the lien," and in the same case it was further said: "It is also con-

tended that the instrument now under consideration was not executed in compliance with the homestead statute, and therefore, was insufficient to create a lien. The wife's name does not appear in the body of the instrument, but she signed it and acknowledged its execution. It contains no relinquishment of dower and the wife's execution of it is referable only to an intention to consent to the creation of a lien and to join in the act creating it. In no other way can any effect be given to her signature." So in this case, to give any effect to the act of these parties in executing this instrument and acknowledging it, it must be held that they executed a valid deed of trust upon the land of Mrs. McGoogan. *Bagby* v. *Bagby,* 152 S. W. 537.

The defense of limitations could be available only upon the theory that the payments made upon the note, secured by the deed of trust, were not indorsed upon the margin of the deed of trust record within five years of the dates upon which they were made, and that Mrs. McGoogan was a third party within the meaning of the provisions of section 5399 of Kirby's Digest; that "when any payment is made on any such existing indebtedness before the same is barred by the statute of limitations, such payment shall not operate to revive said debt or to extend the operations of the statute of limitations with reference thereto, so far as the same effects the rights of third parties, unless the mortgagee, trustee, or beneficiary shall, prior to the expiration of the period of the statute of limitations, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk." Appellees deny having made payment of $5, dated April 25, 1910, but admit the correctness of the other payments, and this admission was sufficient to keep alive the lien of the deed of trust as between the parties thereto, Mrs. McGoogan not being a third party within the contemplation of the section of the statute above quoted.

Probably the most difficult question in the case is the

one of fact in regard to the charge of usury. The evidence of McGoogan upon that question fully sustains that charge, but if the act of the court in dismissing the cause for want of equity was based upon that finding, we are of opinion that it was against a clear preponderance of the evidence. There was a volume of testimony upon this point, a very great deal of which was incompetent and it would probably serve no useful purpose here to set it out in detail. The evidence of McGoogan is not in harmony with that of his wife, and when considered by itself, it is inconsistent, and upon a consideration of all the evidence, we hold that the proof does not establish that defense. *Smith* v. *Mack,* 105 Ark. 653, 151 S. W. 431.

Upon the whole case, we are of opinion that the plaintiff has a valid, subsisting lien upon the property in controversy, to secure the balance due upon the note, which it is admitted she now owns. And this cause is remanded with directions to the chancellor to enter a decree ordering a foreclosure of the deed of trust.

SMITH *v.* CARTER.

Opinion delivered February 10, 1913.

MANDAMUS—REQUIRING COURT TO REINSTATE CASE ON LAW DOCKET—APPEAL.—Where petitioner files a petition in a circuit court asking that a cause be reinstated on the law docket, and the circuit judge, after hearing the petitioner, entered a judgment refusing the prayer of the petition and dismissing it, and the petitioner excepted to the ruling of the court, the remedy of the petitioner is by appeal, and the Supreme Court will not review the judgment of the circuit court for error in the proceeding there, and for relief against it by a writ of mandamus.

Petition for mandamus. Petition denied.

STATEMENT OF FACTS.

The petitioner asks a mandamus from this court to compel respondent, Judge of the Eighth Judicial Circuit, to cause the circuit clerk to reinstate on the common law docket case No. 1090, wherein petitioner was plaintiff

and the Texas & Pacific Railway Company was defendant, and to compel the respondent, as circuit judge, to proceed to try said cause anew. The facts upon which petitioner asks the writ are substantially as follows:

On March 25, 1908, petitioner brought suit against the Texas & Pacific Railway Company and recovered a judgment against it in the sum of $25. After judgment was obtained in the circuit court the court adjourned for the term on the 4th day of July, 1908. On the 14th day of July, 1908, the Texas & Pacific Railway Company filed a motion for a new trial in the circuit court, alleging newly discovered evidence. The circuit court overruled the motion and the railway company appealed the case to this court, where the judgment of the circuit court was affirmed. (See *Texas & Pacific Railway Company* v. *Smith,* 91 Ark. 362-6.) This court, in affirming that judgment held that the newly discovered evidence upon which the railway company relied in that case was not relevant to any issue in the original cause, but said that "the defendant was not without a remedy," and affirmed the judgment "without prejudice to appellant's right to institute a suit in equity for relief."

On the 18th of September, 1909, the railway company brought suit in the Miller chancery court against Daniel W. Smith, asking that a new trial be granted to said company, and that Smith be restrained from collecting his judgment until the case could be heard in the circuit court. The chancery court rendered a decree in favor of the railway company, enjoining Smith from collecting his judgment unless he would give to the railway company an opportunity to submit the evidence to the jury in the original case.

On the 18th day of December, 1911, Smith filed his petition with the clerk of the Miller County Circuit Court, asking that case No. 1090 of the common law docket be redocketed and reopened in order that the case might be tried anew in the circuit court. The motion alleged that the railway company had due notice of the filing of the motion or petition. The case, on the first day of the term,

was placed by the clerk on the common law docket. The circuit court overruled the motion and entered a judgment dismissing the petition to have the case reinstated. Smith excepted to the ruling of the court, and afterward applied to this court for a writ of mandamus, setting out substantially the facts as above stated.

The respondent entered his appearance here.

E. F. Friedell, for petitioner.

Mandamus is the proper remedy. The writ will issue whenever the failure or refusal of officers to act in a matter in which their duty to do so is plain, and their failure to act may deprive one of a legal right. 35 Ark. 298, 299, 301; 43 Ark. 66; 45 Ark. 126.

Glass, Estes, King & Burford, for respondent.

Petitioner's remedy was by appeal. Mandamus will not lie for the correction of mere errors. 177 U. S. 48; 1 Ark. 11; 128 S. W. 557; 91 Ark. 231.

WOOD, J. (after stating the facts). The respondent, the circuit judge of the Eighth Circuit, did not refuse to entertain petitioner's motion to reinstate, but, on the contrary, heard the same, and entered a judgment refusing the prayer of the petition and dismissing it. The petitioner excepted to the ruling of the court, and he had his remedy, if the circuit court erred in its judgment, by appeal to this court, but he can not have this court review the judgment of the circuit court for error in that proceeding, and for relief against it by a writ of mandamus.

"A writ of mandamus indeed can not be used to perform the office of an appeal or writ of error to review the action of an inferior court, but if the court, after sufficient service of the defendant, erroneously declines to take jurisdiction of a case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute." *In re Grossmayer,* 177 U. S. 48. See also, *Goings* v. *Mills,* 1 Ark. 11; *Gilbert* v. *Shaver,* 91 Ark. 231, p. 238; *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118-121.

The petition will be denied.

BRUNSON v. BOARD OF DIRECTORS OF CRAWFORD COUNTY LEVEE DISTRICT.

Opinion delivered February 10, 1913.

1. TAXES—ILLEGAL ASSESSMENT—VOLUNTARY PAYMENT—RECOVERY BACK.—Where a party owns land in the levee district created by the Act of 1909, page 159, but his land was taken out of the district by Special Act of 1911, page 24, and an illegal assessment is made against the land under the latter act, a payment of taxes by the land owner, under the illegal assessment, with knowledge of the facts, is voluntary, and the taxes can not be recovered back, when it appears that although the lands would have been declared delinquent, they could not have been levied upon and seized to enforce payment, because under the statute suit would have had to be brought by the directors to collect the same. (Page 27.)
2. TAXES—ILLEGAL ASSESSMENT—REMEDY OF LAND OWNER.—Where the statute, under which an illegal assessment is made requires that suit be brought by the district directors to collect delinquent taxes, a land owner, who, with knowledge of the facts, pays the taxes illegally assessed, makes a voluntary payment and can not recover them back. The proper remedy of the land owner would have been to have refused to pay the taxes and defended the suit to collect same. (Page 28.)

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

STATEMENT OF FACTS.

Appellant brought this suit in the circuit court against appellees, the directors of the Crawford County Levee District, to recover taxes which he alleges were illegally assessed against his land, and which were paid under protest by him. The Crawford County Levee District was created by the Legislature of 1909. See Acts of 1909, page 159. The levee district was divided by natural conditions, a large stream known as Frog Bayou, running from the hills through the district to the Arkansas River. Appellant's lands were included in the district and were situated east of Frog Bayou. After the creation of the district, certain land owners instituted suit in the chancery court of Crawford County to dissolve the district on the ground that it was unconstitutional, but the act was upheld by the court. *Alexander* v.

Board of Directors of Crawford County Levee District, 97 Ark. 322. Immediately following this decision, the Legislature amended the act creating the levee district, so as to take out of the district, as originally created, all that part lying east of Frog Bayou, in which appellant's land was situated. See Special Acts of 1911, page 24. The Special Act provided that the territory excluded from the district as originally created, should be liable for its *pro rata* part of the preliminary expenses incurred in organizing the district. The special act also provided for the levy and collection of taxes for that purpose. Pursuant to this provision, the taxes in question were assessed against appellant's land. Section 6 of the act of 1909, provides that the sheriff of Crawford County shall act as collector of the levee taxes, and that if the levee taxes as assessed, are not paid by the 10th of April of each year, a penalty of 25 per cent shall be assessed for the failure to pay, and said board of directors shall enforce the collection thereof by a proceeding in the chancery court of Crawford County. Substantially these facts were alleged in the complaint of appellant, and in addition, the complaint alleged that there were two mortgages upon the land, in each of which it was provided that if the mortgagor failed or refused to pay the taxes or assessments levied on the land, both of said mortgages should immediately become due. That on the 20th of April, 1911, the collector of Crawford County notified appellant that unless payment of this levee tax was made at once, the statutory penalty would attach. That for the purpose of preventing the advertisement and sale of the said lands for said assessment, and to prevent a cloud upon his title, and to prevent a sale of his land under the terms of said mortgages, appellant paid the taxes so assessed against his land under protest and compulsion, and at the time of making said payment so informed the sheriff.

Appellee filed a demurrer to the complaint, which was sustained by the court. Appellant declined to plead further, and upon his complaint being dismissed by the court, he has duly prosecuted an appeal to this court.

J. E. London and *C. H. Starbird,* for appellant.

1. A tax can not be legally levied and collected for a local improvement unless there is a corresponding benefit to the lands of the owner. 9 La. Ann. 503; 84 Me. 212; 72 Md. 587; 79 Md. 469; 92 Md. 535; 112 Mich. 588; 42 Neb. 120; 49 Neb. 883; 27 N. J. Eq. 568; 31 N. J. Eq. 472; 61 O. St. 1; 15 O. St. 76; 92 Tex. 685; 96 Tex. 258; 97 Va. 728; 154 Ind. 467; 164 U. S. 112.

2. The payment of the tax by appellant was not voluntary. 37 Cyc. 1183; 91 Me. 508; 57 N. E. 379; 36 N. W. 69; 72 N. W. 320; 101 N. W. 855; 92 N. W. 208; 82 N. W. 202; 70 Vt. 609; 34 Wash. 707.

E. L. Matlock, for appellee.

1. The Legislature was acting well within its recognized authority when, by the amendatory act of 1911, it provided, "that the territory hereby excluded from said district shall be liable for its *pro rata* part of said total expense, to be based on the direct proportion which the total property value of said excluded territory bears to the total property value of the whole district as it existed prior to the passage of this act," and in levying the tax upon the whole district including the land in question, to defray the initiatory expenses of the original district. 72 Ark. 119; 81 Ark. 562; 83 Ark. 54; *Id.* 344; 98 Ark. 113; 76 Ark. 303.

2. Appellant's payment of the tax was voluntary. 2 Dillon, Mun. Corp. 943; 65 Ark. 155; 46 Ark. 358.

HART, J. (after stating the facts). The taxes in question were assessed and collected under the Act of 1911 referred to above for the purpose of paying the expenses incurred in forming the district. It is claimed by counsel for appellee that the assessment and collection for this purpose was valid. On the other hand, counsel for appellant contend that his land was taken out of the district by the terms of the special act of 1911, and that the assessment and collection of the taxes in question were illegal and void. We deem it unnecessary to go into any question arising out of the improper levy or collection of taxes assessed upon appellant's land, for we hold that

the payment was voluntary and with full knowledge of all the facts. In some of the States the right to recover illegal taxes paid under protest is given by statute. In this State, however, there is no statute regulating the matter, and if any recovery is had, it must be under the rules of the common law. The common law rule governing cases of this kind is laid down in the following cases: *Lamborn* v. *County Commissioners,* 97 U. S. 181; *Railroad Company* v. *Commissioners,* 98 U. S. 541. These cases lay down the following rule:

"Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and can not be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary."

This rule was recognized and quoted with approval by this court in the following cases: *Helena* v. *Dwyer,* 65 Ark. 155; *Town of Magnolia* v. *Shannon,* 46 Ark. 358. There are some expressions in some of our cases, which indicate that a broader rule has been adopted, but when the facts of the case are examined and considered, it will be seen that the rule, as above announced, has been strictly adhered to. To illustrate, in the case of *Drew County* v. *Bennett,* 43 Ark. 364, the county court of Drew County, exacted from Bennett four hundred and fifty dollars for liquor license, when only four hundred dollars was the regular tax. Bennett paid the tax under protest, and was allowed to recover the excess as an illegal exaction. It will be noted, however, that Bennett was compelled to pay the tax before he could engage in the business of selling liquor and on that account he paid it under compulsion or duress within the meaning of the law. The facts alleged in the complaint in the instant case, however, do not in law constitute duress or compulsion. Ap-

pellant was in no immediate danger of being disturbed in the possession of his property, and he would not have jeopardized it by not paying the taxes at the time he did pay them. No irreparable injury could have resulted from his not paying them at the time. If he had refused payment to the collector, the latter had no authority to levy upon and seize his land to enforce payment. The statute requires suit to be brought by the board of directors of the levee district to collect the taxes. In the event of such suit, the plaintiff would have his day in court and the opportunity to plead and to offer proof in support of his claim that the taxes were illegal. He could have interposed the same defense to that action which he now asserts as the basis for his recovery in the present action. To hold otherwise would put it in the power of the party paying under protest to choose his own time and opportunity for commencing suit. To permit a person to ignore the remedies permitted under the statute against the alleged illegal taxes upon real estate and pay them with knowledge of all the facts, and then allow him to recover them back by suit would be inconsistent with our tax laws. We are aware that there is a sharp and irreconcilable conflict in the authorities on this question, but we believe that our decision is in accord with the weight of authority on the subject. Many additional authorities could be cited in support of the decision, and many might be cited against it, but they all follow the same general line of reasoning, and no useful purpose could be served by citing them at length. We deem it sufficient to say that a full and extensive note giving the authorities on both sides of the question and to some extent reviewing them may be found in the following cases: *Town of Phoebus* v. *Manhattan Social Club* (Va.), 8 Am. & Eng. Ann. Cas. 667; *Monagan* v. *Lewis,* 10 Am. & Eng. Ann. Cas. 1048; Cooley on Taxation, (3 ed.), Vol. 2, 1502, and cases cited.

The fact that appellant executed a mortgage on his land, and that the mortgage would fall due if he failed to pay the taxes regularly assessed thereon, could not have

the effect of making the payment under compulsion, because, as already stated, he could have made defenses to the suit brought against him to collect the taxes, and if they had been adjudged illegally, he would not have to pay them.

It follows that the judgment will be affirmed.

WOLFE v. STATE.

Opinion delivered February 10, 1913.

1. VENUE—MOTION FOR CHANGE OF—DISCRETION OF COURT—EVIDENCE.—When defendant filed a motion for change of venue with supporting affidavits, and the court examined the affiants orally, it was no abuse of the court's discretion to overrule the motion, when the knowledge of affiants did not extend to the whole county, and their examination did not disclose any such state of prejudice existing in the district as would prevent the defendant from receiving a fair and impartial trial therein. (Page 30.)
2. LIQUORS—VENUE—SELLING WITHOUT A LICENSE.—Selling liquor without a license on a boat west of the middle of the Mississippi river, off the shore of Mississippi county, is selling liquor in Arkansas without a license. *Kinnanne* v. *State*, 106 Ark. 286, cited and approved. (Page 30.)
3. JUDGMENTS—RECORDS OF COURT—PROOF OF SAME—EVIDENCE.—In a trial under an indictment for selling liquor without a license it is competent to show that defendant has been twice convicted of the same offense, and the clerk of the circuit court may read in evidence the records of said court showing the judgments rendered upon the former trials. The judgment of one conviction may be read in evidence, although not written on one page of the record. (Page 31.)
4. BILL OF EXCEPTIONS—PURPOSE OF.—The office of the bill of exceptions is to bring upon the record matters which do not appear upon the judgment roll or record proper, and errors which were committed by the court on the trial, not mentioned in the bill of exceptions, can not be reviewed on appeal, although set out in the motion for a new trial. The use of the bill of exceptions is to assign errors already committed by the court, except when relief is asked because of newly discovered evidence. (Page 32.)

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

Appellant pro se.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

KIRBY, J. This appeal comes from a judgment of conviction of the appellant for selling liquor without license, and fixing the punishment at a fine of $200 and three months in jail, it being the third offense of like kind.

It is contended for reversal that the court erred (1), in denying the motion for a change of venue; (2) in its rulings in giving and refusing instructions, and in the admission of testimony and also, (3) that the testimony is not sufficient to sustain the verdict.

The court's action in refusing to declare a juror incompetent and in permitting certain alleged improper arguments by the prosecuting attorney are also assigned as error in the motion for a new trial.

The motion for a change of venue was supported by the affidavits of two persons, whom the court examined orally to test their credibility. The most that developed upon the examination was that a good deal of prejudice existed in the county according to the statements of these affiants against the "Whisper" line of steamboats, rather than against Captain Wolfe, the defendant. The knowledge of the affiants did not extend to the whole county, and their examination did not disclose any such state of prejudice existing in the district, as would prevent the defendant receiving a fair and impartial trial therein. No abuse of discretion by the trial court is shown in the denial of the motion, and no error was committed in overruling it. *Bryant* v. *State,* 95 Ark. 241; *Ford* v. *State,* 98 Ark. 141; *Jones* v. *State,* 101 Ark. 441.

The court's instructions correctly declared the law relative to the State's eastern boundary as heretofore laid down in the case of *Cissell* v. *State,* 40 Ark. 504, recently approved and followed in the case of *Kinnanne* v. *State,* 106 Ark. 286.

The witnesses stated that they got on the boat at Wilson's landing, and after it left the shore, bought whiskey and beer of the defendant on the deck thereof.

Their testimony is somewhat conflicting as to the exact location of the boat at the time of the purchase. The river is 7,000 feet wide from the Arkansas bank to the north end of the towhead or sandbar west of the chute between the sandbar and island 35, in Tennessee. The chute between the sandbar and the island is 1,100 feet wide, and, according to the map in evidence, the sandbar or towhead is 2,900 feet wide. The jury might have found from the testimony that the sale occurred much nearer the Arkansas bank than the sandbar even; one of the witnesses in one of his statements, saying that they were not much further than 100 yards from the Arkansas bank, but, as said, each witness made conflicting and unsatisfactory statements as to the exact location of the boat. In any event, it can not be said, under the law of the case that the sandbar is not a part of the main channel of the Mississippi River for the determination of the boundary at this point, there being between it and the island another channel 1,100 feet wide and beyond the island still another channel between it and the Tennessee bank. Appellant contends that the channel between the island and the Arkansas bank is the main channel, and, as already said, there is no reason to exclude the sandbar, or towhead, from the main channel in the application of the law as to the boundary, and even if it be done and the western edge of the sandbar regarded as the Tennessee bank, which, of course, it can not be, still, the testimony is sufficient to show that the sale occurred nearer to the Arkansas bank than the sandbar, and the testimony is sufficient to sustain the verdict on that point.

It is next insisted that the court erred in the admission of testimony relative to the former convictions of appellant. The deputy clerk, who wrote the record of the court, was permitted to bring the record into court, and refer to the pages thereof, and the judgments and testify that at former terms of the court, Captain Wolfe, who was the same person as Joseph Wolfe, the appellant herein, had been twice convicted of selling liquor without license. One of these judgments was especially objected

to, because the latter part of it was separated from the beginning by two pages of the record.

Certainly the custodian of the court's record in the court in which the record was made could read the contents of it in another trial therein to the jury, and there was no error committed in permitting the judgment of one conviction to be read because it did not all appear upon one page of the record. Even if there had been other orders or matters upon the pages of the records between the beginning and the concluding part of the judgment of conviction, which the transcript in this case does not disclose, it would not have affected the validity of the judgment. *Fiddyment* v. *Bateman,* 97 Ark. 80.

The proof is amply sufficient to show the conviction of appellant of two similar offenses at former terms of the court, and the policy of the law being to discourage the violation of a statute by the infliction of a greater penalty for the third offense under the conditions herein shown, warranted the finding of the verdict of guilty.

No mention is made in the bill of exceptions other than as it appears in the motion for a new trial of the statements complained of made by the juror on his examination nor of the remarks of the prosecuting attorney in argument now objected to. If any error was committed by the court relative to either of these matters, it can not, on that account, be reviewed here. It is the office of the bill of exceptions to bring upon the record matters which do not appear upon the judgment roll or record proper, and motions for a new trial can not be used for that purpose. Its use is to assign errors already committed by the court, except when relief is asked because of newly discovered evidence as provided in section 6215, of Kirby's Digest. *Foohs* v. *Bilby,* 95 Ark. 303; *Cox* v. *Cooley,* 88 Ark. 350; *Cravens* v. *State,* 95 Ark. 321.

Finding no prejudicial error in the record, the judgment is affirmed.

WOLFE v. STATE.

Opinion delivered February 10, 1913.

1. INDICTMENT—STATUTORY OFFENSE.—An indictment charging a statutory offense, which follows the language of the statute will be held good on demurrer. (Page 36.)
2. LIQUORS—ILLEGAL SALE OF—VENUE.—*Kinnanne* v. *State*, 286, cited and approved. (Page 36.)
3. LIQUORS—SELLING WITHOUT LICENSE.—When the proof shows the sale of four bottles of beer to one customer, the beer being kept in an ice box, there being no counters or other bar-room fixtures, the proof is sufficient to sustain a verdict of guilty under an indictment charging that defendant "did unlawfully keep a dram-shop and drinking saloon without first procuring a license from the county court * * *." (Page 36.)
4. BILL OF EXCEPTIONS—ASSIGNMENT OF ERRORS.—Assignments of errors which should properly appear in the bill of exceptions, but which appear only in the motion for a new trial can not be considered on appeal. (Page 38.)

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

STATEMENT OF FACTS.

Appellant was indicted by the grand jury in the Osceola District of Mississippi County, charged with keeping a dram shop and drinking saloon, without having first procured a license, the charging part of the indictment being, as follows:

"Accuse Joseph Wolfe of the crime of keeping a saloon, committed, as follows, towit: Said Captain Joseph Wolfe, in the county and State aforesaid, Osceola District, on the 10th day of July, A. D. 1912, did unlawfully keep a dram shop and drinking saloon without first procuring a license from the county court from said county authorizing him so to do, against the peace and dignity of the State of Arkansas."

To this indictment a general demurrer was interposed and overruled and appellant saved his exceptions.

The sale of four bottles of beer was made on a boat in the Mississippi River off the Arkansas bank from Golden Lake Landing. The sole witness, the purchaser,

testified that he got on at the landing, and that the boat went out and came back, and that he got off; that there was an ice box sitting on the deck of the boat with beer in it; that he bought four bottles of beer from Joseph Wolfe and drank it on the boat. He did not open it himself, but that another man who had a bottle opener opened it for him, and that Wolfe had nothing to do with opening it. "He had an ice box, I should judge about middle ways of the boat and the ice box had beer in it. No counter or anything of that kind at all. Just set the bottles out as we called for them. It was on the deck of the boat." To the question: "Was there anything there at all except the ice box that looked to you like anything you had ever seen in a saloon or dram shop?" witness answered, "That was all I seen there was the ice box with the beer. That was all I looked for and went for. He might have had more. I don't say he did or didn't. That was all I seen. I suppose the boat carries passengers, and they had some freight on it." The witness stated that Joseph Wolfe was engaged in the steamboat business, that he went on the boat for the purpose of getting something to drink, and got the beer from the defendant. That the boat was in the Mississippi River. To the question, "How far out?" he answered, "I couldn't hardly tell you that; it was quite a piece out." "Was it on the west side or the east side of the middle of the main channel?" "Well, it was somewhere near the middle, I should judge. I don't know whether it was exactly the middle or not." Declined to answer the question whether they had reached the middle. To the question, "Where was it between the two main shores between Arkansas and Tennessee, with regard to the island?" he answered, "Nearest the Arkansas side." Witness thought it was about a mile from the Arkansas shore to the island, and he could not hardly say now how far from the Arkansas shore he was when he purchased the liquor. That he went on the boat for that purpose, and didn't pay much attention. That he was in the channel of the river between the island and the Arkansas shore. "What is

your best judgment as to whether you were nearer the island or the Arkansas shore?" "Well, I should judge we were a little nearer the Arkansas shore than we were the island." Witness only traveled in the boat about a mile and understood that the channel was about a mile wide. He judged the channel was where the navigable boats ran. That they ran mostly on this side where the water is deep.

Another witness, a civil engineer, testified from a map traced from the Mississippi River Commission's chart of the river, that from the Arkansas bank to the north end of the towhead the channel is 4,500 feet wide. That from Golden Lake Landing to the towhead in front of Golden Lake Landing, known as Booker's towhead, is about 3,500 feet, not quite three-quarters of a mile. That the chute between the towhead and island 35 at a point half-way between the ends of the towhead is about 1,100 feet wide; that the island is about two miles wide, across the middle of it, and that the total distance from the main Tennessee bank and Golden Lake Landing on the Arkansas bank is 21,700 feet. That boats go through the chute between island 35 and the main Tennessee bank; that water runs on both sides of the towhead west of the island, and he did not know whether the island was in any wise connected with the towhead or sandbar, couldn't say whether it was an accretion or an independent sandbar.

Another witness testified that boats ran in the channel between island 35 and the main Tennessee shore the year around, the regular packets. He didn't know the width of that channel, or whether it was wider between Booker's towhead and Golden Lake Landing. That the channel west of the island was also navigable.

The court instructed the jury, and from the judgment on a verdict of guilty, appellant brings this appeal.

Appellant pro se.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

KIRBY, J. (after stating the facts). It is insisted

for reversal that the court erred in overruling the demurrer to the indictment, in the giving and refusing of certain instructions, and that the testimony is not sufficient to sustain the verdict in that the venue was not proved and only one sale of liquor shown.

The indictment charges the offense under section 5125, of Kirby's Digest, and follows the language of the statute, which this court has uniformly held is sufficient in charging a statutory offense, and the court committed no error in overruling the demurrer. *Farmer* v. *State,* 45 Ark. 97; *Haupt* v. *State,* 100 Ark. 409-414; *Petty* v. *State,* 102 Ark. 170.

The jury could have found from the testimony of the witness, evidently an unwilling one, that the sale of liquor occurred in the channel of the Mississippi River, between the Arkansas bank and the towhead, east of island 35, and nearer to the Arkansas bank than to the towhead, or sandbar, which was distant about three-quarters of a mile, and if this channel be regarded as the main channel of the river at that point, the sale occurred nearer the Arkansas bank than the sandbar and consequently west of the middle of the main channel, and unquestionably within the jurisdiction of the State. The court correctly instructed the jury, relative to the State's eastern boundary, declaring the law as laid down in *Cissell* v. *State,* 40 Ark. 504, and recently followed and approved in *Kinnanne* v. *State,* 106 Ark. 286.

It is strenuously urged that the testimony shows only a single sale of liquor, and is not sufficient to support the verdict of guilty of keeping a dram shop, and the cases of *Blackwell* v. *State,* 45 Ark. 93, and *State* v. *Mazzia,* 51 Ark. 177, are relied upon in support of this contention.

It is true that only a sale of four bottles of beer was proved in this case, and it does not appear to have been sold from a regularly equipped bar, but the witness stated that they had an ice box with beer in it, about middle ways of the boat; that there were no counters, or anything of that kind, and that the "appellant just set the bottles out as we called for them." He drank the beer on

the boat and another man than the appellant opened it for him. He knew the beer was kept on the boat for sale, he went on the boat for the purpose of buying it, he did buy it of the appellant, and it was taken out of the ice box, the receptacle in which it was kept, and set out to him as he called for it. Under these circumstances, we do not think this case falls within the single sale doctrine, as announced in the cases relied upon by appellant. Appellant kept beer in an ice box for sale, and set it out to be drunk as it was ordered and paid for, after the manner of selling in dram shops, and we are of the opinion that the testimony is sufficient to sustain the verdict.

In *Snow* v. *State,* 50 Ark. 561, this court said: "A place where cider, birch beer, ginger ale and refreshments of like kind are sold, after the manner of dram shops as the proof shows was done in this case is a saloon within the letter and spirit of the prohibition of this statute."

"A dram shop is a place where spirituous liquor is sold by the drink, and is commonly called a saloon." 23 Cyc. p. 61. Webster defines it, "A place where spirituous liquors are sold by the dram or the drink; a bar room."

In *Brockway* v. *State,* 36 Ark. 636, the court said, "It was proved that appellant kept a saloon in the house, kept a bar in the front room; the jury doubtless understood the words, "saloon" and "bar," taken in their connection as meaning a dram shop, or grocery."

Other cases define dram shop, within the meaning of the liquor laws, as a place where spirituous, vinous or malt liquors are retailed in less quantities than a gallon. *Hewitt* v. *People,* 186 Ill. 336; 57 N. E. 1077; *Commonwealth* v. *Narzynski,* 149 Mass. 68, 21 N. E. 228-229; *Crank* v. *People,* 80 Ill. App. 40; *Strauss* v. *City of Galesburg,* 203 Ill. 234; 67 N. E. 836.

Appellant complains of the refusal of the trial court to allow the official stenographer to report the examination by counsel of jurors offered for service, and their statements on their *voir dire* and of the court reprimanding his attorney in the presence of the regular panel of

the jury offered to try the case and also of certain remarks of the prosecuting attorney in his argument to the jury.

The bill of exceptions does not disclose any evidence whatever of these matters complained of, which are only shown in the motion for a new trial. It is the office of the bill of exceptions to bring upon the record matters which do not appear on the judgment roll or record proper, and the motion for a new trial can not be used as a vehicle for that purpose, and therefore these assignments of error can not be considered here, on appeal. *Foohs* v. *Bilby,* 95 Ark. 303; *Cox* v. *Cooley,* 88 Ark. 350; *Cravens* v. *State,* 95 Ark. 321.

Upon the whole case, we do not find any prejudicial error committed and the judgment is affirmed.

ADAMS v. BILLINGSLEY.

Opinion delivered February 17, 1913.

1. PLEADING—SUFFICIENCY OF ALLEGATIONS IN COMPLAINT.—A complaint is good on demurrer, which alleges that appellees are principal and sureties on a supersedeas bond given to supersede a judgment in justice court, and that on the appeal to the circuit court the judgment of the justice was affirmed, and reciting the terms of the bond which provided that appellees be liable on said bond in the event of affirmance by the circuit court. (Page 39.)
2. PLEADING—DEMURRER—ANSWER.—When defendant demurs to the complaint "Because the matters and things complained of by the plaintiff herein have been fully adjudicated by the court in another action in this court by and between the same parties in the same cause," the demurrer should have been overruled and the facts set up by defendant by way of answer as a defense. (Page 40.)
3. COURTS—OTHER SUITS—JUDICIAL NOTICE.—Courts can not take knowledge judicially that two actions are identical. (Page 40.)

Appeal from Izard Circuit Court; *J. W. Meeks,* Judge; reversed.

Samuel M. Casey, for appellant.

Upon the dismissal of the appeal by the circuit court a cause of action arose against the makers of the bond.

The complaint states a cause of action. 6 Am. & Eng. Ann. Cases 465; 62 N. W. 297; 15 N. W. 708; 31 N. E. 812; 58 N. W. 949.

J. B. Baker, for appellee.

McCULLOCH, C. J. Appellant instituted this action in the circuit court of Izard County against appellees to recover on an appeal bond executed by the latter to supersede the judgment of a justice of the peace. It is alleged, in substance, that on November 11, 1910, appellant obtained a judgment before a certain justice of the peace of Izard County, Arkansas, against S. F. Billingsley, one of the appellees, for the recovery of the sum of $174.50 and costs of the suit; that thereafter, on December 3, 1910, said appellee, Billingsley, together with his coappellees, Nicks and Baker, as sureties, executed a supersedeas bond; that at the September term, 1911, of said circuit court, said appeal was by the court dismissed; and that no part of said judgment has been paid. The bond is copied at length in the complaint, and is in the form prescribed by the statute, which is to the effect that if "the judgment of the justice shall be affirmed, or, if, on the trial anew in the circuit court, judgment be given against the appellant, he shall satisfy such judgment, or if his appeal be dismissed, he shall pay the judgment of the justice, together with the costs of the appeal."

Appellee demurred to the complaint on the following grounds, towit: (1) "Because said complaint does not state facts sufficient to constitute a cause of action against these defendants;" (2) "Because said complaint does not state facts sufficient to give the court jurisdiction of said defendants, E. H. Nicks and J. F. Baker;" (3) "Because the matters and things complained of by the plaintiff herein have been fully adjudicated by the court in another action in this court by and between the same parties, and in the same cause."

The court sustained the demurrer, and appellant electing to stand on the complaint without pleading fur-

ther, the complaint was dismissed and final judgment was rendered against appellant for costs. He has prosecuted an appeal to this court from said judgment.

Sufficient facts are stated in the complaint to constitute a good cause of action within the jurisdiction of the court against each of the defendants, and the demurrer, upon the first and second grounds stated therein, should have been overruled.

The matters set forth in the third paragraph of the demurrer did not constitute ground for demurrer, but should have been pleaded by answer as a defense.

It is contended by appellee in his brief that the case of *Billingsley* v. *Adams,* 102 Ark. 511, is between the same parties and constitutes the same cause of action, and that the judgment of this court, in that case, constituted an adjudication of the rights of the parties in this.

We can not take knowledge judicially that the two actions are identical. *Murphy* v. *Citizens Bank,* 82 Ark. 131.

Nothing in the opinion in that case conflicts with our present decision that a cause of action against the principal and the sureties on the supersedeas bond is stated in the complaint now before us. We merely held that the circuit court was without jurisdiction, on dismissing the appeal, to render judgment summarily on the appeal bond. That is so because the statute does not authorize such a judgment, and in case of dismissal of an appeal, the remedy is by independent action on the bond.

The complaint in this case states that the appeal bond was duly executed, and that the circuit court dismissed the appeal. This constituted a cause of action against the obligors on the bond, and the court erred in sustaining the demurrer. Reversed and remanded with directions to overrule the demurrer.

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

Opinion delivered February 17, 1913.

1. JUDGMENTS BY CONSENT—RES JUDICATA.—A judgment by consent has the same effect as *res judicata*, as a judgment rendered upon a trial of the issues involved, and such consent judgment is not subject to collateral attack for mere errors or irregularities in entry or rendition. (Page 46.)
2. JUDGMENTS BY CONSENT—RES JUDICATA.—When plaintiff brings an action for damages for depreciation in the value of his land by reason of acts of defendant, and all damages that had or could accrue to the land by reason thereof, are awarded in said suit, and the judgment entered recites that the judgment of $900, entered is in "full and complete satisfaction to plaintiff for all damages caused or that may be caused, or that he may or will receive," the controversy between the parties is adjudicated and plaintiff can not maintain a second suit for damages accruing since the rendition of the first judgment. (Page 46.)
3. JUDGMENTS BY CONSENT—FINALITY—COLLATERAL ATTACK.—When a judgment rendered in the circuit court is satisfied in full and not appealed from, and there is no allegation of lack of jurisdiction of the court rendering the judgment, it can not be impeached collaterally because it is not in accordance with the agreement of the parties. (Page 47.)
4. JUDGMENTS.—COLLATERAL ATTACK—FRAUD.—A judgment can not be attacked in a collateral proceeding by a party or privy, on account of fraud. (Page 47.)
5. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY.—An attorney is authorized by ordinary employment to prosecute a claim of his clients to judgment and satisfaction, and the client will not be allowed to impeach such judgment collaterally by showing that the attorney, when he admits that he authorized the attorney to bring the suit, had no authority to agree to the judgment which was actually entered. (Page 48.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant brought suit against the railroad company for damages to a certain block of land in the city of Little Rock, alleged to have been caused by the construction of a railroad track near it without drainage, prevent-

ing the escape of the surface water and causing it to overflow.

This suit was brought in February, 1912, and in the complaint it was alleged that in November, 1909, he had brought suit against the same company for damages for causing and allowing the surface water to overflow and stand upon the same block of land and that he accepted a settlement for his damages in the first suit on April 7, 1910, for the sum of $900, for damages sustained up to that time and in consideration of an additional agreement from the railroad company that it would remedy the condition and relieve the cause by providing for drainage, which it has failed to do. Alleged further for the present cause of action that years ago the defendant constructed a line of railroad and embankment along and adjacent to the property described, negligently and unskillfully and has maintained said roadbed so that it obstructs and retards the passage of water and allowed the openings originally made through the embankment to fill up so that the overflow water does not pass through, as it naturally would but for such obstruction and insufficient opening and thus causes the water to overflow and stand upon the property of plaintiff. Said property has houses upon it occupied by tenants and that by reason of the defendant's negligence in maintaining its roadbed he has been damaged in the sum of $3,000, for which judgment is prayed.

Appellee answered, admitting the bringing of the first suit for damages and the settlement thereof, and plead *res adjudicata,* exhibiting with its answer the pleadings in the former suit, the judgment therein and entry of satisfaction thereof; denied that there was any additional agreement, other than as contained in the judgment. Denied any negligence and plead also the statute of limitations.

Appellant filed a response to the answer and a motion to modify the judgment which was on motion stricken from the files.

The record recites the following: "Both parties announced ready for trial and a jury was regularly impaneled to try the case. The plaintiff admits in open court that the transcript of the judgment attached to the defendant's amendment to answer filed this day is true and a complete copy of the judgment entered in cause No. 5960, entered and now appearing of record in this court, in record book circuit court record, second division No. 27, at page 101; and that the complaint and the answer attached to the defendant's amendment to answer herein filed this day are the original pleadings in said cause No. 5960, upon which the judgment aforesaid was rendered, and that said judgment and pleadings constitute the record in cause No. 5960; and that the parties in said action No. 5960 were the same as the parties to this action, and that the property described in the complaint and judgment in said action No. 5960, for injury to which damages was claimed in said action, is the same property for which damage is claimed in this action, and that the judgment aforesaid has been fully paid by the defendant; plaintiff thereupon offered to prove in open court, by his attorney, Robert L. Rogers, that the settlement named in the judgment aforesaid was for damages accrued up to the said date of said judgment and did not cover future damages to said property, and further that the agreement was that the defendant would open up the drain through the dump and roadbed mentioned in said pleadings and that he, as such attorney, did not consent to any judgment for future damages, and had no authority from the plaintiff to consent to any judgment for future damages to said property. Plaintiff also offered to testify that he employed Robert L. Rogers, his attorney, to bring this suit for damages done to the property up to the date of the trial, and not any future damages, and that the said Robert L. Rogers was not authorized by him to accept any settlement for damages that might occur thereafter to said property.

"On motion of the defendant, the court refused to admit in evidence the foregoing testimony offered by the

plaintiff or any part thereof, but excluded the same from the consideration of the jury, to which action of the court the plaintiff at the time objected and asked that its exceptions be noted of record, which was accordingly done."

The court sustained the plea of *res judicata,* held it a bar to the action and rendered judgment dismissing the cause of action with prejudice and for costs. Appellant excepted to the action of the court and prayed an appeal.

Robert L. Rogers and *Terry, Downie & Streepey,* for appellant.

1. The agreement to open up the drain through the dump and roadbed belonging to appellee was a part of the consideration for the entry of the judgment in the prior suit and is binding upon appellee regardless of the former judgment. It was a contract between the parties for the breach of which appellant is entiled to sue. The court therefore erred in excluding Rogers' testimony. Lawson on Contracts (2 ed.), 458; Beach, Modern Law of Contracts, 1751.

2. To render a judgment *res judicata* it must be shown that the issue presented in the subsequent action was involved in the prior action, and that both actions are between the same parties. 100 N. W. (Neb.), 202.

Here the issues are not the same. The nuisance complained of in the original suit was of the class which are not necessarily injurious but may inflict injury for awhile and then cease, and for which successive recoveries may be had as the injuries occur, as stated in the Hoshall case, 82 Ark. 387, 392. It is clear from the allegations of the complaint and the agreement between the parties that the plaintiff only contemplated recovering damages up to the date of the judgment, and, since appellee had agreed to correct the defect in the drainage facilities, there would have been no subsequent damage, had it done so. The judgment, therefore, concludes only the issues in that case, and, in so far as it refers to future damages is not responsive to the pleadings in the case. 140 U. S. 254; 35 Law. Ed. 464, 469.

3. Appellant was entitled to introduce testimony for the purpose of modifying the judgment to conform to the judgment which should have been entered. 76 S. W. (Ky.), 540; 93 Ark. 342, 345 and cases cited.

E. B. Kinsworthy and *R. E. Wiley,* for appellee.

1. When a cause of action has once been adjudicated by a court of competent jurisdiction it can not again be litigated between the same parties. 20 Ark. 85, 91.

Judgments by consent are as binding and have the same effect as estoppels or *res judicata,* as do those rendered upon a trial of the issues by the court. Freeman on Judgments, § 330; 2 Black on Judgments, § 705; 137 Mo. 517; 59 Am. St. Rep. 508; 62 *Id.* 133, 159.

It is clear from the allegations of the original complaint that only single damages could be recovered, and the judgment is the only one that could properly have been entered. 86 Ark. 406; 89 Ark. 542.

It could not be collaterally attacked. 23 Cyc. 1097; 122 N. W. 21; 79 Ga. 64, 7 S. E. 133; 61 Tex. 134; 155 Mass. 77, 28 N. E. 1135; 41 N. E. 475, 477; 73 N. Y. 256; 202 Pa. St. 488; 19 S. W. 1091; 52 Atl. 30.

Any modification or correction of the judgment could only be upon motion in the court where it was rendered, or in chancery for fraud; it could not be avoided when it is relied upon as a defense by showing that it was not agreed to. *Supra;* 71 Ark. 330; 23 Cyc. 1097.

It can not be impeached collaterally by showing that the attorney who had authority to bring the action had not authority to agree to the consent judgment which was actually entered. 73 Am. St. Rep. 577.

2. If there was any error in refusing to admit proof offered by plaintiff it was such error as could not properly be shown on the judgment roll; it could only be availed of by filing a motion for a new trial and brought in to the record by bill of exceptions. 27 Ark. 37; *Id.* 506; 46 Ark. 21.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in sustaining the plea of *res adjudicata* and that he should have been permitted to

show the consideration of the first judgment and to recover damages for the failure thereafter to perform the agreement to drain the roadbed and prevent further damages by the obstruction of the water and overflow.

It is the policy of the law that when a cause of action has been adjudicated by a court of competent jurisdiction, it can not again be litigated between the same parties.

This court has stated the rule as follows: "A judgment or decree of a court of competent jurisdiction, directly upon the point, is conclusive between the same parties, or their privies, upon the same matter, when brought in question in the same court, or in another court of concurrent jurisdiction. The rule is founded upon considerations as well of abstract justice as of the public policy which forbids the litigation of any matter which has once been fairly determined by proper and competent authority between the same parties, or those standing in the relation of privies to them." *Peay* v. *Duncan*, 20 Ark. 85, 91.

Judgments by consent have the same effect in estoppel and are as binding as *res adjudicata*, as those rendered upon a trial of the issues involved and neither are they subject to collateral attack for mere errors or irregularities in their entry or rendition. 23 Cyc. 1097; Freeman on Judgments, § 330; 2 Black on Judgments, 705; *Short* v. *Taylor*, 137 Mo. 517, 59 Am. St. Rep. 508; *Adler* v. *Vankirkland Co.*, 62 Am. St. Rep. 133.

The pleadings in the original suit show that the cause of action was for damages for depreciation in value of the land, because of the construction of the roadbed and dump, as maintained, and upon the issues made all the damages that had or could accrue to the lands by reason thereof could have been awarded in that suit. A judgment was in fact entered, reciting that "the parties herein agree and consent to a judgment for nine hundred ($900) dollars, in favor of the plaintiff, as full and complete satisfaction to the plaintiff for all damages caused or that may be caused, or that he may or will receive by

the building, erection, construction and maintenance of a certain railroad dump or roadbed spur, or railroad at or near block 18 in the city of Little Rock, State of Arkansas, and that said amount shall be in full satisfaction of all damages that have accrued or may accrue to the plaintiff on account of any and all allegations made in the complaint herein. * * *"

This judgment was not appealed from and has been satisfied in full by the payment of the amount for which it was rendered.

There was no allegation of lack of jurisdiction of the court rendering it and it was not therefore subject to collateral attack.

Cyc. states the rule thus: "Where want of jurisdiction is not alleged, the judgment can not be impeached collaterally, because it is not in accordance with the agreement of the parties." 23 Cyc. 1097. See also *Wabaska Electric Co.* v. *City of Blue Springs,* 122 N. W. 21; *Williams* v. *Simmons,* 79 Ga. 649; 7 S. E. 133; *Frisby* v. *Withers,* 61 Tex. 134; *Young* v. *Watson,* 155 Mass. 77; 28 N. E. 1135; *Biddle* v. *Pierce,* 41 N. E. 475; *White* v. *Bogart,* 73 N. Y. 256; *Hughes* v. *Schreiner,* 202 Pa. St. 488; 52 Atl. 30.

The decisions of many courts, our own among the number, hold to the broad general rule that it is not permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud. *Bonner* v. *Gorman,* 71 Ark. 480; 77 S. W. 602. See also *Logan* v. *Central Iron Co.,* 139 Ala. 548, 36 Sou. 729; *Porter* v. *Rountree,* 111 Ga. 369; 36 S. E. 761; *Kirby* v. *Kirby,* 142 Ind. 419, 41 N. E. 809; *Edmonson* v. *School District,* 98 Iowa, 639, 67 N. W. 671; *Gaines* v. *Johnson,* 12 Ky. Law Rep. 779, 15 S. W. 246; 23 Cyc. 1098, and other cases cited.

Appellant nowhere contends that his attorney did not have authority to bring the first suit, nor consent to judgment, but only that he was without authority to consent to a judgment for future damages as rendered.

It will not be questioned that an attorney is author-

ized by ordinary employment to prosecute a claim to judgment and satisfaction and appellant will not be allowed to impeach such judgment collaterally by showing that the attorney whom he admits had authority to bring the suit and file the complaint had not authority to agree to a judgment by consent, which was actually entered. *Moore* v. *Morrell,* 56 Ark. 378; *Bellveau* v. *Amoskeag Mfg. Co.,* 73 Am. St. Rep. 577.

Even if appellant's response and motion to modify the judgment which was filed in the court below and later on motion stricken from the files can be considered here, which is extremely doubtful, under the state of this record, its allegations are not sufficient to warrant the modification of the judgment under the statute if it be regarded a direct proceeding for that purpose. Section 4431, Kirby's Digest.

We find no error in this record and the judgment is affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* MIXON-MCCLINTOCK COMPANY.

Opinion delivered February 17, 1913.

1. CORPORATIONS—PROOF OF CORPORATE EXISTENCE.—Under section 845 of Kirby's Digest, the certificate of incorporation is expressly made admissible in all courts of the State, and is *prima facie* evidence of the due incorporation of the company to which it is issued. (Page 56.)
2. IMPROVEMENT DISTRICT—RIGHT TO SUE—ORGANIZATION—PRESUMPTION.—Where the statute organizing a road improvement district gives it the right to sue and be sued, and there is testimony that the district has been organized, has issued bonds and borrowed money, it will be presumed for the purpose of bringing suit, that it has been properly organized. (Page 56.)
3. CARRIERS—RIGHT OF CONSIGNEE TO SUE.—Where a carrier receives a shipment of mules in an interstate shipment, and contracts to deliver them to a certain consignee, the consignee may bring suit against the carrier for damages to the stock, even though the consignor and consignee are different parties. (Page 57.)

4. CARRIERS—SAME.—When a carrier contracts to deliver a shipment to a certain named consignee, it can not complain that the consignee is without authority to bring suit for damages thereto. (Page 56.)

5. PARTIES—JUDGMENT.—When two companies have a right of action against defendant for damage done to stock in transit, it is no defense if the parties are not properly joined, since defendant can be compelled to pay the judgment but once. (Page 57.)

6. CARRIERS—INTERSTATE COMMERCE—LIABILITY OF INITIAL CARRIER.—The initial carrier in an interstate shipment, having issued its bill of lading for the property shipped, is liable to the lawful holder of the bill of lading for any loss, damage or injury to such property, caused by it or any connecting carrier, to which the property was delivered, and over whose lines it passed in reaching its destination. (Page 57.)

7. CARRIERS—LIABILITY OF INITIAL CARRIER—BURDEN OF PROOF.—When defendant, the initial carrier, received a shipment of mules at Kansas City for delivery at Marianna, Ark., and in an action for damages to the same, it interposes the defense that the mules injured each other by their own viciousness, the burden is on defendant to prove that defense, by a preponderance of the evidence, and failing to do so, is liable for the damages irrespective of whether the injury occurred on its line or not. *Carmack Amendment to Interstate Commerce Act*, 34 Statutes at large (U. S.) 584. (Page 57.)

8. CARRIERS—RESTRICTED LIABILITY.—The provisions of the Hepburn interstate commerce act, forbidding exemptions from liability, are not violated by a contract, limiting the amount of the recovery to $100 for the loss or injury to each animal shipped, in consideration of a lower freight rate, where such limitation is expressed in a contract for an interstate shipment of mules. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491). (Page 58.)

9. APPEAL AND ERROR—EXCESSIVE DAMAGES—REMITTITUR.—Where, from the undisputed testimony, the jury could not have found damages against defendant for loss of a mule more than $250 and defendant being liable for only $100 of that amount, the judgment will be affirmed upon the entering a remittitur of $150, the error thereby being cured. (Page 58.)

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

STATEMENT BY THE COURT.

Appellees brought this suit against the appellant railway company for damages for injury to twenty-four head of mules, shipped from Kansas City, in Missouri,

to Marianna, Arkansas. The mules were purchased of Cottingham Bros., in Kansas City, by the Mixon-McClintock Company, of Marianna, Arkansas, for Road Improvement District No. 1, of Lee County, and delivered to the Kansas City Southern Railway Company for shipment to the point of destination. It was alleged that appellant received the mules and undertook to deliver them and issued its bill of lading therefor to the Mixon-McClintock Company, of Marianna. That the mules were in good condition, sound and healthy at the time they were delivered to it for transportation, but that they failed and neglected to deliver them to appellees at Marianna, Arkansas, in good condition. That the same on arrival at Marianna were greatly injured and bruised and that some of them died soon after reaching the point of destination on account of the injuries received; that eighteen of them were injured to a greater or less extent, many having their legs broken, others having cuts and gashes on their bodies, heads and shoulders and that appellees were unable to use said stock upon their arrival and all the injury and damage to same occurred and was caused while the mules were in transit from Kansas City, Missouri, to Marianna, Arkansas. A bill of lading and contract of shipment was exhibited with the complaint and it was further alleged that notice of the injury to the stock was given to the agent of the delivering carrier at the place of destination within the time required by the bill. That appellees have been damaged in the sum of $1,900, for which amount judgment was prayed. In an amended complaint, the injuries to the animals were specified.

The answer denied that the Mixon-McClintock Company and Road District No. 1 were corporations and that they had authority to bring the suit. Denied all the allegations of the complaint, except that it was a common carrier. Alleged that it received the mules for transportation only over its own lines from Kansas City to Neosho, Missouri, and there delivered the same to the Missouri & North Arkansas Railroad Company, in good

order and condition. Denied that notice of the injury to the stock was given to the agent for the carrier at the point of delivery and alleged that the Missouri & North Arkansas Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company, the delivering carriers, were necessary parties and moved the court to have them made parties defendants. Alleged that the injury to the animals was caused by the negligence and fault of the plaintiff and set out the contract of shipment and that it contained a stipulation that the parties had agreed, in consideration of the freight rate made, that the animals, if injured or destroyed, should be valued at the sum of $100 each. It further alleged that the appellees had agreed that they would at their own cost and expense look after the condition of the car, as well as the condition of the stock in the car; that they overloaded the car and caused the animals to be injured through the negligence of the appellees; that the shipper agreed to assume all risk of injury or loss to said stock because of any defect in the car, or the stock being wild or unruly and maiming each other; denied that any notice of the injury to the animals was given before removing them from the station at the point of delivery.

R. L. Mixon testified that he was a member of the Mixon-McClintock Company and that same was duly incorporated and introduced in evidence the certificate of incorporation issued by the Secretary of State upon the filing of its articles of incorporation in that office. The special act of the Legislature, authorizing the creation of Road District No. 1, of Lee County, was also offered in testimony. Mixon testified that he was one of the commissioners of the Road Improvement District and "after we issued bonds and prepared to work, it became necessary to buy some stock—mules. He then took a man to Kansas City and bought twenty-four head of mules from the Cottingham Bros. there, and the contract of shipment was made between the Cottingham Bros. and the Kansas City Southern Railway Company, and the mules mentioned in the contract were consigned to the Mixon-

McClintock Company, at Marianna, Arkansas. The mules were large and young and averaged in weight between 2,000 and 2,800 pounds per pair and were of the value of $250 each; that they were delivered to the railroad company on August 10, 1911, and received at Marianna six days later, twenty-two of them came in a different car than the one in which they were loaded, and two in a car by themselves, arriving two days after the first shipment arrived. The parties who examined the mules found only one of them in condition to work upon arrival; some had enlarged hocks, making them stiff and lame. Some were skinned on the front part of the hind legs, from the ankles up. One had a cut on the hip and one a troublesome gash on the shoulder. This one died a week or ten days after arrival at Marianna. One of the injured mules was sold for $150, and Mr. Mixon, after the injury to each of the mules was described before the jury from a written memorandum, which was made in his presence, stated that he could not answer as to the damage done to each individual mule, and was permitted to state that he figured the difference in value of the entire lot at $1,700. That it was a reasonable and fair amount of damages for injuries to the mules. That they were paid for by draft from the Mixon-McClintock Company, but that they were really bought for the Road Improvement District and considered by the company to belong to the district, that they were purchased for accommodation by the Mixon-McClintock Company, the road district being without credit. He said further, "We did not sell them to the improvement district at all. We bought these mules for the Improvement District and the Improvement District paid exactly what we paid for them. The Improvement District is the party to whom the amount of damages for which the suit is brought is going. The Mixon-McClintock Company was simply acting for the accommodation of the improvement district. The Improvement District had no rating and the Mixon-McClintock Company did, and although the mules were consigned to the Mixon-McClintock Company,

they were never bought for that company but were bought for the Road Improvement District. The Mixon-McClintock Company was not out a cent on the mules. They were simply drawn into it by paying for the mules and delivering them to the Road Improvement District. The Mixon-McClintock Company has not a penny interest in the lawsuit. If anything is recovered, that recovery belongs to the Road Improvement District and not to the Mixon-McClintock Company."

A motion was made by appellant after this testimony to strike from the case the Mixon-McClintock Company and also the point was insisted upon that the proof did not show that the Road Improvement District would be authorized to bring the suit.

There was other testimony introduced relating to the conduct of the shipment, the unloading and feeding the mules at different places and the changing of the animals into the car in which they arrived at their destination from the car in which they had been shipped, the reloading of them into two other cars before arrival at destination. This proof tended to show that the mules were in good condition when they arrived at Eureka Springs, Arkansas, after they had been received by the Missouri & North Arkansas Railroad Company. There was also some proof tending to show that they were biting and kicking and fighting in the car at some places along the route and that they were not roughly handled by any of the roads over which they passed. The testimony showed the mules were injured, and those expert in such matters stated, judging from an examination of the injuries received, that they were not inflicted by the animals themselves.

The court instructed the jury, and refused appellant's requested instruction No. 4, as follows: "The jury are instructed that as to the mule which died, if the jury find for the plaintiff, they can only find in the sum of $100."

The jury returned a verdict of $1,700 and from the

judgment thereon the railroad company prosecutes this appeal.

Read & McDonough, for appellant.

1. The plaintiffs herein have no right to bring and maintain this suit. Corporations have no power to act as agents of other parties in matters of this kind unless so authorized by their articles of incorporation. Thompson on Corporations, § 2156.

A suit must be brought in the name of the real party in interest. 2 Crawford's Dig., "Parties," 678; 80 Ark. 167; 91 Ark. 368; 79 Ark. 414; 76 Ark. 558; 65 Ark. 27.

2. The Road Improvement District can not recover for want of sufficient proof to show that it is duly organized. It could only sue or be sued after the county court has made the necessary orders provided for by the act. Special Acts, 1911, p. 321; Hutchinson on Carriers, § 1314, and cases cited.

3. If there is any presumption that the injury was done through the negligence of appellant, that presumption has been rebutted by the evidence of all the trainmen, which, being fair and reasonable, can not, or should not, be arbitrarily disregarded. 66 Ark. 439; 67 Ark. 514.

4. The verdict is excessive. It was clearly erroneous to permit the damages to be estimated in gross. 71 Ark. 302; 68 Ark. 218. See also 117 Ill. (Tex.), 1078.

5. The jury ought not to have been permitted to speculate as to the cause of the damages. Placing the most favorable construction upon the evidence, it is purely a matter of conjecture as to whether the injury of the mules was due to negligence of the defendant or to the viciousness of the mules themselves.

6. The burden of proof was upon the plaintiff to show that the injuries were due to the manner of handling, and not to the propensity of the animals, and the court should so have charged the jury. 43 Pa. Super. Ct. 276; 131 S. W. 118. A carrier of live stock is not bound to exercise the highest degree of care, but only reasonable care. 133 N. W. 746; 109 Pac. 713. And it is

not liable where the damage results from the inherent nature or vice of the animals. 104 S. W. 186; 52 So. 918; 72 S. E. 1042; 137 S. W. 611; 134 S. W. 917; 78 Atl. 1085. The shipper assumes the risk of injuries due to the viciousness of the animals. 119 S. W. 505; 120 N. W. 453; 115 S. W. 184; 40 So. 557.

R. M. Mann, F. M. Burke, S. H. Mann and *J. W. Morrow,* for appellee.

1. As evidence of the fact that Mixon-McClintock Company was a corporation, plaintiff introduced the certificate of the Secretary of State. That was sufficient to establish the fact, and it was not necessary to introduce the articles of incorporation. Kirby's Dig. § 845. On the question of its right to sue, the fact that it was the consignee of the shipment, and the defendant contracted to deliver the mules to it at Marianna, conferred a sufficient interest to authorize it to sue. 141 S. W. (Ark.) 939; 58 Ark. 487. Moreover, appellant is in no position to urge want of capacity in appellee. 10 Cyc. 245 and cases cited; 47 Ark. 269; 12 Ark. 769.

2. Under the circumstances of this case, where it is shown that the animals were in first-class condition when received by the carrier, and the contract of shipment shows on its face, "no one in charge," the burden was upon the carrier to show that the injury was not caused by its own negligence. Elliott on Railroads, § 1548-A.

A carrier is liable for injuries caused to live stock by its own negligence, notwithstanding the animals, owing to their natural propensities, may have contributed thereto. Elliott on Railroads, § 1548.

4. The measure of damages is the difference between the value of the animals before the injury and their value after the injury. 50 Ark. 169, 179.

KIRBY, J., (after stating the facts). It is insisted, first, that the appellees have no authority or right to bring this suit and that the Mixon-McClintock Company was not a proper party, having no interest in the result thereof.

The answer denied the corporate existence of the Mixon-McClintock Company and also of the road improvement district and there was introduced in evidence the certificate of the incorporation of the Mixon-McClintock Company, issued by the Secretary of State upon the filing of its articles of incorporation in that office, as required by law, and also the special act of the Legislature, authorizing the organization of the road improvement district and the statement of one of its commissioners that after they had issued the bonds and borrowed the money it became necessary to buy some mules to carry on the work and that the mules were purchased by the Mixon-McClintock Company for it.

The certificate of incorporation is in proper form and is expressly made admissible in all the courts of the State, and is *prima facie* evidence of the due incorporation of the company to which it is issued. Section 845, Kirby's Digest.

The Road Improvement District is expressly authorized by the statute under which it was created to sue and be sued, and the testimony, showing that it had been organized, issued bonds and borrowed money, the presumption should be indulged that it was properly organized, even if appellant were in a position to raise the question.

The appellant received the mules for shipment in Kansas City, and issued its contract and bill of lading therefor, binding itself to deliver them to the Mixon-McClintock Company, at Marianna, Arkansas, and under such circumstances it would not be heard to complain that the consignee to whom it expressly agreed to deliver the stock was without authority to bring suit for the damage thereto. *St. Louis, I. M. & S. Ry. Co.* v. *Cumbie,* 101 Ark. 179, 141 S. W. 939; *Cantwell* v. *Pacific Express Co.,* 58 Ark. 487.

It is true, the contract of shipment in this case was made with the Cottingham Bros., but the railroad's contract to deliver was to the Mixon-McClintock Company, and it will not be heard to deny the existence of the cor-

poration bringing suit upon such contract for the failure of its performance by the carrier. 10 Cyc. 245.

The testimony shows that each and both companies were authorized to sue, and if they were not properly joined it was no concern of appellant's, since it can not be compelled to pay the judgment but once, and whichever had the right to recover is bound thereby.

The testimony shows that the mules were delivered to appellant carrier in good condition and that their market value was $250 each. It also shows in detail the injuries to each animal upon arrival at the point of destination and the witness's statement of the amount of damages of $1,700 to all of them because of the injuries. It is also undisputed that one of the mules died from the injuries received in transportation and that another was sold for only $150 because of such injuries. The shipment was an interstate one and the initial carrier receiving the property for transportation was required to issue its bill of lading therefor and it became liable to the lawful holder of such bill of lading for any loss, damage or injury to such property, caused by it or any connecting carrier to which it was delivered and over whose line it passed in reaching its destination.

According to the Carmack amendment to the Interstate Commerce Act, 20th section, of June 29, 1906, 34 U. S. Statutes at Large, 584, the common law liability of the carrier for damages for injury to freight in transportation, was defined by this court in *St. L., I. M. & S. R. R. Co.* v. *Pape,* 100 Ark. 279, where it was held that the carrier is liable for all injuries and losses to the property shipped in transportation, except certain ones, arising from the act of God, the public enemy, or of public authority of the shipper, or from the inherent nature of the property shipped and in cases where it claims exemption from liability on account of either of these exceptions that the burden of proof rests upon it to show that the injury resulted therefrom. See also *Adams Express Co.* v. *Croninger,* 226 U. S. 491.

The property having been received at Kansas City

in good condition and delivered at the point of destination in an injured and damaged condition and appellant having failed to show by a preponderance of the testimony, as the jury found, that the damage and injury were caused by the inherent viciousness of the animals themselves, it was bound to the payment of the damages arising from the injury to the mules in transportation, without regard to whether the injury occurred upon the line of the receiving carrier or not.

The majority of the court are of the opinion that the abstract of the testimony in the brief is sufficient to warrant the court in considering the clause in the bill of lading limiting the liability of the carrier to $100 in case of loss or injury, for each of the animals shipped, but the consideration of it must be limited to the clause for the loss of the mule that died only, since no question was made in the trial court upon it as to the damage to any of the others. The limited liability bill of lading shows that the freight charge made was based upon a valuation of not to exceed $100 for each animal and although our decisions before the construction of such a clause, after the passage of the Carmack amendment to the Hepburn Act, by the Supreme Court of the United States, held it invalid, as an attempt to restrict and limit the liability of the carrier in case of an injury caused by it to live stock in transportation and prohibited by the terms of said amendment to the Hepburn Act, we now hold in conformity with the opinion of the Supreme Court of the United States construing it *(Adams Express Co.* v. *Croninger, supra)*, that the provisions of said act forbidding exemptions from liability imposed by it are not violated by the contract expressly limiting the amount of recovery to $100 for the loss or injury to each animal shipped, in accordance with the terms of the contract for shipment.

The court erred therefore in not giving appellant's requested instruction No. 3. It is not such an error, however, that can not be corrected by remittitur, since from the undisputed testimony the jury could not have found that the damage to the animal that died was more than

$250, and appellant is liable for $100 of that amount, and if appellees will enter a remittitur within fifteen days for $150, the judgment will be affirmed, otherwise it will be reversed and the cause remanded for a new trial.

SOUTHERN PRODUCE COMPANY v. TEXARKANA GAS & ELECTRIC COMPANY.

Opinion delivered February 17, 1913.

1. STREET RAILWAYS—OBSTRUCTING STREETS—NEGLIGENCE.—When a street railway company tears up a street and street crossings under authority from the city council, by making excavations and piling up dirt in the work of laying a double track, acting with the most skillful and approved methods, it is not guilty of any negligence, nor is it liable to plaintiff for damages, when plaintiff's store caught fire and burned, and the automobiles of the fire department were unable to get to the fire because of the street's being torn up. (Page 63.)
2. STREET RAILWAYS—STREET CROSSINGS.—When a street car company is repairing its track, it is not required to anticipate and provide against unusual and extraordinary emergencies, and it is sufficient to provide crossings that are sufficient for the usual and ordinary travel. (Page 63.)
3. STREET RAILWAYS—LIABILITY FOR OBSTRUCTING CROSSINGS—PROXIMATE CAUSE.—The obstructing a street crossing by a work train of a street railway company engaged in repairing its tracks, and preventing or delaying the arrival of the chemical engine in front of plaintiff's burning building, is not the proximate cause of plaintiff's damage where it appears that the employee of the fire department, who alone could handle the chemical tank, was off duty that night and not present at the fire. (Page 64.)

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

STATEMENT OF FACTS.

This is a suit by the appellant against the appellee to recover damages which appellant alleged it had sustained by a fire which destroyed its produce and goods of the value of $6,000; that the fire department could and would have extinguished the fire but for the negligence of the appellee in blockading the streets in front of ap-

pellant's place of business so that the vehicles of the fire department were prevented from getting to appellant's house in time to extinguish the flames; that the appellee "was engaged at the time in double-tracking its street railway along Broad street and up Hazel street, in Texarkana, and that it negligently and carelessly tore up the street crossings on Broad street and at Third on Hazel; piled the dirt from the excavation along the streets and rendered them impassable and left no temporary crossings or way for vehicles to get to the south side of Broad street where plaintiff's business house was located."

The appellee (defendant) answered, denying specifically the material allegations of appellant's (plaintiff's) complaint, and alleging that the work that it was doing was by virtue of the authority of the city council of Texarkana; that the work was done in a proper and skillful manner, and that whatever delay there was in reaching the fire was not because of any obstructions produced by the appellee, but because of lack of prudence on the part of the firemen themselves in reaching the place where the fire occurred, and that the alleged negligence complained of in plaintiff's complaint was not the proximate cause of the injury.

At the conclusion of the testimony the court instructed the jury to return a verdict in favor of the appellee. Appellant duly prosecutes this appeal.

H. S. Powell and *Simms & Cella,* for appellant.

1. If there was any evidence tending to establish the allegations of the complaint, there was a question for the jury.

2. If the defendant was guilty of negligence as alleged, it was the proximate cause of appellant's damage. 75 Ark. 133; 20 L. R. A. (N. S.), 1110; 12 *Id.* (N. S.), 382; 39 *Id.* (N. S.), 20; *Id.* (N. S.), 237; 49 N. E. 648; 12 Am. Rep. 689.

William H. Arnold, for appellee.

1. Negligence is not shown. The work was being done under authority granted by the city, was in itself

lawful and could be done without necessarily causing injury. Proper provision was made for crossings and for passage along the streets. There is no liability. 196 U. S. 152; 87 S. W. 995; 89 S. W. 75; 38 Mich. 62; 37 Atl. 39; 82 Ark. 86.

2. The alleged delay of one vehicle of the fire department caused by obstructing the street, can not, if true, be construed as the proximate cause of appellant's loss. 99 S. W. (Ky.), 315; 18 Am. & Eng. Ann. Cases, 1066; 139 U. S. 223; 90 Texas, 223; 124 Fed. 113; 95 U. S. 117-130; 12 U. S. App. 383, 386, 55 Fed. 949; 94 U. S. 469, 475; 88 Hun, 10, 34 N. Y. Supp. 279; 41 O. St. 118, 52 Am. Rep. 74; 66 Ark. 68; 17 N. E. 200; 69 Ark. 402; 101 Fed. 915.

WOOD, J., (after stating the facts). If appellee was liable it was because that in reconstructing and repairing its railroad track in the city of Texarkana it, as alleged in the complaint, "negligently and carelessly tore up the street crossings on Broad street and at Third on Hazel street, and piled the dirt from the excavations along the streets and rendered them impassable and left no temporary crossings or way for vehicles to get to the south side of Broad street where plaintiff's business house was located."

The testimony is exceedingly voluminous, and we shall not undertake to set it forth in detail. Suffice it to say, on behalf of the appellee the testimony showed that it was reconstructing and repairing its railway and laying its tracks through the street in the most approved and skillful manner of modern construction and under the supervision of skillful engineers. The appellee, under its franchise from the city, was authorized "to make all necessary excavations in order to construct the tracks and to do and perform all things necessary or desirable in the establishment and operation of its railroad," provided "that the streets should not be used so as to unnecessarily delay traffic." It had "the right to maintain a single or double track of electric railway and car system throughout the city of Texarkana, Arkansas."

It was shown by the uncontradicted evidence that the work that appellee was undertaking to do in laying its double track could not be done in the most expeditious and approved way by simply laying one block at a time, but it would be necessary to include several blocks at a time in the work that was being done. The work of excavating necessarily involved taking out dirt and piling material on each side of the track, but this was done in such manner as to leave space from 21½ to 25 feet wide for vehicles to pass on each side of the track. Temporary crossings at the intersection of other streets with Broad street were put in. They were made of cross-ties, which were placed level with the rails, and were sixteen feet wide. Appellant contended that these crossings were too narrow for the large automobile called the "Robinson Machine," and other automobile cars bearing engines, hose, chemicals and other necessary equipment for the extinguishment of fire, to cross from the north side of the track where they were situated to the south side where appellant's store was located.

There was no temporary crossing at the intersection of Hazel street and Broad street, nearly opposite the appellant's place of business where the fire occurred; but this was because the work was constantly going on at that place and it was impossible to maintain the crossing while the men were engaged in the necessary work of laying the track. Material necessary for the special work on the track at the intersection of Broad and Hazel streets was placed there on the evening of the fire to be used in constructing the track. The men were at work there that night when the fire occurred. Excavating was going on and the work train was being used along Hazel street from Broad street. Crossings of the kind indicated were at all the street crossings on Broad street, except as above indicated, where Hazel opened into Broad.

Appellant contends that but for the excavation and embankment thrown up by the defendant and the narrow crossing of the streets on the night of the fire the "big

Robinson machine" would have arrived at the building in ample time to have been able to have extinguished the fire and thus to have prevented the injury to appellant of which it complains. There is testimony of one witness to this effect; but giving this testimony its strongest probative force, still it is not sufficient to show that appellee was negligent in the manner in which it was doing the work in hand. The Robinson machine was shown to have had a wheel base of 152 inches from hub to hub. This machine could have crossed a 16-foot crossing and had a space of something over three feet to spare.

On the night in question the evidence shows that one other large automobile, bearing the chemical tank, hose, etc., did pass over the crossing at Walnut street, at which the driver of the Robinson machine might have crossed on the night of the fire. This machine was 144 inches at the base, lacking only a few inches of being the width of the Robinson machine. So it indisputably appears from the physical facts that the Robinson machine could have passed over the crossing. There was no negligence therefore upon the part of the appellee in not making its temporary crossings wider than sixteen feet. That was sufficient width for the passage of an ordinary vehicle, and even of these automobiles of extraordinary size that were in use by the fire department of Texarkana.

Appellee, in the work of repairing its track, was not required to anticipate and provide against unusual and extraordinary emergencies. It was sufficient for it to provide crossings that were sufficient for the usual and ordinary travel. But even in this case it is undisputed that the crossings were sufficient not only to accommodate all vehicles of the usual size, but even these automobile fire engines of extraordinary dimensions.

So, we are of the opinion that the uncontroverted evidence shows that there was no negligence on the part of appellee either in failing to provide necessary crossings or in the matter of embankments and excavations. Appellee, according to the undisputed evidence, was doing a work that was necessary to be done and doing it

according to the most approved methods, and was not negligent even if what it did, or failed to do, was the proximate cause of the loss to appellant.

It was contended on the part of the appellant that a hook and ladder wagon, which also carried on it a chemical machine, hose, etc., and drawn by horses, was delayed in reaching the fire by reason of a work train that was on the crossing between Hazel and Third streets at the time the alarm of fire was given and at the time the hook and ladder vehicle reached this crossing. But there was no attempt on the part of the driver of the hook and ladder wagon to have the employees of appellee move this work train, five cars in length, away from over the crossing. The driver, instead of doing this, hurried on towards the fire and drove into the excavation in front of the building, but he pulled out and was not delayed in getting to the fire.

The uncontradicted evidence showed that it required two men to use the chemical tank, one to pump it, and the other to handle the hose. The regular driver of the hook and ladder wagon was not on duty that night and the driver who drove the wagon to the scene of the fire was not familiar with the work of using the chemical tank. It conclusively appears that even if the driver had taken this hook and ladder wagon in front of the building at the time the fire started he could not have used it, and so his failure to get it there earlier could not have been the proximate cause of the loss to appellant. The chemical tank on this hook and ladder wagon could not have been brought into commission even if the wagon had not been obstructed by the work train and if it had not gone into the excavation in the street in front of the burning building.

In our opinion, the testimony wholly fails to prove the allegations of the complaint.

The judgment is affirmed.

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

Opinion delivered February 17, 1913.

APPEAL AND ERROR—PERMANENT NUISANCE—OBSTRUCTION OF DRAINAGE—LAW AND FACT.—In an action by an adjacent land owner against a railway for damages to his land from overflow, caused by the filling of an old drain and the construction of a culvert, it is a question of law for the court, under the pleadings, to declare that the character of the nuisance complained of was permanent, but it was for the jury on the issue of damages, and it is error to withdraw the case from the jury.

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

STATEMENT BY THE COURT.

The appellants were the owners of certain farm lands in Clark County. The appellee is a railroad corporation, having a line of road running through these lands. The appellants sued the appellee, setting up that appellee had negligently closed a certain drain and opened a culvert through its roadbed on appellant's land, and that by reason of such negligence, on July 15 and on August 15, 1911, appellant's crops were greatly damaged and destroyed on account of heavy rainfalls occurring on the above dates respectively. The damages to the crops were specified, aggregating $1,152, for which appellants prayed judgment.

The appellee denied the allegations as to the negligent construction of the drain and culvert and denied the damages, and set up that it "did open the culvert complained of; that the said culvert is a permanent improvement made for the protection of its roadbed;" and alleged that if appellants "have sustained damages it was by reason of the permanent improvement of its roadway, and that the only damage is the decrease in the market value of their land by said permanent improvement."

The prayer was that "if judgment be rendered against it that it be for the decrease in the market value of the lands and not for damages to crops grown thereon."

Appellants replied to the answer, denying that it was necessary to construct the drain and culvert in the manner alleged, and stating that "if it should be determined, in accordance with the allegations and prayer of defendant's answer, that plaintiffs are entitled to permanent damages only, then they allege that they had seventy-seven acres in the tract described in the complaint, the value of which will be damaged by the continuance of said new opening, if same is permitted to remain, and that said lands would be damaged $3,500;" and concluding with the prayer that "if permanent damages only are to be allowed, they pray for alternate relief, for $3,500."

There was testimony on behalf of the appellants tending to show that in May, 1910, appellee constructed a culvert under its track and at the same time closed an old drain on the lands of appellants that ran under its tracks. Appellants' farm lands lay on both sides of the railroad. Before the old drain was closed and the new culvert constructed the water would back up a little, but "would run off easily as soon as it could get through the old drain." In 1911 there was "an awful rainfall. The water hit the sills of the trestle." The water stayed on the land three or four days, damaging appellants' crops, which damages are specified.

There was testimony tending to show that the land was wetter since the trestle was constructed than it was before. Before the trestle was constructed the water was not precipitated on the land as it is now, and it did not stand there as it did in 1911 when the damage to the crops occurred.

The testimony on behalf of the appellee tended to show that the trestle complained of was put in because of a necessity for a change of drainage along appellee's track through appellants' land at the point complained of. The old drain was closed and the new trestle under the track was put in at the point complained of "to prevent danger to traffic and water waste to the track. It is absolutely essential for the railroad, in order to protect its roadbed and render it safe, to maintain this culvert.

The lowest point for the natural drainage is where the new culvert was located. It was installed to be a permanent improvement and was necessary to protect the track at that point."

Another witness testified that "this new opening was in the nature of a betterment to forestall possible washouts and to take care of such conditions as we had in 1905 and 1908."

The record shows that "at the trial the plaintiff offered to prove what would have been the permanent damages to plaintiffs' land provided the court should hold that they were only entiled to recover permanent damages to the land, and not damages to the crop of 1911. The said witnesses were ready to testify as to the amount of said permanent damages to the land, but the court refused to allow them to do so, and to this refusal plaintiffs at the time excepted and asked that their exceptions be noted of record, which was done."

The court instructed the jury to return a verdict for the defendant. The appellants excepted to the court's peremptory instruction. From a judgment in favor of the appellee appellants duly prosecute this appeal.

John H. Crawford, for appellant.

1. In a case where a verdict is instructed against the party appealing, if there is any legal, *prima facie* evidence in the record that would support a verdict, it should be the rule that the abstract would be sufficient if it covers that evidence without making reference to the evidence that may have been introduced by appellee. Here the matter to be determined is whether or not appellant's evidence is sufficient on which to base a verdict when given its strongest probative force; and, regardless of the case made by the appellee, if he has made out a *prima facie* case, he is entitled to have it submitted to a jury. 22 App. D. C. 181, 62 L. R. A. 875.

2. The court erred in directing the verdict because of the disputed questions of fact whether or not it was necessary to close the old drain and open a new one, and

whether or not the construction of the culvert was such a permanent improvement as would call for the assessment of damages to the land only and not to the crops. 97 Ark. 438; 105 Ark. 106.

3. Appellee had no right to obstruct and close the natural drain, and when it did so without appellant's consent they were entitled to compensation for their damages. Acts 1909, p. 897; 62 Ark. 360; 92 Ark. 465; 93 Ark. 47; 99 Ark. 128; 95 Ark. 297.

4. The new culvert was not a necessary permanent improvement, but falls within that class of cases where when the improvement is first put in it is not certain that it will cause injury, and is not necessarily dangerous but might or might not cause injury, owing to rainfall conditions. 56 Ark. 612; 72 Ark. 127; 76 Ark. 542; 52 Ark. 240.

Even if the improvement complained of was of a permanent character it would not fall within the rule in the Morris case, 35 Ark. 622, and the Anderson case, 62 Ark. 360, unless it was a necessary one to be maintained for the protection of appellee's track and for the public good, and was of a necessarily injurious character.

E. B. Kinsworthy, R. E. Wiley and *W. G. Riddick,* for appellee.

1. An offer to prove "what would have been the permanent damages to the land provided the court should hold" that appellants were entitled to recover only permanent damages, without showing what the evidence was, or that the witnesses were competent to testify on the point, or that the testimony to be offered was competent and admissible, is too broad, and is not a good offer of testimony. 67 Ark. 371-375; 73 Ark. 407; 38 Cyc. 1332; *Id.* 1333, 1334; 38 Ind. 67; Elliott, App. Proc. § 743. It is clearly within the discretion of the court to refuse admission of testimony offered after all the evidence was in. 75 Ark. 325; 38 Cyc. 1367.

The prayer in the appellant's reply for damages for the permanent injury to the land, if the court should decide that they were entitled to permanent damages only,

was not such a pleading as is recognized by our practice. It is of no effect whatever, and the court should have struck it out. Kirby's Dig. § 6108; 33 Ark. 56; 44 Ark. 293; 75 Ark. 183.

2. The damage resulted from a permanent improvement and was original. For such an improvement the recovery would be for the entire damage, present and prospective. 92 Ark. 411; Gould on Waters, 416; 52 Ark. 240; 62 Ark. 360; 93 Ark. 46; 35 Ark. 622; 92 Ark. 465; 86 Ark. 406.

WOOD, J., (after stating the facts). The evidence showing the character of the obstruction to the flow of water through appellant's land and the consequent effect thereof was undisputed. This testimony showed that the filling up of the old drain and the construction of the trestle for a new outlet for the water was of a permanent character and that its construction and continuance were necessarily injurious to appellant's land. The testimony brings the present case clearly within the doctrine of this court as announced in *St. L., I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, where we said: "Whenever the nuisance is of a permanent character and its construction and continuance are necessarily an injury, the damage is original, and may be, at once, fully compensated." See to same effect *St. L., I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360; *Turner* v. *Overton,* 86 Ark. 406; *St. Francis Levee District* v. *Barton,* 92 Ark. 411; *Kelly* v. *K. C. So. Ry. Co.,* 92 Ark. 465; *St. L., I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46.

Under the pleadings and the undisputed evidence, the court erred in directing a verdict, but it should have permitted appellants to prove, as they offered to do, the amount of the permanent damages to their land by reason of the nuisance complained of. The request and the offer were sufficiently specific under the pleadings. The court was asked, and it was its duty, under the evidence, to find whether or not the nuisance was of a permanent character, and under the uncontroverted facts it should have declared that the nuisance was permanent and

granted the request of appellants to permit them to show the extent of the damage which they had incurred by reason of such nuisance. Appellee's answer, in which it set up that the damages sustained by appellants were "by reason of the permanent improvement of appellee's roadway resulting in the decrease in the market value of appellant's land by said permanent improvement," and appellant's reply to this, in which they also claimed that "if the nuisance was of a permanent character the lands would be damaged in the sum of $3,500," and praying for such damages, were sufficient to have the cause sent to the jury on the issue of the extent of appellant's damages. Under the pleadings and the evidence the court should have treated the case as one instituted to ascertain the amount of the damages to appellants, if any, by reason of the filling of the old drain and the construction of the culvert. It was a question of law for the court to declare that the character of the nuisance complained of was permanent, but it was an issue for the jury as to the amount of the damages. The appellants were in apt time in their offer to introduce evidence to show the amount of their damages, and the court erred in refusing them that privilege and in directing a verdict in favor of the appellee.

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

LAWLER v. LAWLER.

Opinion delivered February 17, 1913.

1. CONFLICT OF LAWS—CONTRACTS.—The nature, validity and interpretation of contracts are to be governed by the law of the place where they are made; but the remedies are governed by the law of the forum. (Page 73.)

2. HUSBAND AND WIFE—LOAN TO HUSBAND FROM SEPARATE ESTATE.—In Arkansas, a wife can not sue her husband at law to enforce a contract made by her with him, but she may bring her action in equity, where a promise by the husband to repay her a loan *bona fide* made by her to him out of her separate estate will be enforced. (Page 73.)

3. HUSBAND AND WIFE—LOAN TO HUSBAND.—Where a wife in Missouri loaned money to her husband, taking his note therefor, and under the laws of Missouri a husband and wife may contract with each other, and sue and be sued by each other, if the wife wishes to bring suit in Arkansas against her husband on the note, under the laws of Arkansas, her remedy is in equity. (Page 73.)

4. ACTION—PRACTICE AS TO TRANSFER TO EQUITY.—When a complaint at law states a good cause of action in equity, and defendant demurs to the complaint, the law court should not sustain the demurrer and dismiss the complaint, but should consider the demurrer as a motion to transfer to equity, and should transfer the cause. (Page 74.)

Appeal from Jackson Circuit Court; *R. E. Jeffery,* Judge; reversed.

Ira Mack, for appellant.

Contract between husband and wife in Missouri is valid. § § 4335-4340 Digest of 1899; 176 Mo. 107; 75 S. W. 404; 92 S. W. 637; 127 S. W. 118; 68 S. W. 758.

The law of the place of making will determine whether a contract has been validly entered into. Minor on Conflict of Laws, § 72, p. 144; 124 N. W. 1042; 43 S. W. 687; Story on Conflict of Laws, § § 66, 102.

A married woman may alone sue or be sued in the courts of this State on account of her separate personal property. Kirby's Digest, 5214, 6017. As to her separate property she may sue her husband at law or in equity. 22 N. W. 35.

The rule of *stare decisis* should not obtain here. 10 Ark. 289; 47 Ark. 359. A single decision is not necessarily binding as a principle of law. 11 Cyc. 745 and a decision by a divided court is not obligatory as a precedent. 11 Cyc. 746; 117 N. W. 572.

If the circuit court had no jurisdiction, then it should have transferred to the chancery court and not have dismissed the complaint. Kirby's Digest, § 5991; 85 Ark. 208; 52 Ark. 415; 37 Ark. 186.

Campbell & Suits, for appellee:

A wife can not enter into a contract with her husband and then sue him on such contract in a court of law

in Arkansas. 30 Ark. 17. The husband and wife are incapable of contracting with each other. 31 Ark. 678; can not form a partnership, 56 Ark. 294.

The law of the forum governs and regulates as to who shall be parties to a suit. 22 A. & E. Enc. Law (2 ed.), 1383-4; 21 Cyc. 1514; 124 Mo. 178.

Court committed no error in not transferring case to chancery, as it was not requested to do so, and appellant can not now complain of its failure to do so.

HART, J. Pearl Lawler brought this suit in the circuit court against John Lawler. The complaint, with formal parts omitted, is as follows:

"That she is now and was on all hereinafter mentioned dates the wife of the defendant.

"That in the city of St. Louis, State of Missouri, on the 14th day of September, 1908, the defendant executed and delivered to the plaintiff his certain promissory note of that date, in the sum of $1,900, due and payable one year after date, with interest at the rate of eight per cent per annum. Said note is in words and figures as follows:

'St. Louis, Mo., September 14, 1908.

One year after date I promise to pay to Pearl Lawler nineteen hundred dollars ($1,900) with eight (8) per cent interest from date. Value received.

(Signed) John Lawler.'

"And the same is made a part of this complaint, the original being held subject to the orders of the court herein.

"That said note was given for money loaned to defendant by plaintiff; that said money so loaned was out of and was a part of the separate property of plaintiff and said note is now the sole and separate property of plaintiff and so held and owned by her. That the same is long past due and wholly unpaid and defendant fails and refuses to pay same.

"Wherefore, plaintiff prays judgment against the defendant on said note for the sum of nineteen hundred dollars, the face amount of same, and for all interest due thereon, for costs and all proper relief."

The defendant filed a demurrer to the complaint. The court sustained the demurrer and dismissed the complaint. Plaintiff has appealed.

The Supreme Court of Missouri has decided that the statutes of that State bearing on the rights of married women are broad enough to permit her to contract with her husband. *Oday* v. *Meadows,* 92 S. W. 637; *Montgomery* v. *Montgomery,* 127 S. W. 118. In the latter case the court said:

"It seems now to be the settled law of this State that a man and his wife may contract with each other, sue and be sued by each other, the same as other parties."

It is well settled in this State that the nature, validity and interpretation of contracts are to be governed by the law of the place where they are made; but the remedies, by the law of the forum. *Crebbin* v. *Deloney,* 70 Ark. 493; *Sawyer* v. *Dixon,* 66 Ark. 77; *Tenny* v. *Porter,* 61 Ark. 329; *Prior* v. *Wright,* 14 Ark. 189.

It has been held in this State that a wife can not sue her husband at law to enforce a contract made by her with him. *Countz* v. *Markling,* 30 Ark. 17. See also *Pillow* v. *Wade,* 31 Ark. 678; *Gilkerson-Sloss Commission Co.* v. *Salinger,* 56 Ark. 294.

The question whether a loan by the wife to the husband of money which is her separate property upon his promise to repay creates an equity in her favor which a court of equity will enforce has been decided in the affirmative in this State. In discussing the question in the case of *Pillow* v. *Sentelle,* 49 Ark. 430, Mr. Justice BATTLE, speaking for the court, said:

"A question arises as to the validity of the notes of Pillow to his wife. Are they valid? At common law contracts between husband and wife are void. But in equity a promise by the husband to his wife to repay her a loan *bona fide* made by her to him out of her own separate estate, upon his promise to repay, is obligatory, and can be enforced." (Citing many authorities.)

It follows that the plaintiff brought her suit at law when it should have been in equity. In the case of *Moss*

v. *Adams,* 32 Ark. 562, the court held that a mistake as to the kind of action is no ground for sustaining a demurrer to the complaint and dismissing it. The court should have considered the defendant's demurrer as a motion to transfer to equity and we so treat it. The circuit court erred in dismissing the complaint. The action should have been transferred to the chancery court. *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208; *Rowe* v. *Allison,* 87 Ark. 206.

The judgment will be reversed and the cause remanded with directions to the court to transfer the action to the chancery court.

LASTER *v.* BRAGG.

Opinion delivered February 17, 1913.

1. MALICIOUS PROSECUTION—OPINION OF COUNSEL.—When a party lays all the facts before counsel before beginning a prosecution, and acts *bona fide* upon the opinion given by such counsel, though that opinion is erroneous and unwarranted, he is not liable in an action for malicious prosecution. (Page 83.)
2. MALICIOUS PROSECUTION—PROBABLE CAUSE.—When L. filed an information against B. upon advice of the prosecuting attorney, in justice's court, and L failed to appear at the trial, and B was discharged for failure of L. to appear and prosecute, and it does not appear that L. acted in bad faith, the facts do not constitute evidence of want of probable cause, in an action by B. against L. for malicious prosecution. (Page 83.)
3. PRACTICE—MISJOINDER OF ACTIONS—WAIVER OF OBJECTIONS.—When no objection was made by defendants in the court below, for joining two defendants in one action for slander, and for joining an action for malicious prosecution, with that for slander, the defendant will be deemed to have waived objection to the improper joinder, and the question can not be raised for the first time on appeal. (Page 85.)
4. SLANDER—VARIANCE BETWEEN COMPLAINT AND PROOF.—In an action for damages for slander, while it is not sufficient for plaintiff to prove words of a similar import merely, he must prove that defendant used substantially the same words as charged in the complaint, yet a variance in the mere form of expression is not material. (Page 86.)

5. SLANDER—VARIANCE BETWEEN COMPLAINT AND PROOF.—There is no variance between the complaint and the proof, when, in an action for slander, plaintiff alleged that defendant said of him: "That he is the damndest thief in the county, and we are going to make an example of him," and showed by the proof that he said: "That he was a damn thief, and that he would lose the rent to get to prosecute him," because the actionable word used is the word "thief," and the words accompanying it are merely descriptive, and the slander proved substantially corresponds with the allegations of the complaint. (Page 86.)

Appeal from Lonoke Circuit Court; *Eugene Lankford,* Judge; reversed as to J. H. Laster, affirmed as to Charles Laster.

STATEMENT BY THE COURT.

D. F. Bragg filed a complaint in the Lonoke Circuit Court against J. H. Laster and Chas. Laster in three counts. The first and third counts alleged malicious prosecution and the second, slander. The first paragraph of the complaint alleges in substance that on or about the 25th day of October, 1911, the defendants maliciously and without probable cause instituted a prosecution against plaintiff before a justice of the peace, charging him with having stolen cotton belonging to defendants and disposing of the same. The second paragraph of the complaint alleges that the defendants on the 24th day of October, 1911, in the presence of and in conversation with one of his neighbors uttered the following false and malicious words of and concerning the plaintiff: "That he (plaintiff) is the damndest thief in the country, and we are going to make an example of him." The third paragraph of the complaint alleges in substance that on the 15th day of November, 1911, the defendants maliciously and without probable cause instituted a prosecution against plaintiff before a justice of the peace, charging him with having stolen cotton belonging to defendants and disposing of the same.

The defendants answered, denying all the material allegations of the complaint.

The plaintiff and his witnesses testified to a state of facts substantially as follows: During the year 1910

the plaintiff, D. F. Bragg, rented land from the defendant, J. H. Laster. During the year 1911 he also rented land from said defendant. He planted and cultivated about nine acres in cotton and three acres in corn. He agreed with Laster to pay him as rent one-third of the corn and one-fourth of the cotton. He raised about four bales of cotton. About the 5th day of October, 1911, Laster asked Bragg when he could bring in some cotton and Bragg replied that he would haul a bale of cotton to Laster's gin within a few days. A few days thereafter Bragg started with a load of seed cotton to Laster's gin. On his way to the gin he met a neighbor who told him that Laster's gin was not running that day. Bragg then climbed upon the levee and saw no smoke coming out of the smoke-stack of the gin and concluded that Laster's gin was not running. He then carried his load of cotton to another gin and sold it in the seed. He carried the money and ticket showing the weight and price of the cotton home with him. On the 23d day of October, 1911, he carried another bale of cotton to England to another gin and sold it in the seed. He also brought the money for this cotton home with him and a ticket showing the weight and price of the cotton. On the 25th day of October, 1911, an information was filed by the deputy prosecuting attorney before a justice of the peace in Little Rock, Arkansas, charging Bragg with the crime of larceny, alleged to have been committed by stealing an amount of cotton valued at $50.00, the property of J. H. Laster. This information was also signed by J. H. Laster and sworn to by him. The warrant of arrest was issued by the justice of the peace and Bragg was arrested and brought before the justice for examination. The deputy prosecuting attorney appeared to prosecute the case, but Laster failed to appear. After waiting about three hours for Laster the deputy prosecuting attorney began the examination of the witnesses and at the conclusion of the examination Bragg, with the consent of the deputy prosecuting attorney, was discharged by the justice of the peace. The constable who arrested Bragg

said that he notified Laster of the fact and of the time of the trial. Bragg kept the money which he got for the cotton until after he was discharged by the justice of the peace in Little Rock. A few days thereafter he offered the money to Laster and Laster refused to take it, saying that he could not steal his cotton and settle it in that way. Bragg kept the money which he got from the sale of the first bale of cotton for about fifteen days before the affidavit for warrant of arrest was filed before the justice of the peace. He says that the reason he kept it was because he did not have occasion to see Laster and thought it all right to keep the money until it was convenient to see him. He said he had rented land from Laster the year before and had sold a bale of cotton and then paid Laster his part of it.

On the 12th day of November, 1911, J. H. Laster filed another affidavit for warrant of arrest before another justice of the peace in Pulaski County. In this affidavit it was charged that Bragg removed and sold a certain amount of cotton, the value of which exceeded ten dollars, with the intent to defraud a landlord in his lien for rent. A warrant of arrest was issued and Bragg was arrested and brought before the justice of the peace, where after examination he was bound over to await the action of the grand jury. The transcript of the justice of the peace shows that the affidavit first charged Bragg with the larceny of the cotton and was then changed to the crime of selling and removing cotton with intent to defeat the landlord's lien on the same. The grand jury failed to indict Bragg and he was discharged.

Another witness for the plaintiff, Schwartz, testified that he had a conversation with the defendant Chas. Laster about Bragg selling the cotton and in the course of the conversation he asked Laster if he had ever said anything about it and Laster replied, "No, and that he was a damn thief and that he would lose the rent to get to prosecute him." Chas. Laster was the son of the defendant J. H. Laster.

J. H. Laster, one of the defendants, testified:

I was the prosecuting witness in the case against Dennis Bragg. I instituted the prosecution for this reason: I was expecting him with some cotton. I had talked with him a few days before when he passed there, about the 5th of October, and I asked him when he was going to bring up some cotton, and he said he would bring some up in a day or two to pay the rent. It was the contract that he was to deliver the cotton at the gin.

About the last of October, I heard that he had hauled the cotton and sold it at England. I went to see Mr. Schwartz and asked him if Dennis had sold any cotton there. He said he hadn't. Then he said, "Wait a minute and let me look at my books." And he went and looked over the books and then told me that Bragg had sold him a bale on October 12. Then I sent my son over to England and he found that he had sold another there about October 23. That's the reason I had the warrant issued.

Before I instituted the prosecution against Bragg I consulted Judge F. T. Vaughan and he advised me to see the prosecuting attorney. Mr. Rogers was sick and told me to talk to Mr. Kidder. I laid the facts before Mr. Kidder. I told him that I had rented the land for one-third the corn and one-fourth the cotton and that Bragg had carried two bales off and sold them and had not offered to pay the rent. Then we went before Judge Sanders to file information and he issued a warrant. Mr. Kidder wrote the information and I signed it.

On the day set for the trial I was not there. It was my understanding that I was to be notified of the time of the trial, and I think that Judge Sanders wrote the names of the witnesses on the warrant. I was not summoned by the deputy constable, Frank Allison. I was never notified that the case was set for trial at a certain time, before the case was disposed of. My son was not there. The deputy constable came by where I was working and said he would go and arrest Bragg and take him to town and get the case set for trial and then notify me. I supposed he would do as he said he would.

I first learned from Judge Sanders that the case had been disposed of. He told me this the next morning, I think it was, after the case was tried. I went to the judge's office and asked him how about the case; he said it was dismissed. I asked him how it happened he had dismissed it when I was not there, and he said that there were no witnesses there against the fellow and that the prosecuting attorney recommended the dismissal, and that was the reason it was dismissed. Then I told him I would see Kidder and try to get the straight of it. Then I went to Kidder; he told me about the same thing Sanders had—that there were no witnesses against him. I told him what the constable told me and that I had no earthly chance to be there.

Then I consulted Vaughan & Akers and laid all the facts before them, made a full and honest statement, just as I had to Mr. Kidder. I made that statement to both members of the firm and they advised me to go before a justice of the peace of Eagle township and have Bragg arrested. I have known the firm of Vaughan & Akers for some time, and the senior member for fifty years. He is a man of good reputation as a lawyer. He was a circuit judge for several years. Acting upon my lawyer's advice, I instituted proceedings before Justice Mashburn and Bragg was bound over to the grand jury.

At the time I instituted these proceedings, acting on the advice of my lawyers, I honestly believed that I had good grounds for prosecuting Bragg, and I still believe so. If I hadn't I would not have done it. I have no malice whatever against Bragg.

I did not use the language, "We will spend more money than the cotton is worth to prosecute you" (meaning Bragg). I did not say to him, "You, Bragg, can not continue to steal my cotton as you have been doing." When Bragg came up to settle the rent after he had been arrested before Sanders, I told him I couldn't settle, because the matter was in court and I felt that I had no authority to settle, and because I had not rented the land for a money rent, but for one-fourth of the cotton. As

a matter of fact, he has never settled with me at all; but in the next April he sent one bale by Watson, which weighed 495 pounds, out of the last picking, saying that that was a settlement for all the cotton picked. I was not there when the bale came. Charley was there. The preceding year, I bought his cotton at my gin in the seed.

My plantation is near Oakdale in Eagle township, Pulaski County. A "dinky" railroad runs nearby, but trains do not run every day. They pass only when some one along the line wants to ship some freight, or when there is a load of freight to be delivered. I did not agree with Bragg that he might pay the debt for the corn land in money. I have lived in Pulaski County most of the time since 1863. I have made forty-three crops on the place I am on now.

The defendants also deny that they said that Bragg was a damn thief and that they meant to make an example of him, or words to that effect.

Laster stated on cross examination that he never said anything to Bragg about his disposing of the cotton because he considered that Bragg had done a thing which he should not have done. That he consulted Judge Vaughan before he saw Kidder and that Judge Vaughan sent him to the prosecuting attorney. That he related the facts to Judge Vaughan and Mr. Kidder just as he had stated them here. That he talked with Judge Vaughan again after Bragg had been discharged by Justice Sanders. That Judge Vaughan said that the action of Sanders was wrong and advised him to institute a prosecution before Justice Mashburn. That he talked with Judge Vaughan after Bragg had offered to make a settlement and told Vaughan of this fact and of the further fact that he had refused to settle with Bragg. That Judge Vaughan then told him to institute proceedings against Bragg before Justice Mashburn. Laster stated that his gin was running on the day that Bragg sold the cotton and that Bragg went a roundabout way to another gin and sold the cotton.

Earl Kidder, the deputy prosecuting attorney, is a

practicing lawyer, and corroborated Laster as to the statements made to him and stated that if Laster had been in court and testified to this state of facts he would not have consented to the discharge of Bragg.

The plaintiff dismissed the first and third counts as to the defendant Chas. Laster. The jury returned into court the following verdict: "We, the jury, find for the plaintiff in the sum as follows: Against J. H. Laster in count No. 1, $250; against J. H. Laster in count No. 3, $250; against Chas. Laster in count No. 2, $250. C. B. Leigh, Foreman."

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

Vaughan & Akers, for appellants.

1. In an action for malicious prosecution the evidence is not sufficient to sustain the verdict against the defendant where it not only fails to show want of probable cause for the alleged malicious prosecution, but on the other hand affirmatively shows that there was such probable cause. 19 Am. & Eng. Enc. of L. 650, 663; 26 Cyc. 7, 8; 71 Ark. 422-6-7; 71 Ark. 351, 361; 26 Cyc. 83; 32 Ark. 763; 15 Ark. 345; 63 Ark. 386. The burden is upon the plaintiff to show affirmatively the absence of facts sufficient to induce in the mind of a reasonable person a belief in plaintiff's guilt. 19 Am. & Eng. Enc. of L. 657, 658, 659; 24 How. (U. S.), 544; 16 L. Ed. 765; 79 Ga. 637; 1 Pa. St. 234; 5 W. & S. 438; 97 U. S. 642; 33 Ark. 316; 15 Ark. 345.

2. The court should have held as a matter of law that want of probable cause was not shown, and that when appellants showed that they had in good faith acted on advice of counsel, they had made out a complete defense. 19 Am. & Eng. Enc. of L. 671, 673; 32 Ark. 163; Wells, on Questions of Law and Fact, 256-260; 33 Atl. 211, 212; 13 Enc. Pl. & Pr. 466-467; 59 Hun. (N. Y.), 424; 137 N. Y. 629; 33 N. E. 745; 40 N. Y. Sup. Ct. 41; 19 Am. & Eng. Enc. of L. 685; 56 L. R. A. 649; 131 Wis. 575.

3. Two defendants can not be jointly sued for slander. The court should have sustained defendants' de-

murrer in short which objected to the joinder. 13 Enc. Pl. & Pr. 62; *Id.* 30; Cooley on Torts, 142; *Id.* 209; 17 Mass. 182; 9 B. Mon. 198.

4. There was a substantial variance between the allegation and the proof as to the slander. 77 Ark. 64, 70, 71.

Miles & Wade, for appellee.

1. To justify a prosecution of the kind complained of it must appear that the prosecutor not only had reasonable grounds for the belief that the defendant was guilty of a crime but also that he actually believed that the defendant was guilty. 63 Ark. 387. Laster did not use the precaution to inform himself what the law requires. 223 Mo. 294.

2. Advice of counsel is no defense in an action for malicious prosecution, unless it is shown that a full, fair and honest statement of the facts of the case were submitted to counsel. 71 Ark. 351; *Id.* 422; 73 Ark. 439. And it is for the jury to determine whether he has "fully and fairly communicated to his counsel the facts within his knowledge and used reasonable diligence to ascertain the truth, and also whether he acted in good faith upon the advice received from counsel." *Supra;* 76 Ark. 43.

3. There is no substantial variance between the allegation and the proof on the question of slander. They both plainly charge Charles Laster with being a thief. 56 Ark. 100; 129 S. W. (Ky.), 298; 55 Ark. 494.

4. The record discloses no demurrer in short and none will be considered here. It was not error, however, to join these parties as defendants in the action for slander. Kirby's Dig. § 6069, sub-div. 5; 80 Ark. 231; 88 Ark. 127.

HART, J., (after stating the facts). It is first contended by counsel for appellant that the undisputed evidence shows that the defendant J. H. Laster had probable cause to institute the prosecution against Bragg and that the court erred in not so decreeing, as a matter of law. In the case of *Hitson* v. *Sims,* 69 Ark. 439, the

court, speaking through Mr. Justice BATTLE, in discussing an instruction on probable cause, said:

"In cases like this, a probable cause is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution. *Foster* v. *Pitts,* 63 Ark. 387. The question in this case was not whether a prudent man would have declined, but whether all of the circumstances and facts in appellant's mind, and known to him, or made known to him by creditable persons, before he instituted the prosecution, were sufficient to cause a person of ordinary caution to believe, and did cause him to believe, that the appellee was guilty of the crime charged. The two questions are different. What might be sufficient evidence to convict of a malicious prosecution without probable cause according to one test might not according to the other."

In the case of *L. B. Price Merc. Co.* v. *Cuilla,* 100 Ark. 316, the court held:

"Where one lays all the facts in his possession before the public prosecutor, or before counsel learned in the law, and acts upon the advice of counsel in instituting a prosecution, this is conclusive evidence of the existence of probable cause, and is a complete defense to an action for malicious prosecution."

In the application of these principles of law to the facts in the instant case, we think the court erred in not directing a verdict for the defendant, J. H. Laster, in the action for malicious prosecution. It may be true, as insisted by counsel for plaintiff, that Bragg was not guilty of the crime of larceny, and that the prosecution should have been under section 2011, Kirby's Digest, which makes it a crime to sell or dispose of property on which a landlord's lien exists, provided such sale be made with the intention to defeat the holder of such lien in the collection of the debt secured by the lien. But even so,

we think that under the facts of this case the court erred in not directing a verdict for the defendant. As we have already seen, the general rule is that where a party lays all the facts before counsel before beginning a prosecution and acts *bona fide* upon the opinion given by such counsel, though that opinion is erroneous and unwarranted, he is not liable in an action for malicious prosecution. In the instant case the undisputed evidence shows that the defendant J. H. Laster made a fair statement of all the facts in the case to counsel and acted upon the advice given upon such statement. He not only testified to this fact himself but is corroborated by the deputy prosecuting attorney. There is nothing in the evidence which affects the integrity of Laster's conduct in the matter. The undisputed evidence shows that he acted in good faith, under the advice of counsel. It appears both from the testimony of the deputy prosecuting attorney and the defendant himself that the defendant made a fair and full disclosure of all the facts of the case and acted throughout in good faith upon the advice of counsel. The defendant testified that under the facts which were in his possession and which he related to Judge Vaughan and the deputy prosecuting attorney he believed Bragg to be guilty, and, acting upon that belief, upon the advice of counsel, he instituted the prosecution against Bragg.

There is no fact or circumstance adduced in evidence tending to contradict this. J. H. Laster was not present when the examination was held before Justice Sanders, and satisfactorily accounted for his absence. The proceedings there amounted to a voluntary dismissal of the charge because of his absence. Laster had no control over the case or the actions of the prosecuting attorney or the justice of the peace, who had jurisdiction of the case. The discharge of Bragg was not attended by any facts or circumstances involving the conduct of Laster which in themselves indicate a want of probable cause for the prosecution. In such cases the question of proba-

ble cause becomes one of law and the defendant in an action for malicious prosecution will be protected.

The record shows that the case has been fully developed and there is no probability of any other testimony being obtained. Therefore, no useful purpose can be served by remanding the cause for malicious prosecution for a new trial. For the error in not directing a verdict for the defendant the judgment will be reversed and the plaintiff's cause of action dismissed.

On the action for slander, but little need be said. It is first insisted by counsel for defendant that the court erred in permitting the plaintiff to sue J. H. Laster and Chas. Laster jointly for slander. Under our rules of practice, we can not consider that question because it is raised here for the first time. The record shows that no objection was made in the court below to joining both defendants in the action for slander, nor was an objection made to joining the action for malicious prosecution and that for slander. In such cases the defendant under our settled rules of practice will be deemed to have waived any objection that he might legally have to such proceedings, and can not raise them on appeal for the first time. This rule has been in force for many years and has been so uniformly followed that a citation of authorities to support it is unnecessary.

The allegation in the complaint is that the defendant Chas. Laster spoke to L. A. Schwartz of plaintiff the following words:

"That he is the damndest thief in the county and we are going to make an example of him." The testimony offered upon the part of plaintiff but denied by defendant was that he said to Schwartz of Bragg: "That he was a damn thief and that he would lose the rent to get to prosecute him."

This was the only evidence tending to prove the utterance of slanderous words by Chas. Laster. It is insisted by counsel for defendant that there is a substantial variance between the words proved and those alleged in the complaint. Therefore, they contend that under

the rule laid down in *Miller* v. *Nuckolls,* 77 Ark. 64, where it is said:

"It is not sufficient to prove that the defendant made the same charge against the plaintiff in words substantially different from those alleged, even though they may be of equivalent and similar import," the defendant should have had the benefit of a peremptory instruction.

The rule is thus stated in Townsend on Slander, section 365:

"The plaintiff need not prove all the words laid but he must prove enough of them to sustain the action. It is sufficient if the gravamen of the charge as laid is proved, and unless the additional words qualify the meaning of those proved so as to render the words proved not actionable, the proof is sufficient. It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in themselves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words."

Thus it will be seen the rule is, while it is not sufficient to prove words of a similar import merely, and it must be proved that the defendant used substantially the same words as charged, yet a variance in the mere form of expression is not material. The word "thief" is the actionable one in the present case because, unexplained, it amounts to a charge that the plaintiff had been guilty of larceny, which is an infamous crime. *Gaines* v. *Belding,* 56 Ark. 100.

Hence, it will be seen that while the exact words charged in the complaint were not proved, the words proved are substantially proved as laid. Both the words charged and the words proved impute the crime of larceny. The meaning of the rule above announced seems to be that if the words charged to have been spoken are proved but with the omission or addition of words not at all varying or affecting their sense the variance will not be regarded as material. While it is not necessary under the rule to prove as laid, all the words which are alleged to have been spoken by the defendant, yet so much of

them must be proved as is sufficient to sustain the cause of action. As we have already seen, the actionable word in the instant case is the word "thief," because it imputes the crime of larceny. The words accompanying it were merely descriptive and in the application of the rule to the facts of this case we conclude that the slander proved substantially corresponded with the allegation of the complaint, and there was no variance.

This branch of the case was submitted to the jury under proper instructions of the court, and the judgment will be affirmed.

JERRALL v. STATE.

Opinion delivered February 24, 1913.

1. ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF EVIDENCE.—Evidence that a shooting was the result of malice; that appellant shot at prosecuting witness four times with a deadly weapon at a distance of twelve or fifteen feet; that prosecuting witness made no hostile demonstration toward appellant, nor contemplated, nor was prepared to do appellant any bodily harm; that appellant fired three shots in rapid succession, and stopped a second or two before firing the fourth, is sufficient to show that appellant assaulted witness with intent to kill him. (Page 93.)
2. ASSAULT WITH INTENT TO KILL—PROVOCATION.—A quarrel between appellant and the prosecuting witness can not afford justification for an attack on prosecuting witness by appellant the following evening. (Page 93.)
3. EVIDENCE—RES GESTAE.—Testimony by a witness that he examined pockets of prosecuting witness immediately after the latter was shot, and found no pistol in them, when it appears that there is no collusion, was of the *res gestae* and competent. (Page 93.)

Appeal from Pope Circuit Court; *Hugh Basham*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellant was convicted of the crime of assault with intent to kill and appeals to this court. The testimony of Hugh Priestley is as follows: "I am twenty years old; came to Russellville a year and a half ago from Alabama. I lived at the home of Joe Jerrall's father, who kept a

private boarding house. I know Ada Jerrall, the sister of the defendant, but I never made love to her and never made improper advances towards her. On the 13th of October, 1912, defendant shot me four times. This occurred at the home of Mr. Howell on Sunday, about 6:30 or 7 o'clock p. m. It was not good dark when the shooting occurred. I had eaten supper and thought I would walk up to Mr. Howell's and get Monroe Ferguson, a stepson of Mr. Howell, to go with me up town. I walked up to Mr. Howell's and Joe, Mr. Howell and Munroe were all sitting there and I spoke and said good evening, and kinder turned toward them on the edge of the walk and Joe jumped up and began shooting and he did not even speak. I was then boarding about a block from there. I knew Joe was there along that evening. That was not Joe's home and I did not know Joe was there at this particular time; I had seen him there about 5:30, but he had been making his home at the mines. The sidewalk is ten or fifteen feet from Mr. Howell's house. I was walking south when I reached Howell's home and I had got nearly to the north end of the house when I turned and spoke. Joe, Mr. Howell, and Monroe were sitting on the porch. I had started to sit down on the porch by Monroe, I guess. I had no idea that Jarrell was going to shoot or do anything of that kind; I had my hands down at my side. I had a little knife, such as I had been carrying all the time, an ordinary pocket knife. It was in one of my pockets and shut. My hands were not in my pockets that I know of. I did not place my hands upon my hip pocket or anything like that. The defendant shot me with a forty-five automatic pistol. Shots sounded like they were pretty rapid."

On cross examination, witness stated that it was true that he and Joe had a little trouble down at the mines on the evening before the shooting; that this occurred at Mr. Jerrall's home; that the cause of the trouble was his attention to and talking with Miss Ada Jerrall. He stated that after the hot words with Joe Jerrall, he went to George Davidson's and tried to borrow a gun: the

reason he wanted a gun was that Joe was hunting one for him. He called Davidson out of the house and told him what he wanted. Davidson did not let him have the gun and he (Priestley) got so mad that he cried. He did not tell Henry West that he was going to kill every damn one of the Jerrall family, but he did say that Joe could not run over him. He admitted that Joe Jerrall came in the house while he was there and said nothing to him. He denied that after Joe left, he went by the Jerrall house and told Miss Ada to tell Joe that he would see him later. He did not remember which pocket he had his hand in when he went the next day to Howell's where the shooting took place. He carried his knife most ordinarily in his coat pocket; then it was in his pants pocket; he did not have it open on that occasion. He had passed Howell's home about an hour and a half before the shooting, saw the defendant there and did not speak to him, although others in the buggy did speak to him. He did not think that his going up to Howell's would bring on a difficulty. He was not looking at Joe when he walked up to the house and said "good evening," but he stopped directly in front of Joe. Joe drew the weapon and began firing and it was over as soon as he could work one of these automatic pistols. Not a word was spoken by him or Joe after the shooting commenced. Joe did not tell him the afternoon before when he asked witness to quit talking to his sister; that "We were all good friends and he wanted us to remain so;" he (Joe) did not tell witness that his (Joe's) father and mother objected to his talking to Miss Ada. Joe was running over witness and witness told him that he would fight it out right then and there if Joe wanted to. Miss Jerrall knew that witness had a wife back in Alabama and that this wife had left him. Miss Ada knew that witness' wife did not want to live away from her people and that she had gone home for that reason. Witness lived for a year in the Jerrall home as a member of the household. He had been away from the Jerrall home about a week when the shooting occurred. When witness and Joe had the row the even-

ing before, the witness talked about settling it with him then and there, witness meant a fist fight and he got the pistol merely for the purpose of protecting himself.

Witness, Dr. Wiggs, testified that he got to the prosecuting witness in about three minutes after the shooting occurred. Witness heard the shots, three were fired in rapid succession and then an elapse of a second or two, when the fourth shot was fired.

Witness Nugent testified, over the objection of appellant, that he reached the scene of the shooting within three minutes after it occurred. When he got there, the prosecuting witness was sitting on the edge of the porch; witness helped him into the house and searched his clothes; he did not find any open knife in his right hand coat pocket. Witness went through his pockets because he had curiosity to see if he had a gun; witness did not think there was an open knife on him; it was only a small pocket knife. Witness went all around in all the pockets he could get to. Witness thought if he could find a pistol, he could find who caused the trouble. Witness thought that if he could find a pistol that there had been two shooting. Witness did not find out, until ten minutes after he got there, who did the shooting. There did not seem to be anybody that knew anything about the matter. Here appellant again objected and moved to exclude all that testimony, but his motion was overruled.

Dr. R. L. Smith testified to the character of the wounds. One wound was near the temple; one in the right shoulder, entered from behind and ranged downward and was the most dangerous wound received; one in the left side, a skin and muscle wound; and one wound in thigh which cut the skin for three inches from entrance to exit.

Witnesses on behalf of appellant testified that they saw Priestley on Saturday evening before the shooting occurred on Sunday evening and that Priestley began to cry and said he would kill all the damn Jerralls; "if they thought he was afraid of them, he would show them; that

he would kill every damn one of the damn Jerrall family."

Witness R. H. Howell, on behalf of appellant, testified he was sitting on his front porch.. Defendant and Monroe Ferguson were sitting there also; Priestley came up the sidewalk until he got about twelve or fourteen feet from the house and when he got even with Joe, he stopped and said "hello." He had his right hand in his back pocket and was looking right at Joe; was facing him. About that time Joe raised up and began shooting. Four shots were fired; Priestley did not fall until the fourth shot. Joe did not fire any shots after Priestley fell. Joe did not try to do anything more. Priestley was taken in witness' house. Witness examined his coat after some one had removed it and hung it on a hall-tree. He found an open knife in the right coat pocket. On cross examination, the witness stated that he thought Priestley's hand was in his right-hand coat pocket when he walked up and said "hello." Another witness corroborated the testimony of the above witness substantially. It was testified that Priestley was not shot from behind.

The testimony of appellant tended to show that he had had trouble with Priestley on the day before the shooting. Priestley was talking to his sister. Appellant warned Priestley that the attention he was showing appellant's sister was distasteful to his father and mother and her father and mother were not at the home at this time. Priestley got mad and said he could not run it over him and that he had a right there; that he was not afraid of me; and that he would settle it right there. He went away on his horse and in a short time he came back by in a lope and told appellant's sister to tell appellant that he (Priestley) would see appellant later. Appellant was told that Priestley was trying to get a gun for him and that he had threatened the whole family. Appellant next saw Priestley on Sunday evening between 4 and 5 o'clock, passing with other parties in a buggy. The other parties spoke to him, but Priestley did not. He next saw Priestley when the shooting

occurred. Priestley walked up until he was directly in front of appellant, then turned and faced appellant and drew his hand back to his hip, and appellant believed from what he had heard that Priestley was going to begin shooting, then appellant began firing.

Tom D. Brooks and *J. T. Bullock,* for appellant.

Evidence of witness Nugent was incompetent. Incompetent evidence is prejudicial where there is a conflict in the evidence. 91 Ark. 555.

Where it does not affirmatively appear that the error was harmless the case will be reversed. 69 Ark. 594; 73 Ark. 146.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

Passion alone will not reduce the grade of homicide. 99 Ark. 407-410; 96 Ark. 55.

A general motion to exclude all the testimony of a witness is properly overruled if a part of it is competent. 96 Ark. 55.

WOOD, J., (after stating the facts). The appellant contends that the evidence is not sufficient to sustain the verdict; but giving the evidence, introduced by the State, its strongest probative force, we are of the opinion that it was sufficient to show that the appellant assaulted Priestley with the intent to kill him. No better evidence of that fact could be produced than the testimony showing that at a distance of twelve or fifteen feet, appellant began shooting at Priestley with a deadly weapon and shot him four times. The testimony also was sufficient to show that the shooting was the result of malice. The testimony of Priestley tended to show that he was making no hostile demonstrations towards the appellant at the time appellant began firing on him; that he was not contemplating any injury to the appellant at the time and was not prepared to do him any bodily harm, especially at the distance between him and appellant when appellant began firing. The testimony of one witness tended to show that appellant fired three shots in rapid

succession and then stopped for a second or two before firing the last shot. Priestley received one wound in the back.

The jury accepted and believed this testimony rather than the testimony of appellant himself and his witnesses that tended to show that the shooting was done in self-defense. The testimony on behalf of the State was sufficient to warrant the jury in finding that the shooting of Priestley was caused by the quarrel that appellant and he had on the evening before, concerning the attention that Priestley was giving to appellant's sister, to which appellant objected. According to the testimony of Priestley, there was no provocation for the shooting unless the above was the motive. But this quarrel between appellant and Priestley could not have afforded justification for the attack made by appellant on Priestley on the following evening, nor was it sufficient, if death had resulted from the assault, to have reduced the grade of the offense from murder to manslaughter. *Clardy* v. *State,* 96 Ark. 55; *Young* v. *State,* 99 Ark. 407.

There was no prejudicial error in the court's ruling upon the admission of the testimony to which appellant objected. The testimony that the witness found no pistol in the pockets of Priestley on a search made immediately after he was assaulted, under circumstances which showed that there could have been no collusion, was of the *res gestae* and competent. The judgment is therefore affirmed.

CLEVELAND *v.* PINE BLUFF, ARKANSAS RIVER RAILWAY COMPANY.

Opinion delivered February 17, 1913.

1. RAILROADS—VIOLATION OF RULE—NOTICE.—A railroad company will not be liable in damages to a woman injured by a collision, while riding on a hand-car at the invitation of the section foreman, in violation of the rules of the company, when it is not shown that the officials of the company who had control over use of the

hand-car had any knowledge that the hand-car was used on this or other occasions for carrying employees and their friends up and down the line. (Page 97.)

2. RAILROADS—DUTY TO—LICENSEE.—A railroad company owes to a mere licensee upon its track only a duty to use reasonable care not to injure him after discovering his presence. (Page 99.)

Appeal from Jefferson Circuit Court; *Antonio B. Grace,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellant instituted this suit against appellee to recover damages for injuries received by her while riding upon one of appellee's hand-cars on its line of railroad. The facts shown by the appellant and her witnesses are substantially as follows:

Appellant was a midwife and had been nursing the wife of A. S. Desha, a section foreman on appellee's line of railroad. On the day she was injured she was at Mr. Desha's house and deciding to return home, Mr. Desha had the section hands to bring out the hand-car and take her home on it. She started home on the hand-car with the section hands a short time after dark. On the way home a motor car, which was being run on appellee's line of railroad, ran into the hand-car and severely injured appellant. Several witnesses testified that it was the custom of people living in the neighborhood to ride upon the hand-car and that this custom had been in existence for over eight years. They said after work hours the people in the neighborhood would ride on the hand-cars in going to lodges, to festivals and to other places for their own pleasure and business. Another witness stated that this custom prevailed to the extent that the hand-car was used for this purpose during any hour of the day or night. Most of the testimony, however, was to the effect that it was so used after work hours. Another witness testified that on a few occasions he had hired the hand-car to go to places upon his own business.

The testimony for appellee is substantially as follows: Appellee had owned and controlled the railroad in question for about five years. The road was a branch

road of the St. Louis Southwestern Railway Company, and was some fifteen miles long. The hand-cars were for the use of the section foremen and their crews. The railroad company had a rule for the operation of the hand-cars by section foremen and this rule was in force at the time appellant was injured. This rule provides that the hand-cars must be pushed with care and must not be used except in service of the company without special authority from the roadmaster or assistant roadmaster, and no one is allowed to ride upon the hand-car except employees in the performance of duty, unless authorized by written order, and section foremen are to keep the hand-cars locked or so secured that they can not be moved. Not to be used on Sunday except for inspection of track and in case of necessity. When obliged to run hand-cars after dark a red light must be displayed. It was also against the rules to permit a hand-car to be sent out after working hours except on the business of the company. The superintendent and his assistant, the roadmaster and his assistant, all testified that they had never authorized any section foreman to use a hand-car at night or after work hours and that they did not know of them having been so used. The roadmaster testified that he was accustomed to go over the road in question and spent one night on it about once a month. That during these trips he had never heard the hand-cars running at night and did not see them being used contrary to the rules of the company.

A. S. Desha, the section foreman, testified: I was familiar with the rules concerning the use of hand-cars and knew that I had no authority to use the hand-car or to permit it to go out on the track after working hours. Such use would be a violation of the rules unless it was for the company's business. The working hours are from seven to six. I sent her (appellant) home on the night in question on the hand-car just for courtesy and to accommodate her. I had no authority from any of the officers over me to take the car out that night.

The testimony of appellant shows that the station

agent knew that the people in the neighborhood were accustomed to ride on the hand-cars after working hours, and the testimony on the part of appellee showed that the station agent had no control over the use of the hand-cars. Other evidence will be referred to in the opinion.

The jury returned a verdict for appellee and to reverse the judgment rendered appellant prosecutes this appeal.

A. H. Rowell, for appellant.

S. H. West and *Bridges & Wooldridge,* for appellee.

HART, J., (after stating the facts). The instructions of the court took away from the jury every question of fact except that based upon the doctrine of discovered peril, and this action of the court is assigned as error by counsel for appellant. The undisputed evidence shows that the railroad company did not operate its hand-cars for the carriage of passengers and that the rules of the company forbade their use for that purpose. It is conceded by counsel for appellant that a person, taking a ride on the hand-car with the foreman's assent merely, could not be regarded as a passenger and that under such circumstances the presumption would be that he was not legally a passenger. Counsel insists however that such presumption may be rebutted by showing such a general and continuous custom of the section foreman in allowing persons to ride upon the hand-car as would be notice to the railroad company. In other words, counsel for appellant concedes that the section foreman had no power whatever as to the transportation of passengers and that the rules of the company forbade him to carry them on the hand-car but he claims that under the particular facts of this case the rule was abrogated by the general custom of the people in the neighborhood riding upon the cars by the permission of the section foreman, and that the railroad company had constructive knowledge of that fact, and that under the facts proved by appellant, the appellee was liable for the injuries sustained by her. We can not agree with him in his contention. Appellee had been in possession and control of the road for a period

of five years, and only evidence of what had been done while it had control of the road is competent in this case. The evidence shows that during the time appellee had operated the road its section foremen, as an accommodation, had been accustomed to invite and to allow people living in the neighborhood to ride with them on the hand-cars and had often used such cars to take their families and neighbors up and down the track on business and for pleasure. This was done without the authority of the railroad company and was against its rules. There is no evidence to show that it ever came to the attention of the company's officers who had control over such matters, and the physical evidence of such use was not sufficient to impart knowledge thereof to the railroad company. It is true one witness testified that he had on two or three occasions hired the section foreman to carry him up and down the road on business but it is not shown that any of the officers having charge of the operation of the railroad knew of this fact. The other testimony on the subject only goes to the extent of showing that people living in the neighborhood were accustomed to ride up and down on the railroad with the section foreman for business or pleasure and that this was done principally after work hours. The roadmaster was accustomed to spend one night during the month on this branch line of railroad, but he says he did not know of this custom and did not hear the hand-car running up and down the road during the time he was there.

Therefore, we do not think that the testimony is sufficient to show that the railroad company had consented to the use of its hand-cars for the carriage of passengers and that its officers in charge of the operation of the road had knowledge of the fact that its hand-cars were used for such purposes. *Rathbone* v. *Oregon Railway Co.*, 66 Pac. 909; Hutchinson on Carriers, Vol. 2, Sec. 1000; *Ib.*, Vol. 3, Sec. 1205.

The case of *St. L., I. M. & S. Ry. Co.* v. *Caraway*, 77 Ark. 405, and other like cases, are relied upon by counsel for appellant to sustain his position. We do not think

the doctrine there announced has any application to the facts of the present case. The court was discussing the liability of the master to his servant. The rule is well settled that if the master directs an appliance to be used for some purpose other than that for which it was originally intended, he puts it in the same position as if he had originally furnished it for that purpose. But the fact that it has been diverted to a new use will not render the master liable if that diversion occurred without his knowledge or consent. A qualification to this rule is admitted in cases where it appears customary for employees to put the appliance to a new use and the master knows of this custom. See 1 Labatt on Master & Servant, section 28. So the rule has become settled that when the master permits a custom to become established by which an appliance is put to a secondary use he is equally liable as in the case of a primary one. Besides in the case of the *Arkansas & Louisiana Railway Company* v. *Sain,* 90 Ark. 278, the court said:

"If the company permits persons to go upon its premises or its cars for the purpose last above indicated, such persons are not trespassers, but licensees. They are not, however, upon the company's platform or car 'to welcome the coming or speed the parting guest,' in the sense of the law, and are therefore nothing more nor less than bare licensees. To bare licensees railroad companies owe no affirmative duty of care; for such licensees take their license with its concomitant perils. (Citing cases.) A custom upon the part of a railway company, however long continued, to permit people to go upon its cars merely for the purpose of meeting or seeing incoming passengers, but not for the purpose of rendering them any assistance, does not constitute those who go upon the cars in pursuance of such custom anything more than naked licensees. They are not licensees upon invitation, but simply by passive permission. An invitation upon the part of the company is implied where one goes upon its cars to render some needed assistance to passengers, for the reason that such service to the passenger is

considered to be in the interest of the company as well. *Railway Company* v. *Lawton,* 55 Ark. 428."

Therefore, the only duty that appellee owed appellant under the circumstances of this case was to exercise reasonable care not to injure her after her presence on the track was discovered. We have not deemed it necessary to abstract the evidence on this point. It is sufficient to say that it was conflicting and the question was properly submitted to the jury under the instructions of the court and a verdict was rendered in favor of appellee. We find no reversible error in the record, and the judgment will be affirmed.

DRIFOOS *v.* CITY OF JONESBORO.

Opinion delivered February 17, 1913.

MUNICIPAL CORPORATION—AUTHORITY TO MAKE ARREST FOR MISDEMEANOR. —Although courts do not take judicial notice of town ordinances, it is immaterial if the ordinance which defendant is accused of violating is not proved, if the crime for which he was tried constituted a misdemeanor under the criminal laws of the State.

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

Hawthorne & Hawthorne, for appellant.

1. "Process" is a writ or summons issued in course of a judicial proceeding. Kirby's Dig. § 7815. Under the testimony to the effect that the police officers had no warrant or other process for Amory, there is clearly no evidence to sustain the verdict. Kirby's Dig. § 1960.

2. Instruction 1 given by the court is clearly erroneous in that it refers to an ordinance which was never introduced in evidence. Kirby's Dig. § 3066; *Id.* § 5471; 35 Ark. 75; 66 Ark. 35; 68 Ark. 483.

No brief filed for appellee.

SMITH, J. Upon an appeal to the circuit court from the judgment of the police court of the city of Jonesboro, the appellant was convicted of the offense of obstructing the police in the arrest of George Amory for a violation

of the ordinances of the city of Jonesboro. Upon the trial in the circuit court, the defendant was again convicted and was fined fifty dollars, and appeals from the judgment of the court imposing that fine. The evidence tended to show that a young man, named Amory, was drunk and came out of appellant's restaurant in that condition, when two members of the city's police force saw him and one of these officers said to the other, "Let's take him and put him up; he is too drunk to be on the streets," and one of the officers put his hand on the drunk man's shoulder and asked him, "Where are you going?" when the drunk man drew his knife and backed away and staggered into appellant's place of business. The officers undertook to follow the drunk man, but were met by appellant at the door and refused admittance, and, the officers say, the appellant remarked with an oath that they would have to wait until the man came outside, that they could not arrest him while he was in appellant's place of business and that as they were not sure they had the authority to force their way into appellant's place, they left without making the arrest, but that they telephoned the chief of police, who told them to wait until morning and get a warrant from the police judge and this they did. Upon the other hand, appellant testified that he did not deny admission to the officers and did not prevent the arrest, but he says he saw the drunk man with a knife and one of the officers with a pistol, and he was afraid some one was going to be killed, as the drunk man had said he would not be taken out alive and he begged the officers to wait until the drunk man should leave his place. This conflicting evidence made a question of fact, which has been settled adversely to appellant's contention by the verdict of the jury.

Appellant did not deny the right of the officers to make the arrest, but he questions the sufficiency of the evidence to sustain the charge and he says there was no proof of any ordinance of the city on the question of resisting an officer. The court gave the following instruction to the jury:

"Gentlemen of the Jury: In this case, the defendant, George Drifoos, is charged with the offense of resisting an officer in the discharge of his duties, alleged to have been committed in the city of Jonesboro on the 16th day of October, 1912. The ordinance under which this is charged reads as follows: 'If any person shall unlawfully and wilfully resist any ministerial officer in the discharge of any official duty, he shall be deemed guilty of a misdemeanor,' and in this case if you find from the evidence beyond a reasonable doubt that within twelve months before the 16th day of October, 1912, this defendant wilfully and unlawfully resisted a police officer or officers in the city of Jonesboro, in the discharge of an official duty, you should find him guilty, in which event you will assess his punishment at a fine of not less than $50 and you may, if you see proper, under the evidence, imprison him for a period not exceeding six months in addition to the fine."

If there was a city ordinance on the subject, it was not introduced in evidence, although the judge appeared to be reading a city ordinance.

Courts do not take judicial notice of town ordinances. *Strickland* v. *Little Rock,* 68 Ark. 484. But it is immaterial whether there was a city ordinance on the subject or not. The instruction charged the law as found in section 1960 of Kirby's Digest in so far as that section was applicable to the facts here offered in evidence. The provisions of that section are as follows:

"Section 1960. If any person shall knowingly and wilfully obstruct or resist any sheriff, or other ministerial officer, in the service or execution of, or in the attempt to serve or execute any writ, warrant or process, original or judicial, in discharge of any official duty, in case of felony, or any other case, civil or criminal, or in the service of any order or rule of court, in any case whatever, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty dollars, and may also be imprisoned not exceeding six months."

A city policeman is a ministerial officer within the meaning of this section, and as such had a right to make the arrest for an offense committed in his presence, even though he had no warrant. Kirby's Digest, section 2119.

We, therefore, conclude the court did not err in its instruction to the jury, even though there was no city ordinance on the subject, and the judgment of the court below is affirmed. *Marianna* v. *Vincent,* 68 Ark. 244; Kirby's Digest, section 5634; *Laur* v. *State,* 94 Ark. 178; *McCall* v. *Helena,* 86 Ark. 442; *Searcy* v. *Turner,* 88 Ark. 210.

Affirmed.

GRAND CAMP COLORED WOODMEN v. WARE.

Opinion delivered February 17, 1913.

BENEFIT INSURANCE—LIABILITY.—When a fraternal order issued a benefit certificate of insurance to deceased, who was a member of its local camp, which provided for the payment of a certain sum to a person named in the certificate, provided the member comply with the laws of the order, it is liable on the certificate upon the member's death, if his dues had been paid and he was otherwise in good standing with the order, although the local camp, of which he was a member, had been suspended from the association for failure of its financial secretary to remit dues collected, but the general officers of the order are not personally liable on the certificate.

Appeal from Woodruff Circuit Court, Northern District; *Hance N. Hutton,* Judge; modified and affirmed.

Scipio A. Jones, for appellant.

1. The judgment against Drew and the other officers of the appellant lodge is manifest error, not responsive to the allegations of the complaint nor to the verdict of the jury.

2. The evidence is not sufficient to support the verdict against the lodge. The so-called "financial card" was inadmissible in evidence without proof of its genuineness.

No brief filed for appellee.

SMITH, J. This suit was commenced by appellee, who alleged in her complaint that her husband, Ed Ware, became a member of the Grand Camp Colored Woodmen, Forest of Arkansas, his membership being in Lafayette Camp, No. 179, a subordinate lodge thereof at Tupelo, Arkansas; and that her said husband had paid the fees demanded by said camp; and that there had been issued to him Benefit Certificate No. 779, for the sum of $1,000, to be paid any person who might be designated in the said certificate; and that she was the person so designated; and all camp dues had been paid by the said Ed Ware up to the time of his death. That the said Ed Ware departed this life on October 30, 1910; and that although proof of his death had been forwarded and received by the Grand Camp, no payment had been made.

The answer admitted Ware had been a member of its organization, but denied that he had paid his dues or had designated any beneficiary. It admitted the receipt of the proof of death, and that the said Ware died on October 30, 1910. It alleged that the certificate which was issued to members provided among other things that the Grand Camp will pay to the beneficiary named in its certificates, a sum not less than $325, and not to exceed $1,000, which may be raised by an assessment of twenty-five cents on each and every member of the order in good standing within the Grand Jurisdiction, under the laws of the order; provided he shall be in good standing at the time of his death, and it was further stipulated that as a part of said contract of insurance, the member by acceptance of the certificate, agreed to abide by the laws and constitution of the order then in existence, as well as any that might be passed thereafter. That said certificate provided that all assessments must be paid in advance and must reach the office of the Grand Banker on or before the first of the month for which the member is paying, and that upon failure so to pay, the certificate immediately and without notice became null and void. It was further alleged that the said Ware was in default of payment for the month of September and was not,

therefore, in good standing at the time of his death, and it was also alleged that the local camp, of which deceased was a member, had itself been suspended because of the failure of the financial secretary of this local camp to make a report for the months of November and December, 1910, and January and February, 1911, and that under the provisions of sections 2 and 3 of the by-laws, all members and officers of said camp stood suspended and no officer thereof had authority to receive or receipt for the payment of dues on or after the 25th day of October, 1910. The said sections, 2 and 3, are as follows:

"If any member shall fail to pay the proper officer the assessment levied upon him or her, on or before the twenty-fifth day of the month succeeding its issue, he shall forfeit all claim for any death benefit, and shall stand suspended. The financial secretary shall send two lists of names of members who paid their endowment, one with the money to the Grand Banker, and one duplicate to the Grand Secretary."

"Section 3. The financial secretary shall, within five (5) days after the twenty-fifth of the month, after that in which the assessment is collected, forward all sums collected by him or her for assessment or taxes, to the Grand Banker, and if any financial secretary shall fail to make such remittance, he or she, upon the report of the Grand Banker, shall be suspended for thirty (30) days for the first offense, and removed from office for the second."

At the trial, appellee produced the financial card of her husband on which all dues were marked paid that were payable prior to his death and she produced his certificate of membership, showing that she had been designated as the beneficiary therein; indeed, the point in regard to the designation of beneficiary is not here contested.

The banker of the local lodge testified that he saw Ware pay to the financial secretary his dues for the months of September and October, 1910, and saw the secretary credit the payments on the financial card, intro-

duced in evidence and another member of the lodge corroborated this statement.

There was a verdict for plaintiff for three hundred and twenty-five dollars, the minimum sum to be paid upon the death of any member in good standing, and judgment was rendered against the appellant and its chief officers for that amount. A motion for a new trial was overruled and this appeal taken.

The judgment against the officers of this order was erroneous, and was no doubt a mere misprision of the clerk. At any rate, the judgment as to them is reversed and the cause dismissed. The record shows that the financial secretary was the proper lodge officer to receive the dues and sign the financial card.

The proof shows that the camp was suspended on October 30, 1910, but there is nothing in the proof as abstracted which shows that the validity of the policy was affected in any way by the failure of the lodge secretary to make remittances of dues collected.

Section 2 of the by-laws provides that the member, who fails to pay his dues on or before the 25th day of the month shall forfeit all claims for any death benefit and shall stand suspended. But the jury found from evidence which was sufficient to support that finding, that Ware had paid all assessments which were due at the time of his death, and the section 3 of the by-laws quoted provides that upon the failure of the lodge secretary to make remittance that officer, and not the lodge, shall be suspended. The only witness, who testified as to the date of Ware's death, stated that he had died on October 29, which was one day before the local lodge was suspended. But we need not consider that question. The record here presents the same question decided in the case of *United Brothers of Friendship* v. *Haymon,* 67 Ark. 506, where to quote the syllabus, it was said:

"Benefit Insurance—Liability.—Where a mutual aid association issued a certificate of insurance to a member of one of its local lodges, which provided for the payment of a sum of money to the beneficiary named therein on

the death of the member, on the condition that such member should comply with all the laws of the association, it is liable on the certificate at the member's death, if the member kept her dues paid and otherwise complied with the laws of the association, although the local lodge of which she was a member had been suspended from the association for nonpayment of its dues.

Modified and affirmed.

WENDT v. ISMERT-HINCKE MILLING COMPANY.

Opinion delivered February 17, 1913.

1. SALE OF CHATTELS — BREACH — RECESSION — EVIDENCE. — Defendant agreed to purchase flour from plaintiff at a certain price, and before the date of shipment, A wrote to plaintiff that it had acquired defendant's business and could not use the flour. Plaintiff then sold the flour to A at a price less than the contract with defendant. *Held*, when it appeared that defendant acquiesced in A's letter to plaintiff in order to get the flour at a lower price, the letter was admissible and was evidence of a renunciation of the contract by defendant. (Page 112.)
2. SALE OF CHATTELS—BREACH—TENDER.—When the vendee in an executory contract for sale of chattels, rescinds his contract, and the vendor is without fault, the vendor may maintain an action against the vendee without making a tender of the chattels to the vendee. (Page 114.)

Appeal from Jackson Circuit Court; *R. E. Jeffery*, Judge; affirmed.

Jones & Campbell and *Sam Frauenthal*, for appellant.

1. Before appellee could maintain this action, it devolved upon it to show a performance, or an offer to perform, on its part, or such an absolute and unqualified repudiation of the contract by appellant before the time for delivery as to render a performance or tender to perform unnecessary. 4 Selden, 512; 2 Mechem on Sales, § 1109; 56 N. Y. 638; 16 Fed. 168; 30 Cal. 486; 40 Ill. 368; 35 Cyc. 164.

The doctrine that renunciation of an executory contract, performance of which is not yet due, will be treated as a breach entitling the injured party to bring suit at once, a principle recognized by English authorities by the United States Supreme Court in 178 U. S. 1, and this court in the Kirschman case, 92 Ark. 111, is based upon the occurrence of two things: First, there must be a distinct, unequivocal and absolute refusal to perform by one party; and, second, such refusal must be treated and acted upon as such by the other party. A mere expression of unwillingness to perform or negotiations seeking an alteration or rescision is not sufficient. 2 Benjamin on Sales, § 860; 15 Wall. 36; 117 U. S. 490; 2 El. & Br. 678; 2 Mechem on Sales, § 1087; 9 Cyc. 637.

2. The contention that the letter of the Valley Commission Company was such a repudiation of the contract as to constitute a breach is not correct because there is nothing to show that appellant authorized the writing of a letter refusing to accept the flour absolutely and because the letter itself does not purport to be either a repudiation of the contract or a refusal by Wendt to receive the flour.

Jno. W. & Jos. M. Stayton, for appellee.

This is a typical case for the application of the rule that "where one, by word or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his condition, the former is precluded from averring against the latter a different state of things as existing." 29 Ark. 218; 35 Ark. 376; *Id.* 293.

SMITH, J. This suit was brought by appellee to recover damages for the alleged breach of an executory contract for the sale of two carloads of flour. The complaint alleged that on the 29th day of September, 1910, the appellant made two written orders for the purchase of flour from it. One of said orders was for eighty barrels of I. H. flour at $5.15 and eighty barrels of Thunderbolt flour at $4.95, to be shipped to appellant at Newport, Ark., on March 1, following. The other order is for

eighty barrels of I. H. flour at $5.25 and eighty barrels at $5.05 to be shipped on May 1 following, and in both of said orders it is stipulated that an allowance of fifteen cents per barrel should be made for sacks returned to the mill. The order was changed to all Thunderbolt and as changed was accepted by appellee. That on March 15, appellant notified appellee, or caused it to be notified, that none of the flour would be received and declined to receive the same, and that, at the time of the refusal the market for flour had declined and appellee sold same on March 17, 1911, to the Valley Commission Company at the price of $4.50 per barrel, which was the best price obtainable for the flour at that time, and that it had thereby sustained a loss of $160 upon which amount there was a credit of $24 for flour sacks, returned by appellant, and judgment was prayed for the balance of $136.

In his answer, appellee denied all the material allegations of the complaint, and denied that he had notified appellee, or had caused it to be notified that none of said flour would be received, or that he had declined to receive it, but he alleged that before the day of delivery, appellee failed to perform the contract on its part by declining to ship said flour and by selling it to another party.

The cause was submitted to the court, sitting as a jury, and there was a finding and judgment for appellee for the amount sued for. The cause was heard on the deposition of the secretary and manager of the milling company and the oral evidence of the manager of the Valley Commission Company. The appellant did not testify and made no explanation of the correspondence exhibited in evidence. Appellee's manager testified as to the receipt and acceptance of appellant's offer and as to the decline in price and that the flour was sold at the highest market price obtainable at the time of the alleged repudiation of the contract. He exhibited the correspondence, which constituted the contract of purchase and evidenced its breach, if there was a breach. The order for the flour was as follows:

September 29, 1910.

Ismert-Hincke Mfg. Co., Kansas City, Mo. Ship to A. Wendt at Newport, Ark. How ship, R. I. When, March 1. Terms, s/o.

80 bbls. I. H. flour.....$5.15
80 bbls. Thunderbolt flour..... 4.95
98 lbs. cotton.

Allowance of 15 cents per barrel for sacks returned to mill. Absolutely guaranteed to give satisfaction.

A. Wendt.

This order was changed to all Thunderbolt by the following letter:

"Newport, Ark., March 8, 1911.

The Ismert-Hincke Milling Company, Kansas City, Mo.

Gentlemen: I have shipped you 325 empty sacks by express prepaid, and you may ship the flour some time the middle of this month. You may send the draft to the Farmers Bank of Newport, Ark. If possible, please do not ship the freshest flour.

Yours truly,
City Bakery.
Per A. Wendt.

Please ship all Thunderbolt flour.

A. W."

The appellee agreed to this change in the order above referred to, and proceeded to pack the flour in the sacks which had been forwarded to it by the appellant, but, before it was shipped, received the following letter:

"Newport, Ark., February 19, 1911.

The Ismert-Hincke Mill & Elevator Company, Kansas City, Mo.

Gentlemen: I am in communication with a gentleman from Illinois who wants to buy my place of business, and I do not know whether he would be willing to handle your flour or not. We have still enough flour on hand to do us another month or more, and as there is more than one shop here now (which, by the way, gives us a good deal of trouble) we do not need near as much flour as we used to use, and, as I say, will be glad if I

can get rid of the place. I just let you know; you might unknowingly ship that carload off and have no taker for same. I will try to get him to use your flour, although he already told me that I am paying too much for my flour. He has the agency for a certain brand which he claims he may continue to use. Hoping that this little information will not interfere with your plans, I am,

Yours truly,

A. Wendt."

In answer to this letter, appellee wrote the following letter:

"February 21, 1911.

Mr. A. Wendt, Newport, Ark.

Dear Sir: We have yours of the 19th, and note contents. In reply will say that regardless of whether you sell your bakery or not, there is a car of flour due you on our books, which of course we expect you to take out, etc.

* * * * * * * *

Yours very truly,

Ismert-Hincke Milling Company.

Sales Manager."

Appellant wrote the following letter:

"Newport, Ark., March 1, 1911.

The Ismert-Hincke Milling Company, Kansas City, Mo.

Gentlemen: I have several hundred empty flour sacks (98) and as my successor is not going to take possession before April 1, 1911, I will need some more flour before that time. The contract calls for fifteen cents allowance on each barrel if sacks are furnished, and I will ship 320 sacks to you to be refilled with the same flour. The last flour was all right, and if this flour should not come up to the grade of the last flour I will send it back to you, as it was absolutely guaranteed. Let me know at once if this will be satisfactory.

Yours truly,

A. Wendt."

And the appellee replied as follows:

"March 4, 1911.

Mr. A. Wendt, Newport, Ark.

Dear Sir: We have yours of the 1st and note contents. Upon receipt of your empty sacks we will ship you a car of flour as ordered. You need have no fear whatever of this flour not coming up to former shipments, as we test every barrel that we ship, and we assure you we will be very careful in this instance. We will of course allow you fifteen cents per barrel for your empty sacks.

Yours very truly,

Ismert-Hincke Milling Company.

Sales Manager."

These sacks were later received by appellee and were filled and ready to load in the cars for shipment to the defendant when appellee received a letter from the Valley Commission Company of Newport, Ark., as follows:

"Newport, Ark., March 15, 1911.

Ismert-Hincke Milling Company, Kansas City, Mo.

Dear Sir: We have the City Bakery from Mr. Wendt, former manager, and wish to say that the contract on flour that you insist on him taking out we can not use. Therefore any shipment you make to the City Bakery will be turned down by us. Trusting this matter has your immediate attention, we are,

Yours very truly,

Valley Commission Company.

D/P.

P. S.—If you can meet a price of $4.50 (this is price of Caldwell Milling Company's U. S.) per barrel on your Thunderbolt we might let both shipments come on at this price.

V. C. Co."

Defendant at the time objected to this letter on the ground that it was not shown that it was authorized by appellant and saved its exception to the action of the court in overruling its objection. The flour was sold to the Valley Commission Company for $4.50 per barrel.

It is earnestly insisted that but for the letter of the Valley Commission Company of date of March 15, there is not sufficient evidence that this company had authority to cancel the contract, and that appellee was not warranted in the assumption that this letter accomplished that purpose. The evidence of the manager of the commission company in connection with the correspondence herein set out, is sufficient to warrant the submission of that question to the jury, or to the court, sitting as a jury. The following questions propounded to and answers given by Pate, the commission company's manager, are relevant and important and make the letter objected to competent under the circumstances:

Q. Now, Mr. Pate, state to the court how that letter happened to be written.

A. We were figuring on buying out a competitor of Mr. Wendt's, in order to get stock in his concern; that is, to get to sell him the flour he used; and he told us that he had this flour coming from the Ismert-Hincke Milling Company, and we did not get in on the proposition, and we priced the flour and told him we wouldn't use it.

* * * * * * * *

Q. What authority did you have for writing it, if any?

A. Well, I didn't have any authority except if I was going to get the place I wanted to sell him the flour.

Q. When you told him that, what did he say or do?

A. I don't remember what he said.

Q. How did you happen to write this letter?

A. I figured on getting a profit on the flour.

Q. Did anybody suggest to you to write it?

A. Nothing except the profit on the flour suggested it. I told him (Wendt) that we could not use the flour at that price.

Q. Well, what did he say?

A. He said he didn't know how he was going to get around using it, I think, and I told him that I would not use it at that price. I don't remember whether he was there when I wrote the letter or not. I figured out

that I would write them a letter to see what I could do with it.

Q. I will ask you whether or not Mr. Wendt suggested this method to you of getting the price down?

A. No; he didn't suggest it to me.

Q. What suggestion did he (Wendt) make?

A. Well, he told me that I might write them and see what I could do.

Q. And get the price lower?

A. Well, that was for my benefit.

And on cross examination he testified as follows:

Q. And he (Wendt) never authorized you to notify them that he would cancel the order, did he?

A. No; he just told me to go ahead, and if I could get it cheaper to do so; that was up to me if I was going to get an interest in it.

Q. That was on the theory that you were taking it over and getting an interest in it?

A. Yes, sir.

Q. You didn't consummate that transaction?

A. No.

Q. You didn't consummate the deal of taking over the bakery as you contemplated doing at that time, did you?

A. No, sir.

Q. He says, You go ahead and get it cheaper if you can?

A. Well, I guess so. I guess you would call it that. I won't say that he suggested it, though; it might have been a suggestion of mine.

Q. He assented to it, didn't he?

A. Yes.

Q. He endorsed whatever you did?

A. Yes.

Q. Now he (Wendt) endorsed whatever you did in the matter, did he?

A. Yes, sir.

Q. I do not mean that he told you to write this letter, or that he dictated the letter, or anything about that

but he authorized you to do what you did, is that right?

A. Yes; it was all right with him for me to go ahead.

Q. He (Wendt) assented to and endorsed it?

A. Yes, sir.

Q. And you made that offer in this letter, $4.50 per barrel?

A. Yes, sir.

Q. For two cars of Thunderbolt?

A. For the two cars.

Q. Was that offer accepted by them?

A. Yes, sir.

Q. Was the flour shipped?

A. Yes, sir.

Q. What became of it?

A. I sold it to the City Bakery.

Q. Sold it to Mr. Wendt, did you?

A. Yes, sir.

Q. He got the flour after all?

A. Yes, sir.

Q. At a less price than the contract price?

A. Yes, sir.

It is further contended that before the date of performance, appellee put it beyond its power to perform the contract by selling the very flour which appellant ordered, and that before it could maintain this action it devolved upon it to show a performance upon its part, or an offer to perform, or such an absolute and unqualified repudiation of the contract by the appellant, before the day of delivery, as to render unnecessary a performance or tender to perform. We have just shown that the evidence set out was sufficient to sustain the finding that appellant had repudiated the contract, and that finding is as conclusive as the verdict of a jury. *Williams* v. *Board of Directors,* 100 Ark. 166.

There are cases in which it has been held that the repudiation of an executory contract before the time for performance did not give to the other party an immediate right of action and the cases so holding are re-

viewed in the case of *Stanford* v. *Magill,* 38 L. R. A. 760. But other authorities hold that though the performance of an executory contract is not yet due, a renunciation thereof will be treated as a complete breach, entitling the injured party to bring an action at once, and, in an able opinion by Judge FRAUENTHAL, this court adopted this latter doctrine. *Kirchman* v. *Tuffli Bros.,* 92 Ark. 111.

We conclude, therefore, that the judgment is supported by evidence which is legally sufficient, and that the court did not err in the admission and consideration of the letter written by Pate for the Valley Commission Company, and the judgment is accordingly affirmed.

BARWICK *v.* STATE.

Opinion delivered February 17, 1913.

1. CRIMINAL LAW—PLEA OF GUILTY—ENTRY OF JUDGMENT AT SUBSEQUENT TERM.—Upon a plea of guilty entered at one term of court, judgment may be entered at a subsequent term. (Page 117.)
2. CRIMINAL LAW—JUDGMENT BY PIECEMEAL.—When defendant is indicted and enters a plea of guilty, and the court noted on the record the following order: "That this cause be continued; that defendant pay all costs herein at once, and that the fine be imposed at the pleasure of the court." Defendant did not object, and at next term, the court entered judgment against defendant and assessed the fine. *Held,* no judgment was rendered except the one imposing the fine, and the court did not render judgment by piecemeal. (Page 117.)
3. JUDGMENTS—LAPSE OF TIME.—A prosecution is not barred by lapse of time, when the court continued the cause from term to term for further proceedings. (Page 117.)
4. JUDGMENTS—DELAY—WAIVER.—When a court continues a cause from term to term for further proceedings, and the defendant does not ask for final judgment, he is held to have waived the delay, and can not complain because the court delayed in entering judgment on his plea. (Page 118.)

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

Hawthorne & Hawthorne, for appellant.

1. Unlike the Joiner case, 94 Ark. 198, the record in this case shows that the plea of appellant was entered upon condition. It is immaterial that the judgment of February, 1907, was entered by appellant's consent. The court had no power at the November term, 1912, to impose any part of a sentence upon appellant under the order rendered at the February term, 1907. 144 S. W. (Ark.) 208. "The entire sentence must be pronounced at one time, not in parcels." 1 Bishop's New Criminal Procedure, § 1291; 61 Mich. 110.

2. The cause became abandoned and discontinued. A discontinuance results in a cause whenever for any reason there is in connection with it and the court records a lapse, unless such lapse is the fault of the defendant, 20 Ala. 9; 47 Ala. 675; 67 Ky. 427; 64 Ind. 371; 48 N. E. 261; Black's Law Dict. 818.

William L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

1. The plea was unqualified. This case is controlled by *Joiner* v. *State,* 94 Ark. 108. The power to impose a partial judgment at one term and another part at a subsequent term is not involved here. Costs are not a part of the judgment for a fine. 151 S. W. (Ark.) 1023; 61 Ark. 17; 12 Ark. 123.

2. There was no discontinuance. It was not incumbent upon the court to have the case upon the docket at each term in order to avoid a discontinuance, but, even if that were necessary, there is nothing in the record to show that the case was not so docketed.

McCULLOCH, C. J. An indictment was returned by the grand jury of Craighead County, Jonesboro District, at the October term, 1906, against appellant, Ben Barwick, charging him with the offense of selling intoxicating liquor in violation of law. At the next term of the court, which was the February term, 1907, appellant entered a plea of guilty to the charge and the court, after receiving the plea and noting the same upon the record, caused an order to be entered "that this cause be continued; that

the defendant pay all costs herein at once, and that the fine be imposed at the pleasure of the court." No objection appears to have been made by appellant to this order of the court, and no further proceedings were had until the November, 1912, term of the court, when the case was called and the court entered judgment against the defendant, upon his plea of guilty, for a fine in the sum of $100. From that judgment, he has prosecuted an appeal.

Appellant's plea of guilty was entered unconditionally, therefore, the case does not fall within the ruling of this court in *Wolfe* v. *State,* 102 Ark. 295.

We held in the case of *Joiner* v. *State,* 94 Ark. 198, that "upon a plea of guilty entered at one term of court, judgment may be entered at a subsequent term." That case is, therefore, conclusive of the question raised now as to the power of the court to render judgment at a subsequent term.

It is urged, however, that the court had no power to adjudge the penalty by piecemeal, and that in as much as a judgment for costs was rendered that exhausted the court's power to render any further judgment. The award of costs was a mere incident (*Villines* v. *State,* 105 Ark. 471), and it may well be doubted whether the costs could be collected until final judgment was rendered against appellant. The record of the court affirmatively shows that no judgment was rendered, but that the judgment imposing the fine was expressly reserved "at the pleasure of the court." It can not, therefore, be said that the court rendered judgment by piecemeal, as it never attempted to render any judgment at all except the one from which this appeal is prosecuted.

It is also insisted that the case was abandoned, and that the prosecution was barred by lapse of time. As before stated, no judgment was rendered and the court continued the case for further proceedings. It was not abandoned, and no statute is brought to our attention which would operate as a bar, on account of lapse of time, to the exercise of the court's power to render judgment after lapse of several terms.

Counsel cite cases to the effect that a court can not, at will, strike criminal cases from the docket and reinstate them. But it does not appear from the record here that the court ever struck this case from its docket, and reinstated it. Nor does it appear that appellant had ever asked for final judgment, or asked to be discharged on account of no judgment being rendered. For aught the record shows, the defendant may have been in attendance at each subsequent term of the court, and made no objection to further continuance. Under those circumstances, he waived the delay, and can not complain because the court delayed entering judgment on his plea. *Ex parte Hall,* 47 Ala. 675.

The court acted within its powers in rendering judgment at a subsequent term, and no abuse of discretion is shown. Judgment affirmed.

GOOD v. FERGUSON & WHEELER LAND, LUMBER & HANDLE COMPANY.

Opinion delivered February 17, 1913.

1. APPEAL AND ERROR—FAILURE OF CO-DEFENDANT TO ANSWER.—When two defendants in an action were served, but only one answered, if plaintiff goes to trial upon the answer of the one defendant, without moving for judgment against the other, and the answer filed shows a common defense, the question that the second defendant did not answer can not be raised for the first time on appeal. (Page 121.)

2. DEEDS—PAROLE EVIDENCE TO PROVE CONSIDERATION.—When a deed of conveyance recites no specific consideration, but recites merely that the conveyance was made "in consideration of value received," it is competent to show what the real purpose and consideration was. (Page 124.)

3. CORPORATIONS—ASSUMPTION OF ANOTHER'S DEBTS.—One corporation may become liable for the debts of another when it has by reasonable implication assumed the payment of the liabilities of the debtor corporation, and it is a question for the jury to determine from the facts and circumstances whether they lead to the implication that when a new corporation takes over the property of an old one, it undertakes to discharge the latter's obligations. (Page 124.)

4. CORPORATIONS—ASSUMPTION OF OBLIGATIONS—PERSONAL INJURIES.—Where a new corporation takes over the property of another corporation, and assumes all its debts and obligations, it will be liable in damages for personal injuries suffered by an employee of the old corporation, caused by the negligence of the servants of the latter corporation. (Page 127.)

5. MASTER AND SERVANT—LIABILITY FOR INJURY TO SERVANT.—In an action for damages for injury to plaintiff's eye, due to negligence of an employee of defendant in permitting a bolt to come in contact with a sand belt causing sand to fly therefrom in sufficient quantities to injure plaintiff's eye, a question is made for the jury as to the negligence of defendant's servant, and when the injury was severe, it is proper to infer that it was sand and not dust that caused the injury. (Page 128.)

6. MASTER AND SERVANT—ASSUMED RISK.—When plaintiff is a minor seventeen or eighteen years old, and is injured by sand being blown into his eye from a sand belt at which he was working, when he stooped to pick something from the floor, it can not be said as a matter of law that he assumed the risk of this danger; and in determining whether plaintiff assumed the risk of the danger of flying sand, the jury must consider his age, and intelligence and the amount of experience he has had on that particular work. (Page 129.)

Appeal from Clay Circuit Court, Western District; *W. J. Driver,* Judge; reversed.

G. B. Oliver, for appellant.

1. If the appellant was young, inexperienced and without warning placed in a dangerous place to work, and was injured by sand getting into his eye through the negligence and carelessness of Phillips in failing to adjust a proper nose-piece with a proper-sized shoulder to grind the handles, etc., there was liability on the part of the Western Handle Company at least. In determining whether the court was authorized in taking these questions from the jury, that view of the evidence will be taken which is most favorable to the losing party, the appellant. 149 S. W. (Ark.) 90.

2. Wheeler filed no answer and made no defense. The directed verdict was erroneous as to him.

If the Western Handle Company is liable, the Ferguson & Wheeler Land, Lumber & Handle Company is also liable.

A new corporation may become responsible for the liabilities of the old, where the circumstances are such as to warrant the conclusion that the new corporation is but a mere continuation of the old; or where, in express terms, or by reasonable implication, it assumed the debts of the old corporation, or where the assets of the old corporation remain liable in the hands of the new one, the circumstances being such as to render the transaction a division of corporate property as a trust fund for the payment of creditors, or a conveyance for the purpose of hindering, delaying or defrauding creditors. 10 Cyc. 286-288; Thompson on Corp., § § 6542-6543, 6545, 6547; *Id.*, § § 265, 266; 23 Am. & Eng. Enc. of L. 773, 775; 86 Ark. 300-303; 30 Am. & Eng. Enc. of L. 887; 87 N. W. 656.

Basil Baker, for appellee.

The evidence shows that the two corporations are not the same in law or in fact. The fact that some of the stockholders were interested in both corporations does not make of them one corporation. 69 Ark. 85; 94 Ark. 461.

As to whether the new corporation will be responsible for the liabilities of the old, it is a question of intent to be determined from the terms of its articles of association. 5 Thompson on Corp., § 5983; 63 S. W. 776.

Where there is no statute fixing liability upon a corporation which succeeds another in property rights for the debts or liabilities of the first, and no contract or agreement that successor will assume such liabilities, as is the case in this State, then there is no liability except for contractual obligations, and then only in chancery wherein the corporate assets are bound as a trust fund, or where the transaction is fraudulent and with intent of cheating creditors. 10 Cyc. 287 *et seq.;* 9 Am. & Eng. Enc. of L. (2 ed.) 608, 609, 619; 15 How. 304; 8 Peters, 284; 37 Ark. 23; *Id.* 17; 59 Ark. 562.

McCULLOCH, C. J. This is an action instituted by the plaintiff, Herbert Good, against two Missouri corporations, the Western Handle Company, and the Ferguson & Wheeler Land, Lumber & Handle Company, George

B. Wheeler and William Ferguson, to recover damages for personal injuries received while at work in the service of the first of the above-named corporations.

The Western Handle Company seems not to have been served with process, and did not appear in the action. The same may be said of William Ferguson, another of the defendants.

The Ferguson & Wheeler Land, Lumber & Handle Company answered all of the allegations of the complaint, and the case went to trial upon the issues thus made.

Defendant Wheeler, though having been served with process, did not file an answer.

Upon the testimony adduced by plaintiff, the court gave a peremptory instruction in favor of the defendants. Judgment was entered accordingly in defendants' favor, and plaintiff appealed.

Counsel for plaintiff insist, in the first place, that there should have been a judgment by default against defendant, Wheeler. But as plaintiff did not move for such judgment, and went to trial upon the answer of the other defendant, which presented a defense in some respects common to all the defendants, it is too late now to complain that the court treated the defense as a common one, and directed a verdict against the plaintiff in favor of all of the defendants. If, therefore, the testimony adduced at the trial was not sufficient to warrant a verdict against Wheeler, or the other defendants served in the action, the court was correct in taking the case from the jury and rendering a judgment against the plaintiff.

The case is presented here principally on the question of the responsibility of the Ferguson & Wheeler Land, Lumber & Handle Company for the liabilities of the other corporation, including its liability, if any is established, for the plaintiff's injury. We will direct our attention, therefore, to that question.

The testimony concerning the status of the two corporations, their relations to each other, and the amount of property and liabilities of each, is confined to the testi-

mony of Mr. George B. Wheeler, who was one of the organizers and officers of each corporation as well as a member of the partnership composed of himself and William Ferguson under the style of Ferguson & Wheeler, which owned substantially all the stock in both corporations. The firm of Ferguson & Wheeler had its principal offices in Poplar Bluff, Missouri, but owned considerable property in Arkansas as well as in Missouri. It owned about 3,000 acres of timber land and operated two or more plants in Arkansas for the manufacture of lumber and its products. It also owned and operated a mercantile establishment at Corning, Arkansas. In the spring of the year 1907, the members of the firm of Ferguson & Wheeler organized and incorporated the Western Handle Company, the members of that firm owning the stock except a few qualifying shares issued to its employees. Another person, Angus McNeill, was to be an equal stockholder, but he didn't pay for any of his stock, and the shares were not issued to him. The handle factory near Corning, at which plaintiff was working when he received his injuries, was operated in the name of the Western Handle Company, but it was, in fact, owned by the firm of Ferguson & Wheeler. The intention was for the partnership to convey the property to said corporation, but that was never done. Plaintiff received his injuries on December 20, 1907, while the plant was being operated in the name of the Western Handle Company. During the operation of the business of that corporation all the debts contracted by it were guaranteed by the members of the firm of Ferguson & Wheeler. Mr. Wheeler testified positively as to that fact. In April, 1908, it was found that the Western Handle Company was considerably involved in debt, as was also the firm of Ferguson & Wheeler, though neither of the concerns were shown to have been insolvent. Both concerns were heavily in debt, and the business condition brought about by the panic of 1907 made it necessary for a change to be made in the business. The Western Handle Company was incorporated in the sum of $30,000, and the idea was conceived

by the members of the Ferguson & Wheeler firm to organize a new corporation with a much larger capital and take over the property and business of the Western Handle Company, and also that of the firm of Ferguson & Wheeler, in order that a new loan could be floated sufficient to cover all of the old indebtedness. This idea was carried out by the organization of another corporation named the Ferguson & Wheeler Land, Lumber & Handle Company, which was incorporated with a capital stock in the sum of $300,000. The stock was all taken by the two members of the firm except one qualifying share issued to its bookkeeper. Ferguson was president of both corporations and Wheeler was treasurer of both. Upon the organization of the new corporation, the Western Handle Company conveyed all of its property to the firm of Ferguson & Wheeler, who, in turn, conveyed it to the new corporation. The partnership, by separate deeds, conveyed its real estate to the new corporation, and the testimony of Mr. Wheeler shows that all the property of the old corporation and all the property of the partnership except the stock of goods at Corning was turned over to the new corporation. All of the transactions with respect to these changes took place simultaneously, or substantially so, that is, within a few days of each other. The deed from the Western Handle Company to Ferguson & Wheeler recited that "in consideration of value received," the corporation conveyed "all the personal property and effects of this company" to Ferguson & Wheeler, a partnership composed of William Ferguson and George B. Wheeler; and the deed from Ferguson & Wheeler to the new corporation, the Ferguson & Wheeler Land, Lumber & Handle Company recited that "in consideration of value received," said firm conveyed "all personal property and effects" to the new corporation. The last deed contained the following clause with reference to the property conveyed, which was substantially in the words of the clause in the deed from the Western Handle Company to the partnership, towit: "It being intended hereby to convey, and the grantor herein has

conveyed, to said corporation all of the personal property and effects of the grantor, of every kind and character and wheresoever located, consisting of goods, wares and merchandise, finished and unfinished logs, lumber, accounts, bills receivable, etc., as evidenced by their books March 1, 1908."

Mr. Wheeler testified that these changes were merely for the purpose of convenience of himself and Mr. Ferguson, who were the real owners of all the property, and of all the stock of each of the corporations, that they were personally liable as guarantors for all the debts of the Western Handle Company, that the partnership assumed, and was to pay all the debts of the Western Handle Company, and that the new corporation likewise agreed to assume and pay all of said debts. He testified further that the new corporation borrowed $30,000, and applied it in satisfaction of debts of the Western Handle Company. In making these various changes and conveyances, no inventories were taken either of the property of the Western Handle Company or of Ferguson & Wheeler, and no consideration was actually paid for the conveyances.

All of the transactions and conveyances were, according to the testimony of Mr. Wheeler, merely for the purpose of getting title to the property in the name of the new corporation, and of consolidating all of the interests of the owners, Ferguson & Wheeler, in the new corporation. It is true that Mr. Wheeler, in his testimony, seems to make some distinction between assuming the "debts" and the "liabilities" of the Western Handle Company, and mentions the fact that at the time of these transactions, the plaintiff had not asserted any claim for damages, and that they did not take into consideration that claim; but his testimony is certainly broad enough to justify the conclusion that there was an agreement that all the liabilities of the Western Handle Company were to be discharged. He testifies positively that there was no intention on the part of himself or his partner to escape the payment of any just liability of the Western Handle Company, and that it was their intention to pay

all the debts, and merely transferred the property for convenience in consolidating the property and business in the hands of a new corporation of a much larger capital, so that a loan in sufficient amount could be floated to pay off all obligations and operate the business.

It is additionally significant that all of the insurance policies, including employer's liability insurance as well as other kinds, were transferred by the old to the new corporation. In fact, the inference from Mr. Wheeler's testimony is, that every right and interest possessed by the old corporation passed to the new.

After going over the matter thoroughly in his examination in chief and cross examination, in which he reiterated the statements hereinbefore referred to, he was recalled to the witness stand, and stated positively that the firm of Ferguson & Wheeler assumed the payment of all the debts of the Western Handle Company when the property was transferred, and that the Ferguson & Wheeler Land, Lumber & Handle Company, in taking over the assets of the old corporation, assumed the payment of debts to the same extent that the firm of Ferguson & Wheeler had done. It should be noticed, in this connection, that the deeds of conveyance did not recite any specific consideration." It was competent, of course, to show what the real purpose and consideration was, and no rule of evidence was violated in the introduction of that testimony. *St. Louis & North Arkansas Rd. Co.* v. *Crandell,* 75 Ark. 89.

The case was here formerly on appeal from a judgment in plaintiff's favor, and we reversed it on the sole ground that the court erred in admitting in evidence a deposition of George B. Wheeler. In stating the law of the case, we said that "liability, if any (of defendant, Ferguson & Wheeler, Land, Lumber & Handle Company) must arise from the terms of the purchase." 97 Ark. 106.

This court has announced the rule, which is in line with the weight of authority, that "the assets of an incorporated company are a trust fund for the payment of its debts, and may be followed into the hands of any person acquiring them with notice of the trust." *Jones, Mc-*

Dowell & Co. v. *Ark. M. & A. Co.,* 38 Ark. 17. This doctrine is not, however, without its restrictions. *Worthen* v. *Griffith,* 59 Ark. 562. The law seems to be well settled that a new corporation is not liable for the debts of an old corporation merely because the former was organized to succeed the latter, and in *Lange* v. *Burke,* 69 Ark. 85, it was held that the fact that two corporations were practically under the same control, and had the same officers, employing the same agents and having intimate business relations with each other, did not necessarily prove that the two corporations were in fact the same in the sense that one could not assert a claim against the other while insolvent so as to take the assets away from other creditors. The necessary inference from that decision is, that under those circumstances, neither of the corporations would have been liable for the debts of the other merely because of their identity of interest in the respects named above.

The following statement is given of the rule with respect to liability of a new corporation for the debts of an old one:

"(1) Where the circumstances are such as to warrant the conclusion that the former is not a separate and distinct corporation, but merely a continuation of the latter, and hence the same person in law; and (2) where it has in express terms or by reasonable implication assumed the debts of the old corporation." 10 Cyc. p. 287.

These two rules seem to be sustained by the authorities, and the last one has been expressly approved by this court. *Spear Mining Co.* v. *Shinn,* 93 Ark. 346. In that case, it was also held that under those circumstances, a creditor of the first corporation could maintain an action at law against the succeeding corporation which had, either by express terms of the contract or by reasonable implication, assumed payment of the liabilities.

The doctrine hereinbefore announced is approved by Mr. Thompson in his work on Corporations, Vol. 5 (2 ed.), section 6090.

The Supreme Court of Michigan, in the case of *Chase* v. *Michigan Telephone Co.,* 121 Mich. 631, 80 N. W.

717, stated the following rules covering the liability of corporations:

"Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when, by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) when the new corporation is a mere continuance of the old; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser."

To the same effect, see *Austin* v. *Bank,* 49 Neb. 412, 68 N. W. 628.

In *The Friedenwald Company* v. *Asheville Tobacco Works,* 117 N. C. 544, it was held that:

"Where a corporation engaged in business, transfers its entire property, rights and franchises to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned, and to substitute the new one as debtor."

Now, in this case the testimony is sufficient to warrant a finding that there was an express agreement on the part of the new corporation to discharge all liabilities of the old one, and certainly the testimony is sufficient to bring the case within the rules announced by this court in *Spear Mining Company* v. *Shinn, supra,* that one corporation may become liable for the debts of another where it has "by reasonable implication assumed the payment of the liabilities of the debtor corporation." It is unnecessary to repeat the various facts and circumstances which necessarily lead to the implication that it was intended for the new corporation to take the property of the old and discharge all the latter's obligations. The jury could have inferred as much from the testimony, and the court erred in taking that question from the jury.

The next question is, whether or not the plaintiff

made out a case of negligence against the Western Handle Company so as to entitle him to compensation for his injuries. At the time of the occurrence, he was a minor between seventeen and eighteen years of age. The company was operating a handle factory, and plaintiff was employed at the time as a helper to one of the men engaged in smoothing off the handles or "grinding" them, as it is expressed. The grinding was done by bringing the handle in contact with a rapidly moving belt, eight or ten feet in length, which was covered by sand glued to it. The handles, of different sizes and kinds, were brought from lathes in another room and placed near the belt where they were to be ground. In order to grind or polish the handles, they would be placed in contact with the moving belt. This was done by sticking one end in a wooden nose-piece on the end of an iron strap, which was controlled by the operator's foot on a pedal attached to the strap. In this way one end of the handle would be controlled by the action of the foot, and the operator would take hold of the other end with his hand. The handle would thus be drawn down so as to bring it in contact with the moving belt. The wooden nose-piece was bolted to the iron strap, and in the ordinary operation, the piece would frequently come in contact with the belt and wear off its surface. This made it necessary for the grinder to frequently put in a new nose-piece, and it was his duty to do this as well as to look after the movement of the belt and other things in connection with his work. Plaintiff was stooping down near the machine, picking up some handles which had been polished, as was his duty to do, and it is claimed that sand was caused to fly from the belt on account of negligence on the part of the grinder in permitting an exposed steel bolt or nut with a square shoulder to come in contact with the belt, and that the sand flew into one of plaintiff's eyes and severely injured it. At the time of the trial, he had lost the sight of the eye entirely. Negligence of Phillips, the grinder, is alleged in allowing the nose-piece to become so worn that it would not hold the handles securely, and that the steel bolt or nut was permitted to come in con-

tact with the belt. Negligence of the employer is also alleged in failing to give plaintiff warning and instruction as to his duty in avoiding sand flying from the belt.

Our conclusion is, that there was enough evidence to go to the jury on the question of negligence of Phillips in permitting the bolt or tap to come in contact with the belt, and that this caused the sand to fly from the belt in sufficient quantities to injure plaintiff's eye. The question is, by no means, free from doubt, but it is one, we think, peculiarly for the jury.

It is earnestly insisted by learned counsel for defendants that the testimony does not show definitely that it was sand that flew in plaintiff's eye, but that it was merely dust which necessarily flew from the wooden handles being polished. We think, however, that the testimony of plaintiff himself was sufficient to show that it was sand, and not dust, that flew into his eye; and, besides that, the injury was so severe and the pain so acute that it warranted the jury in drawing the inference that it was caused by sand, and not by dust.

Nor were the circumstances such as warranted the court in holding as a matter of law that plaintiff assumed the risks of this danger. It is true that sand would fly to some extent necessarily in the operation of the work of polishing the handles. This is shown by the fact that in something like a day's work, the sand belts would become smooth to the extent that the coat of sand would have to be renewed. In other words, the testimony shows that there was some sand flying from the belt all the time, but not to the extent, as plaintiff's testimony tended to show, when the steel bolt came in contact with the belt. In determining whether or not plaintiff assumed the risk of the danger from flying sand while he was stooping near the belt it was important for the jury to consider his age and intelligence, and the amount of experience he had had in that particular work. *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 74; *Arkansas Midland Ry. Co.* v. *Worden,* 90 Ark. 407.

Our conclusion upon the whole case is, that there was enough evidence to go to the jury as to the liability

of all the defendants in this action, and that the court erred in giving a peremptory instruction. Reversed and remanded for a new trial.

HILL v. GIBSON.

Opinion delivered February 24, 1913.

1. FENCING DISTRICTS—DAMAGE TO CROPS.—Where plaintiff owns land in a fencing district properly established under sections 1378, *et seq.* of Kirby's Digest, defendant is liable to plaintiff for damage done by his stock to plaintiff's crops, which he permitted to run at large in said district, after a lawful fence has once been built. (Page 134.)
2. FENCING DISTRICTS—ORDER OF COURT.—The order of the court creating the district remains effective, until the district is dissolved. (Page 135.)
3. APPEAL AND ERROR—HARMLESS ERROR.—When the jury returns a verdict according to the law of the case, the case will not be reversed when an erroneous instruction was given. (Page 134.)

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

STATEMENT BY THE COURT.

Appellee sued appellant for damages alleged to have been caused by the trespassing of appellant's stock upon her crops. The complaint alleges that appellee is the owner of certain lands within Fencing District No. 3, of Conway County; that said district is a legally constituted and existing fencing district of said county, within which it is made unlawful for stock to run at large. That appellant turned his cattle on her crop on her said land to her damage in the sum of one hundred dollars, and she prayed judgment for that sum.

The appellant's answer denied all the material allegations of the complaint, specifically pleading that if said district was otherwise established, it was not unlawful for stock to run at large therein at the times alleged in the complaint, for that said district was not at said time enclosed by a lawful fence.

What amounts to an agreed statement of facts is set out in the bill of exceptions, and is as follows:

"The testimony showed the proper orders of the county court for the formation of the fencing district

mentioned in the complaint. It also showed that the plaintiff owned land in said district, and for the year 1911, rented land therein to one W. H. Faucett for $5 per acre, and that some time during the fall of said year, or early winter, the said Faucett sold his crop to the plaintiff in settlement of the rent. The testimony further tended to show that the defendant, Bob Hill, had control of land in said district during said year, and made a crop thereon and owned and herded about one hundred head of cattle after his crops were gathered upon the lands cultivated by him and other portions of said fencing district about a mile from the land on which the crop was claimed to have been destroyed; that some time about the first of February, 1912, about fifteen head of cattle were seen on plaintiff's land where the crop had been made, and that said cattle were all but one branded "O." The testimony further shows that defendant's cattle were branded "O." The testimony further tended to show that one Bradley had about one hundred head of cattle in said fencing district herded by the same herder that herded defendant's cattle. The testimony further tended to show that hogs had ranged in plaintiff's crop, and that after the crops had been gathered that defendant and said Bradley relieved their herder and permitted the cattle to roam at will in said fencing district, and which was in February, 1912. The testimony further tended to show that the crop on plaintiff's land had been damaged by stock, but there was no testimony as to whose stock did the damage except that the bunch of about fifteen head were branded "O." The testimony also tended to show that during the month of January, 1912, cattle branded with an "O" were seen at different times in the plaintiff's crop.

The undisputed testimony showed that the fencing district was not enclosed by a lawful fence, and that on account of gates being down and the fence around said district not being as required by law, cattle and other stock could go in and out of said fencing district during the year 1911, and up until after the alleged injury was committed, at will.

The testimony tended to show that the crop had been

damaged by stock to the extent of the verdict rendered by the jury.

This was all that the testimony established or tended to establish, and was all the testimony in the case."

On motion of plaintiff, and over the objection of defendant, the court instructed the jury as follows:

1. "You are instructed that if you find from the evidence in this case that the defendant was herding his cattle on land in the fencing district, or was permitting them to run at large on such land, and they escaped and went upon the land of plaintiff inside the district and damaged the crop, then you will find for the plaintiff, notwithstanding the district fence was not a lawful fence and assess plaintiff's damage at such sum as the evidence shows was caused by the stock of defendant."

And refused the following instructions asked by defendant:

1. "You are instructed to return a verdict for the defendant."

3. "You are instructed that if the defendant had the right to herd his cattle on portions of the district, and they strayed off on plaintiff's ground for that she could not recover for the injury."

4. "You are instructed that you can not find for the plaintiff more than nominal damages, as there is no proof of the amount of damages done by defendant's stock."

And upon motion of defendant, gave the following instructions:

2. "You are instructed that the undisputed testimony shows that the fencing district was not enclosed by a lawful fence at the time of the alleged injury, and you can not find for the plaintiff on the ground that the defendant permitted his cattle to run at large inside of a district having a lawful fence."

5. "The proof shows that the land was rented to Faucett for standing rent. For damages to the crop while he owned it, the plaintiff can not recover. She can not recover unless you find that she bought the crop from Faucett, and then only for such damage as was

caused by defendant's stock after plaintiff bought the crop."

There was a verdict for plaintiff for $75 damages, and this appeal was taken from the judgment pronounced thereon.

We have been favored with no brief by appellee, but the case has been ably and fairly briefed by appellant, who presents several questions, which have been considered by the court, but which we do not regard necessary to discuss. But the controlling question in the case, and the one upon which appellant chiefly relies for a reversal is the correctness of instruction numbered one (1) given by the court, and the refusal to give defendant's instruction numbered three. These instructions present the respective theories of the parties to this litigation.

Sellers & Sellers, for appellant:

The trespass sued on herein was not committed in a legally constituted and existing fencing district as the proof shows that the district was not enclosed by a good and lawful fence, therefore, appellant is not liable. Kirby's Digest, Chap. 81.

The common law rule as to the running at large of stock has never been recognized in this State, but on the contrary, the courts have recognized the right of stock owners to permit stock to run at large, as well as the corresponding duty of land owners to fence against them, except in sections where, by special enactment a different rule obtains. Kirby's Digest, Chap. 81; *Ib.* § 1998; 37 Ark. 562; 46 Ark. 207; 48 Ark. 369; 12 A. & E. Enc. (2 ed.) 1041-1042 and note 1.

In order to recover for trespass, it must be shown that the appellant wilfully turned his cattle loose upon the enclosed lands. 12 A. & E. Enc. 1045 and note; 22 S. W. 300; 37 Pac. 893; 21 Pac. 41; 22 L. R. A. 105; 47 L. R. A. 588; 5 Kan. 433; 13 S. W. 937; 22 S. W. (Tex.) 300; 69 Pac. 1024; 92 Am. Dec. 404.

Section 1914, Kirby's Digest, ceases to be operative after January 1, as to crops of preceding year, and the

trespass alleged in case at bar occurred after that date, and appellant's request for peremptory instruction should have been granted.

No briefs for appellee filed.

SMITH, J. (after stating the facts). It appears that at the time of the depredations of defendant's stock, the fencing district was not enclosed with a lawful fence, and that the gates were down, and, consequently, stock could come in or go out of the fencing district at will. The court's instruction, numbered one, and defendant's instruction numbered two, which was given are apparently in conflict, for this second instruction tells the jury that defendant would not be liable for the damage done by his stock if the fencing district was not enclosed by a lawful fence. Under the evidence, this instruction would have directed a verdict for the defendant, but the jury's failure to follow it in this case is not prejudicial error for the reason that it is not a correct declaration of the law. The jury evidently followed the court's first instruction, which is the law. *St. L. S. W. Ry. Co.* v. *Grayson,* 89 Ark. 154.

These fencing districts are provided for by law. Sections 1378 to 1413, Kirby's Digest. These sections provide the procedure for their organization and contemplate that considerable expense will be incurred upon their creation, and provision is made for their maintenance and protection. When the order of the county court is made, the fencing district becomes a permanent entity, until it is dissolved; but until it is dissolved, the law fixes the rights and liabilities of residents within the district. The petition for the establishment of the district specifies what stock the petitioners wish to restrain from running at large, and when the district is established, the court makes an order restraining the stock mentioned in the petition, from running at large within such district, and the fencing district law applies to all such stock as are so mentioned. Kirby's Digest, section 1378. And, thereafter, it is unlawful for any person, owning or having control of stock that has been restrained from running at large, to knowingly permit such stock to run at large within the territory comprising such

fencing district, and any person, who violates the law by so doing, subjects himself to a fine. Section 1405, Kirby's Digest, deals with the same subject and provides for a double liability for damages done. It is as follows:

"Sec. 1405. After any fencing district has been inclosed by a good and lawful fence, it shall be unlawful for any person who is the owner, or who has control of any kind of stock, to let the same run at large in said district, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not less than one nor more than fifty dollars, and, in addition to the above fine, shall be liable for double the amount of any damages that any person may sustain by reason of said stock running at large in said district, to be recovered by action before any court having competent jurisdiction. *Provided,* this section shall not prohibit any person from fencing his or her lands, or any part thereof, separately, and pasturing the same."

The court's second instruction in effect interprets this section, as if it read, "after any fencing district has been inclosed by a good and lawful fence, *and, during the time, the same is maintained,* it shall be unlawful, etc." We do not think it a fair interpretation of the fencing law to say that the order of the court, establishing the district is effective only when the fences are lawful and the gates are closed, but we rather think that after the court has made its order, establishing the district and prohibiting stock from running at large, and after a lawful fence has once been built, that the order remains effective until the district is dissolved.

Appellant has collected a number of cases which, in effect, hold that the owner of stock is not liable for the trespasses of his stock unless they enter a close which is enclosed by a fence which the law has said shall be a lawful one, unless the owner wilfully drives his cattle or stock upon such defectively and insufficiently enclosed premises, in which last event, he would be liable without reference to the legal sufficiency of the fence. But it would be abstract to consider here the liability of the

owner of stock living without the district for damages for the trespass of his stock upon the lands embraced in a fencing district, enclosed by a fence which was not a lawful one. The defendant here resided in the district, and when he turned his stock loose, they would be unrestrained from entering upon any land where pasturage was good within the district. We conclude, therefore, that the judgment is correct, and it is accordingly affirmed.

BURBRIDGE v. GOTSCH.

Opinion delivered February 24, 1913.

1. TAX TITLES—CONFIRMATION—NOTICE.—While § 662 of Kirby's Digest, authorizing the confirmation of tax sales, requires that the notice to be published calling on all persons interested in the land to appear, shall be signed by the purchaser, his heirs or legal representatives, if the notice is signed by the clerk and also by the petitioner's attorney, the signature of the clerk will be treated as surplusage and the notice will be held to be in compliance with the statute as one given by the petitioner. (Page 139.)
2. TAX TITLE—CONFIRMATION—IRREGULARITY.—Where, in the proceeding to confirm a tax title, the purchaser failed to have the notice signed in the manner required by the statute, the failure was a mere irregularity which can not be taken advantage of in an action to vacate the decree confirming the tax sale. (Page 140.)
3. JUDGMENTS—REGULARITY.—A decree will be held to have been rendered during term time, where an order of adjournment appears in the record, is erased, then the decree entered, and then the order of adjournment rewritten. (Page 140.)
4. JUDGMENTS—FRAUD.—A judgment will be canceled for fraud, only when the judgment was procured by fraud. (Page 140.)

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

E. E. Williams and *B. L. Herring,* for appellant.

1. The confirmation decrees are void for want of jurisdiction. The statute, Kirby's Digest, § § 661 to 675, inclusive, prescribes minutely the whole procedure for confirming a defective tax title. A valid confirmation can only be had "by pursuing the rules hereinafter prescribed." *Id.,* § 661. One of these rules is, that "the pur-

chaser, or the heirs and legal representatives of purchasers" shall publish notice for six weeks in succession in some newspaper, etc. *Id.*, § 662. A notice published by the clerk or by the attorney of the petitioner is not a compliance with the statute and can confer no jurisdiction on the court.

A judgment rendered without legal service on the defendants is "absolutely null and void." Kirby's Dig., § 4424. The court must have jurisdiction both of the subject-matter of the suit and the parties thereto. 150 S. W. 135, 136.

2. The decrees should be set aside for fraud in the procurement of the same. Under the statute the payment of taxes for three years, two of which must be after the time for redemption has expired, is a condition precedent to the filing of a petition for confirmation; and, as said by this court, "It is the payment of taxes and not the exhibition of tax receipts, which confers jurisdiction upon the court to confirm the tax title of the petitioner." 75 Ark. 415, 426.

3. The decrees were rendered in vacation, *and are void* for that reason, appearing upon the record after the adjourning order of the January term, 1907, and before the opening order of the fall term of the court, with no record evidence to show that there was an adjourned session of the court between those dates. 86 Ark. 591; 75 Ark. 420; 71 Ark. 226; 40 Ark. 224.

D. A. Bradham, for appellee.

1. The decrees are valid. The tax title statute for confirmation was fully complied with. The decrees will be construed by this court upon the record alone, which is conclusive. 150 S. W. (Ark.) 135; Kirby's Dig., § 4425; 49 Ark. 397. See also 50 Ark. 188; 22 Ark. 118. On collateral attack, the judgment can be impeached only for the want of jurisdiction appearing on the face of the judgment roll. *Supra;* 121 Am. St. Rep. 105; 134 *Id.* 806.

As a direct attack upon the decrees, the case of *Boynton* v. *Ashabranner,* 75 Ark. 426, cited by appellant

in support of his contention, is an authority supporting appellee.

No such fraud is shown as this court will recognize as a reason for setting aside the decrees. 90 Ark. 170; 97 Ark. 314. The burden was upon appellants to show fraud, and they can not ask the vacation of the decrees without such showing. 93 Ark. 462.

The mere fact that they had a valid defense will not of itself warrant the court in setting aside the decrees. 95 Ark. 178.

McCULLOCH, C. J. This is an action instituted by appellants in the chancery court of Bradley County against appellees, in which it is sought to vacate two decrees of said chancery court rendered at the January term, 1907, confirming certain tax sales under which appellees claim title to the lands described in the decrees.

The validity of the two decrees is challenged on the grounds (1) that the court did not acquire jurisdiction of the subject-matter; (2) that the decrees were rendered in vacation, and (3) that they were obtained by fraud practiced by the attorneys for the petitioner, Emma Gotsch.

The case was tried on the record in the two former proceedings, in which the decrees sought to be cancelled were rendered; and also upon an agreed statement of facts, and other testimony.

Appellants showed that they were the owners of the original titles, and that appellees hold under a forfeiture to the State for taxes in 1869, and subsequent conveyances.

It is satisfactorily proved in the present case that the petitioners for confirmation had not paid taxes for three years when the petitions were filed and the decrees were rendered, and, of course, tax receipts showing the payment of taxes for at least three years were not exhibited as required by the confirmation statute. The confirmation decrees themselves, however, recite a finding by the court that the taxes had been paid for three years prior to the filing of the petitions, and each of the decrees also recites that notice of publication had been duly pub-

lished "for six weeks previous to the petition for confirmation, and the last day thereof appearing twenty days before the first day of the present term of this court." Among the papers on file in the confirmation proceeding are the affidavits of the publishers showing publication of the notice, and it appears from these notices that they are signed by the clerk of the court, and also by the attorney for the petitioner.

On a final hearing the court dismissed the complaint for want of equity.

The basis of the charge that the court was without jurisdiction is that the statute was not complied with in the matter of giving notice. The statute concerning confirmation of tax titles provides that "the purchasers, or the heirs and legal representatives of purchasers * * * may at any time after the expiration of the time allowed for such redemption, publish six weeks in succession in some newspaper published in the county where the lands lie * * * a notice calling on all persons who can set up any right to the lands so purchased in consequence of any informality or any irregularity connected with such sale to show cause at the first term of the circuit court of the county, or if there be a separate chancery court in the county, then at the first term of the chancery court, after the publication of the notice, why the sale so made should not be confirmed." Kirby's Digest, section 662.

The next two sections provide that "the notice provided in the preceding section shall state the authority under which the sale took place and give the description of the land purchased and the nature of the title by which it is held," and that "the last insertion of said notice in the newspaper shall be at least twenty days prior to the first day of the term of court at which application for confirmation is to be made."

It will be noted that under this statute, notice is to be given by the petitioners themselves, whereas, under the act of 1899, providing for confirmation of titles, the provision is for notice by the clerk after the filing of the

petition. This court has held that the act of 1899 is not applicable to confirmation of tax sales. *Ex parte Morrison,* 69 Ark. 517.

The notice in each of the cases was in strict compliance with the statute authorizing confirmation of tax sales except that it was signed by the clerk; but as it was also signed by the attorney for the petitioners the signature of the clerk may be treated as surplusage, and the notice is sufficient as one given by the petitioner. However, if we should hold otherwise on that question, the failure to have the notice signed in the manner required by the statute was a mere irregularity which could not be taken advantage of in an attack of this kind. *Porter* v. *Dooley,* 66 Ark. 1; *Johnson* v. *Lesser,* 76 Ark. 465.

The next attack upon the validity of the confirmation decrees is on the ground that they were rendered in vacation.

There is nothing in the evidence to sustain this attack. The records prepared and kept by the clerk show that the decrees were entered during term time. It is true there appears on the record preceding these decrees an order of adjournment, but it had been erased or scratched out and another order of adjournment entered following the record of the confirmation decrees. This condition of the record, even unexplained, would not be sufficient to overturn the clerk's entry of the decrees upon the record. *Fiddyment* v. *Bateman,* 97 Ark. 76. But the condition of the record was fully explained by the testimony of the clerk, who stated that the adjourning order was at first erroneously written before these decrees were entered while the court was still in session.

In support of the attack on the decrees for fraud in their procurement appellants called as a witness the attorney who acted for the petitioners in the confirmation proceedings, and he stated, in substance, that he did not represent to the court that he had the tax receipts, but that he correctly stated the facts at the time of the rendition of the decrees. Appellants also rely upon proof that the petitioners had not in fact paid taxes on the

lands for three years. This was not sufficient to show fraud in procurement of the decrees. *Boynton* v. *Ashabranner,* 75 Ark. 415; *Bank of Pine Bluff* v. *Levi,* 90 Ark. 170; *Terry* v. *Logue,* 97 Ark. 314.

The facts in *Boynton* v. *Ashabranner, supra,* were very similar to the facts of the present case as to the question of alleged fraud. There the court said:

"The defendant testified that he had paid the taxes for the three years preceding the confirmation, and exhibited his tax receipts, and it follows from that testimony that the petition for confirmation could not have paid the taxes for those years. But the confirmation decree recites the exhibition by the petitioner of tax receipts, and the court necessarily found before entering the decree that petitioner had paid the taxes. It is not sufficient to show now that the finding was erroneous because, in the absence of fraud, that finding is conclusive, and another trial of the question can not be permitted. The court may have reached its conclusion upon false or incompetent testimony as to payment of taxes, yet that would not constitute grounds for reopening the question and trying it anew. * * * Mere proof, however, that the taxes were paid by the defendant is not sufficient, in the absence of an affirmative showing of fraud practiced on the court. It is the payment of taxes, and not the exhibition of tax receipts, which confers jurisdiction upon the court to confirm the tax title of the petitioner, and a finding by the court in that proceeding of that jurisdictional fact is final and conclusive until the contrary be shown, and fraud be shown to have been practiced upon the court inducing that finding."

Our conclusion is that appellants failed to establish their claim of fraud in the procurement of the confirmation decrees and that the chancellor was correct in refusing to vacate the decrees.

Affirmed.

THE CITIZENS BANK OF MAMMOTH SPRING, ARKANSAS, v. THE COMMERCIAL NATIONAL BANK OF CHICAGO, ILLINOIS.

Opinion delivered January 27, 1913.

1. JUSTICES OF THE PEACE—APPEAL—PERSONS ENTITLED TO APPEAL.—Where an attachment suit was brought against a nonresident defendant, and a garnishment sued out against the appellant, and the appellee files an interplea, the appellee may prosecute an appeal from a judgment of the justice dismissing his interplea. (Page 145.)
2. GARNISHMENT—LIABILITY OF GARNISHEE.—The garnishee who, in an action before a justice, pays the money garnished to the plaintiff, will be liable for the same to an intervenor who has filed an interplea claiming the same, and when, on appeal from a judgment of the justice dismissing the interplea, it is determined that he is entitled to the money in the garnishee's hands. (Page 145.)
3. JUDGMENTS—ATTACK FOR ERRORS OR FRAUD.—Although a judgment is erroneous and may be set aside on appeal, it can not be attacked in an independent action except on proof of fraud practiced in its procurement. (Page 145.)
4. JUDGMENTS—ATTACK FOR ERRORS OR IRREGULARITIES.—Where the proper order of the court in an action would have been to have ordered the garnishee to have paid the money in its hands to the claimant, instead of rendering judgment against the garnishee for the amount and adjudging costs against it, the error of the court might have been corrected on appeal, but can not be reached in an independent action to set aside the judgment. (Page 146.)
5. PLEADING—UNCERTAINTY—REMEDY.—Although the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a cause of action, the defect must be corrected by a motion to make more definite and certain, and not by demurrer. (Page 148.)

Appeal from Fulton Circuit Court; *John W. Meeks*, Judge; reversed.

STATEMENT BY THE COURT.

On the 28th day of March, 1910, the Wood Grocer Company, of Mammoth Spring, Arkansas, instituted an action of attachment in a justice of the peace court against L. Starks Company, a foreign corporation, and sued out a writ of garnishment against the Citizens Bank of Mammoth Spring. On the return date of the attach-

ment the Citizens Bank appeared in court and answered that it had in its possession the sum of two hundred forty-nine dollars and forty cents, the property of defendant, L. Starks Company. The Commercial National Bank of Chicago filed an intervention in the justice court, claiming said sum of $249.40 as its property. The justice of the peace found that the Commercial National Bank failed to state facts sufficient to entitle it to an investigation of its claim under section 391, Kirby's Digest, and dismissed its interplea.

The Citizens Bank was ordered to pay over the money in its hands to the Wood Grocer Company and the judgment then recites as follows: "And after this was done comes the interpleader and files its affidavit and bond for appeal to the Fulton Circuit Court, which is granted and the attachment is not appealed." The Citizens Bank signed the appeal bond as surety for the Commercial National Bank, and in it it is recited that "this appeal being on the part of said interpleader only." In the circuit court the Wood Grocer Company filed a motion to dismiss the interplea of the Commercial National Bank and the court dismissed the interplea with leave to the interpleader to amend it. Subsequently the Commercial National Bank filed an amended interplea verified by its oath. The Wood Grocer Company then filed a demurrer to the interplea. The court overruled the demurrer and the Wood Grocer Company stood upon the demurrer and declined to plead further. The circuit court after hearing the evidence, rendered a judgment in favor of appellee against appellant for the sum of $255, the amount of the fund which was garnished and which was found to belong to appellee.

Appellant, Citizens Bank of Mammoth Spring, filed its complaint against appellee, Commercial National Bank of Chicago, in the Fulton Circuit Court, in which it set up the above facts and asked the court to vacate and set aside the judgment which it had heretofore rendered in favor of appellee against appellant in the sum of $255. Appellant alleges that the court had no juris-

diction to render the judgment sought to be set aside against it and the judgment is for that reason null and void. The complaint further alleges that the docket of the circuit judge in the case appealed from the justice of the peace, and in which judgment was rendered in favor of appellee against appellant for $255 is as follows: "Fourth day. Judgment for amount against Wood Grocery." That nowhere upon said minutes is it shown that any judgment was authorized to be rendered against appellant in any amount. The prayer of the complaint is that the judgment rendered against appellant in favor of appellee should be declared by the court void and the same is asked to be vacated and set aside.

Appellant demurred to the complaint. The court sustained the demurrer and ordered that the complaint of the appellant be dismissed. From the judgment rendered the appellant has duly prosecuted an appeal to this court.

D. S. King, for appellant.

McCaleb & Reeder and *C. E. Elmore,* for appellee.

HART, J. (after stating the facts). According to the allegations of the complaint an attachment suit was brought before a justice of the peace against a non-resident defendant and a writ of garnishment was sued out against appellant. Appellant appeared in court and answered that it had a sum of money in its hands belonging to defendant amounting to $249.40. Appellee filed its interplea claiming the money. The justice of the peace dismissed the interplea because it did not comply with section 391 of Kirby's Digest. Appellee filed its affidavit and bond for appeal, and appellant became surety on its appeal bond. Appellee had a right to prosecute an appeal from the judgment of the justice of the peace dismissing his interplea. *Bloom* v. *McGehee,* 38 Ark. 329; *Mitchell* v. *Woods,* 11 Ark. 180; *Hershey* v. *Clarksville Institute,* 15 Ark. 128.

According to the allegations of the complaint appellant paid the money in its hands to the plaintiff in the attachment suit after the appeal was taken. It now contends that it had a right to do this because no appeal was taken in the attachment suit. This was not necessary to be done in order to preserve the rights of the interpleader. Appellee, as interpleader, was not interested in the result of the attachment suit. It claimed the funds in the hands of the appellant as its own. The court had dismissed the interplea of the appellee and the appeal was necessary in order to preserve its rights. Appellant was in court and had notice that appellee had taken the appeal and appellant signed its appeal bond. It is true the appeal bond recited that the appeal was taken on the part of the interpleader only; but as we have already seen, appellee was not interested in the judgment on the attachment, and had a right to appeal from the order of the justice of the peace dismissing its interplea. If appellant had desired to be relieved of its liability in the case it should have paid the money into court before the appeal was taken. When the interplea was filed setting forth the claim of appellee to the funds an issue was formed thereon between him and the plaintiff and that issue was whether the money in the hands of the garnishee was the property of the claimant or the principal defendant. As above stated, if the garnishee desired to relieve itself of liability in the matter it should have paid the money into court to be delivered to whichever party the court should decide was entitled to it. Not having done so, it can not in this suit by alleging that it paid the money to the plaintiff in the attachment suit, after the appeal of the interpleader was taken, relieve itself of liability. In the judgment of the circuit court on appeal the court found from the evidence "that the money and draft garnisheed in the hands of the Citizens Bank is the property and money of said Commercial National Bank to the sum of $255, and that the said Commercial National Bank of Chicago should have judgment against the said Citizens Bank in the sum

of $255, its debt." It will be seen from this that the judgment of the circuit court might have been based upon a finding that the money was then in the hands of appellant.

The judgment might have been erroneous and this would depend upon the facts before the court. If erroneous, it could have been set aside on appeal but the validity of it can not be attacked except on account of fraud. In the case of *Pattison* v. *Smith,* 94 Ark. 589, the court held (quoting from syllabus): "A judgment or decree can not be impeached for fraudulent acts or testimony, the truth of which was or might have been in issue in the proceeding which resulted in the judgment assailed, but must be impeached by proof of a fraud practiced in the procurement of the judgment itself."

The proper order of the circuit court would have been to have ordered the garnishee discharged upon payment of the money found in its hands to the claimant, who was adjudged by the court to be entitled to it. Then, too, the court should not have adjudged the costs against the garnishee. But these were errors which might have been corrected on appeal.

Again it is contended that the effect of the order of the circuit court permitting appellee to amend its petition as interpleader was in effect the commencement of a new suit, but we do not think so. The court had a right to permit appellee to amend its petition after appeal to the circuit court. *Sherrill* v. *Bench,* 37 Ark. 560; See also, *Sannoner* v. *Jacobson,* 47 Ark. 31.

Finally it is insisted that the court erred in sustaining the demurrer to the complaint because the complaint alleges that the circuit court did not render any judgment against appellant, and that the judgment in question was entered of record by misprision of the clerk. The allegations of the complaint on this point are as follows:

"That at the February, 1911, term of the Circuit Court of Fulton County, towit.: On the 4th day of said term, the same being on the second day of March, 1911,

the defendant herein, the Commercial National Bank of Chicago, by some unlawful means, and unknown to this plaintiff, and unauthorized by the court, had entered upon the records of this county by fraud, mistake or clerical misprision a personal judgment against this plaintiff, the Citizens Bank of Mammoth Spring, Arkansas, in the sum of $255, which said personal judgment and purported findings are set forth in said record entry which are in words and figures as follows, to wit:

(Here the judgment is copied in the complaint.)

"That said judgment was wrongfully and fraudulently and without either the authority or an order of the court entered of record against this plaintiff, and that this plaintiff, the Citizens Bank, was not indebted to said defendant, the Commercial National Bank, in the sum of $255, or any other sum at that or any other time. Neither was this plaintiff surety on bond, note, bill or otherwise for any person or persons to the defendant, the assignor of defendants, whereby it was or is under obligations of any kind whereby any just judgment either in law or equity could be, or could have been, at that time rendered or legally entered of record against this plaintiff, in this or any other sum whatever."

It will be observed that there is no direct allegation in the complaint that no judgment was rendered by the court against appellant, but in the case of the *St. L. I. M. & S. Ry. Co.* v. *Moss,* 75 Ark. 64, the court held that, although the material allegations of a pleading are ambiguous and uncertain, if the inference may be drawn therefrom by a fair intendment that facts exist sufficient to constitute a cause of action, the defect must be corrected by a motion to make more definite and certain, and not by demurrer. See also, *Greer* v. *Strozier,* 90 Ark. 158.

Again in the case of *Stewart* v. *Fleming,* 96 Ark. 371, the court held that indefiniteness in a pleading should be reached by a motion to make more definite. When tested by this rule the sufficiency of the complaint

should have been reached by a motion to make more definite and certain. In other words, the matters set out in the complaint when tested by demurrer are sufficient to allege that the circuit judge who presided on the 2d day of March, 1911, did not render a judgment against appellant in the case of *Wood Gro. Co.* v. *The Commercial National Bank of Chicago,* and the *Citizens Bank of Mammoth Spring, Arkansas,* but that a judgment against appellant in said cause was entered of record by misprision of the clerk and without an order of the court rendering the same. These allegations, if proved by appellant, would entitle it to the relief prayed for. Therefore, the court erred in sustaining the demurrer to the complaint.

It is true that the complaint is very long and involved. It contains much redundant, immaterial and irrelevant matter, but this should have been reached by motion to strike out, and not by demurrer.

Our Civil Code, section 103, provides that the court at any time before the defense shall on motion of the defendant strike out of the complaint any cause or causes of action improperly joined with the others. If the appellee thought the complaint was defective in this respect, such defect should have been met by motion to strike out and not by demurrer. *Terry* v. *Rossell,* 32 Ark. 478; *Dyer* v. *Jacoway,* 42 Ark. 186; *Ashley* v. *Little Rock,* 56 Ark. 391.

Because the court erred in sustaining the demurrer to the complaint, the judgment must be reversed and the cause remanded for further proceedings according to law.

FALLS CITY CONSTRUCTION CO. *v.* CITY OF FORT SMITH.

Opinion delivered February 24, 1913.

APPEAL AND ERROR—PARTIES—SEPARATE APPEAL OF COPARTY.—When appellant construction company contracted with the Ft. Smith District of Sebastian County to build for it a courthouse, and the

contract provided that the district would deliver the site to appellant "unless prevented from so doing by order of court of competent jurisdiction restraining said county." *Held*, when the chancery court restrains the county from delivering the site, and the appellant having consented, under the contract, to rest upon the condition named, and the district having refused to prosecute an appeal from the chancellor's order, the decree of the chancellor cuts off any right appellant had under the plain terms of the contract, and the appellant has no right of appeal.

Appeal from Sebastian Chancery Court; *J. V. Bourland,* Chancellor; affirmed.

Geo. W. Dodd and *Ira D. Oglesby,* for appellants.

Vincent M. Miles, for appellee.

McCULLOCH, C. J. The county courthouse of the Fort Smith District of Sebastian County was constructed in the year 1888 upon a block of ground in the City of Fort Smith patented to the City by the United States (quoting from the language of the patent) "to be used by it for the erection thereon of public buildings, a county courthouse for the Fort Smith District of Sebastian County, Arkansas, and for a public park." The building was constructed by the district, but at the time of its erection a contract was entered into between the district and the city whereby the district leased to the city certain rooms and parts of the building for use as public offices of the city officials, it being stipulated that the lease should continue "while such building may stand." The city paid to the district a rental of $8,000 in four annual instalments, and agreed to pay one-third of fuel expenses, cost of repair of furnace and closets, fencing, sidewalks, and paving, and one-third of the expense of furnishing the water used in the building. That arrangement has continued to the present time, the district and the city both using the building for public purposes. On July 6, 1912, the county court for the Fort Smith District decided to tear down the old building and erect a new one, and appointed a commissioner for that purpose; and on August 8, 1912, the commissioner, with the approval of the county court, entered

into a contract with appellant, The Falls City Construction Company, to furnish the material and erect the building for a stipulated sum. The contract contained the following clause:

"It is further agreed that said county will within thirty days from the date hereof deliver the building site upon which said courthouse is erected, to the contractor free from all obstructions, unless delayed in so doing by injunction, or other legal proceedings, in which event this time shall be extended over a period equivalent to the time lost by such delay; upon which delivery of said site, the contractor shall proceed to perform this contract and shall begin actual building operations on said site fifteen (15) days after said delivery, unless it shall be prevented or delayed in so doing by litigation, injunction or other causes beyond its control, in which event the time for starting work shall be extended for a period equivalent to the time lost by reason of the delay so caused; and if, for any reason the county shall be permanently prevented or restrained from making delivery of this site, then this agreement shall become null and void, but otherwise to remain in full force and effect. This agreement shall bind the county, however, to deliver said site unless prevented from so doing by order of court of competent jurisdiction restraining said county, and nothing herein contained shall be construed, or have the effect of avoiding this contract or affecting the rights of the parties hereto by reason of the failure or refusal on the part of the county to make delivery of said lot to the contractor unless expressly restrained from so doing as aforesaid."

Before anything was done towards tearing down the old building the city instituted this action in the chancery court of Sebastian county against the county judge, the courthouse commissioner and appellant, The Falls City Construction Company, to restrain them from tearing down the building and constructing a new building on the same site. The city contended that it had rights under the lease contract with the district which per-

mitted it to use the building "while such building may stand;" that the old building was still suitable for use, and that the district had no right to tear it down while it remained in usable condition.

The defendant filed an answer, joining issue as to the condition of the building and the necessity for constructing a new courthouse, and also as to the rights of the City under the lease contract.

The chancellor decided in favor of the city and made permanent the temporary restraining order preventing tearing down of the old building and the construction of the new one on the same site.

All of the defendants prayed an appeal to this court and lodged a transcript here; but subsequently the county court entered an order declining to prosecute the appeal and directing a dismissal thereof, and upon motion of the prosecuting attorney of the district and the Attorney General, representing the county court, an order was entered here dismissing the appeal as to the county judge and the courthouse commissioner; but the other defendant, The Falls City Construction Company, was permitted to prosecute its appeal, and the cause has been submitted to us upon that appeal.

It will be observed from the contract between the Fort Smith District of Sebastian County and appellant, The Falls City Construction Company, that the district was to tear down the old building and appellant was to construct a new building, and appellant's right under the contract to construct the new building was by express terms of the contract made dependent upon the question whether or not "the county shall be permanently prevented or restrained from making delivery of this site." Appellant having permitted the insertion in the contract of the condition that it should have no right thereunder if the county was prevented or restrained, it must now abide by that condition and can not assert any rights unless the condition is complied with. However, whatever rights appellant may have under its contract, the question whether the district

should be allowed to tear down the old building and construct a new one on the same site is a public question in which appellant has no concern. It can not compel the district to construct a new building on that site, whatever may be its rights under the contract to recover damages for non-performance on the part of the district; and even that question is settled by the condition inserted in the contract. Appellant was not even a necessary party to this litigation, as it had nothing to do with the tearing down of the old building, which was the bone of contention between the city and the district. Appellant has no right to prolong the controversy between the district and the city, since the former has elected to dismiss its appeal and allow the decree of the chancellor to stand. The district might have acceded to the demands of the city without litigation and appellant would, as we have already seen, have been without remedy to compel the district to carry out its contract. This being so, since the district has seen fit to withdraw from the controversy and let the decree of the chancellor stand, appellant had no right to continue it. Any other course would permit appellant to force the district, against its will, to prolong the controversy with the city and construct a courthouse contrary to the orders of the county court. Appellant having consented for its rights under the contract to rest upon the condition named above, it must now abide by the contract in that respect. The decree of the chancellor, which, since the dismissal of the district's appeal, remains in full force, necessarily cuts off any rights of appellant under the plain terms of the contract; and since appellant had no right to control the action of the district with respect to the decree or to its attitude in ending the controversy with the city, the decree must, so far as it relates to appellant's appeal, be affirmed. It is so ordered.

CAFFEY v. ALLISON.

Opinion delivered February 24, 1913.

1. EVIDENCE—SELF-SERVING DECLARATIONS—ADMISSIBILITY.—In an action by the heir against defendant to recover $200 due on a note alleged to have been executed by defendant to her father, testimony that deceased declared to the witness before his death, that he held defendant's note for $200 in his favor, is incompetent testimony, being a self-serving declaration merely, and a narrative of a past occurrence, which can not be received as proof of the existence of such occurrence. (Page 156.)
2. WITNESSES—WIFE INCOMPETENT TO TESTIFY FOR HUSBAND.—Under section 3095 of Kirby's Digest, a wife is incompetent to testify for her husband except in regard to some business transacted by her, for him, as his agent, and testimony of a wife is properly excluded, which is not in reference to any business transaction done by her as his agent. (Page 157.)
3. BILLS AND NOTES—BURDEN OF PROOF.—When plaintiff sues defendant on a note alleging the same to be in defendant's possession, that issue becomes material when defendant denies that he executed the note, and the burden of proof is on plaintiff to establish it. (Page 157.)

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

STATEMENT OF FACTS.

Juanita Allison, by her next friend, C. G. Reed, instituted this action in the circuit court against I. D. Caffey to recover a balance of $200 alleged to be due on a note executed by Caffey in favor of Kizer Allison, deceased, her father, for the payment of a balance due on certain lands. The complaint alleges that the note was executed on January 25, 1910, and delivered to the wife of I. D. Caffey who was a sister of Kizer Allison and that said note was lost or destroyed or in the possession of the defendant. The defendant denied the execution of the alleged note and alleged that he had paid the amount due on the land.

J. H. Benson, a witness for the plaintiff, testified substantially as follows: I was a justice of the peace in Lonoke county in 1910. Kizer Allison now deceased sold his undivided interest in a certain tract of land to the de-

fendant Caffey. I wrote the deed. I understood the purchase price was $400; $200 to be paid down and the balance in ten or twelve months. I remember writing a note for $200, payable to Kizer Allison, and signed by the defendant Caffey. My recollection is that at the direction of Allison I handed the note to his sister, Mrs. Caffey, the wife of the defendant. The note was given for the balance due on the land.

Mrs. Mamie Allison, mother of Juanita Allison, testified substantially as follows: Kizer Allison was my husband and died on the 3d of March, 1911. After his death Caffey said that the would pay everything that he owed us. He did not owe anything except the $200 note given for the balance of the purchase price of the land sold to him by my deceased husband.

C. G. Reed testified substantially as follows: A short time before his death Kizer Allison purchased a horse from me. He wanted to put up as collateral for the purchase price a $200 note which he said the defendant had executed to him which was in the possession of his sister, the defendant's wife.

Other witnesses testified that they heard Kizer Allison say sometime prior to his death that he had a note for $200 executed in his favor by the defendant, and that he had left the note with his sister, the defendant's wife.

The defendant Caffey admitted that he purchased the land from Kizer Allison and agreed to pay $400 for it. He said that he had $200 which he paid to Allison, and executed a note and mortgage to Bud Rouse for $200 on the same day and that he also paid this $200 to Allison. He denied that the note in question was ever executed and said that the only note he executed on that day was a note to Rouse for the $200 to get the money to finish paying for the land.

The jury returned a verdict for the plaintiff and the defendant appealed.

Charles A. Walls, for appellant.

The testimony of witnesses Young, Reed, Talbert and Mrs. Allison, wife of deceased, was incompetent and irrelevant, too remote in point of time to become part of the *res gestae,* and does not explain or illustrate the character of the original transaction upon which this suit is based. 58 Ark. 168; 51 S. W. 230; 46 Conn. 461; 48 Ark. 261; 32 N. H. 358; 75 Ark. 463; 73 Ark. 152.

Their testimony was hearsay merely and inadmissible. 10 Ark. 638; 16 Ark. 628.

The assertion of the existence of a fact by a person not called as a witness and not under oath is not evidence, but becomes merely hearsay. Rice on Evidence, 490; 16 N. Y. 381.

The statements of these witnesses were made in the absence of appellant, and when deceased was not under oath, and, even if they had been in writing, would have been incompetent and objectionable as hearsay. 16 Cyc. 1214.

A witness is not at liberty to testify to facts derived from unsworn statements of others in whole or in part and testimony so founded should be excluded. 16 Cyc. 1196.

All of the statements made by Kizer Allison were self serving and incompetent. 124 Ind. 507; 29 Neb. 76; 7 Hill 361; 6 Hill 405. A declaration that is self serving continues to be incompetent either in favor of the declarant, or his estate. 16 Cyc. 1214.

The testimony of appellant's wife was competent and any statement made by her as to the transaction that took place in the presence of deceased and her husband while the contract was being entered into and considered is clearly admissible. 75 Ark. 218; 30 N. Y. 330.

The proof on the part of appellee was sufficient to constitute agency on the part of the wife, and complaint will be considered to have been amended to conform to the proof. 62 Ark. 262; 98 Ark. 312.

James B. Reed, and *Terry, Downie & Streepey,* for appellee.

The testimony of appellee's witnesses regarding statements made by her father were statements made relative to *possession* of personal property, and were made when there could have been no *lis mota,* and were clearly admissible. 20 Ark. 592; 34 Ark.. 720.

A wife can not testify for her husband, except where she acts as agent for him (Kirby's Digest, § 3095), and the testimony shows she was not in any manner acting as agent for her husband, but if any agency existed she was agent of her brother. 77 Ark. 431; 132 S. W. (Ark.) 1000.

HART, J., (after stating the facts). The testimony of witness Reed and others as to the declarations made by Kizer Allison that the defendant had executed the note in his favor and that he was the owner of it was not competent evidence. The declarations were in the nature of a narrative of a past occurrence and can not be received as proof of the existence of such occurrence. These declarations were not in disparagement of his title but were self-serving declarations merely. They were offered by the plaintiff to strengthen her claim. Decedent's declarations were no more evidence for the plaintiff here than they would have been for him in case he had lived and been the plaintiff in this action, and it is apparent that he could not have proved his own mere declarations to third parties of his ownership in order to establish his title to the note against the defendant. The testimony was permitted to be given to the jury as competent and proper for their consideration. If the testimony was believed, it could not fail to have a prejudicial effect against the defendant and to weaken the defense upon which he was insisting. Therefore, the admission of such evidence was prejudicial to the rights of the defendant. *Brown, Admr.* v. *Kenyon,* (Ind.) 9 N. E. 283; *Bedell* v. *Scoggins,* (Cal.) 40 Pac. 954; *Royston* v. *Royston, Admr.* 29 Ga. 82; *Gibson* v. *Gibson,* 15 Ill.

App. 328; *Wilson* v. *Wilson,* 6 Mich. 9; *Ward* v. *Ward,* 37 Mich. 253; *Marcy* v. *Barnes,* 16 Gray, Mass. 161.

Counsel for defendant insists that the court erred in refusing to permit the wife of the defendant to testify that her husband did not execute the note in question. There was no error in this. Under section 3095, Kirby's Digest, a wife is incompetent to testify for her husband except in regard to some business transacted by her for him as his agent. The wife in this case was not the agent for her husband and the excluded testimony was not in reference to any business transaction done by her as his agent. *Taylor* v. *McClintock,* 87 Ark. 243, and cases cited. *St. L., I. M. & S. Ry. Co.* v. *Courtney,* 77 Ark. 431.

Counsel for the defendant also assigns as error the action of the court in refusing and giving instructions. The theory of the plaintiff was that the defendant executed the note in favor of her father and that her father left the note with his sister, who was the wife of the defendant and that the note had never been paid. On the other hand the defendant denies that he ever executed the note. The plaintiff alleged that the note was in the possession of the defendant and that was denied. It thus became a material issue and the burden of proof was on the plaintiff to establish it. *Norris* v. *Kellogg,* 7 Ark. 112; *Williams* v. *Cubage,* 36 Ark. 307; *Fields* v. *Anderson,* 55 Ark. 546; *McLain* v. *Duncan,* 57 Ark. 49.

Inasmuch as the judgment must be reversed for the error in admitting the testimony indicated above, it will not be necessary to take up the instructions and discuss them in detail. We deem it sufficient to say that the court had in mind the principles of law just announced in giving instructions to the jury. The instructions given were inartistically drawn in that it might be inferred from them that there was an indication on the part of the court that the note in question had been executed, when this was the principal issue to be determined by the jury. We do not mean to hold that the

instructions as given are erroneous, but call attention to this defect in their verbiage in order that it may be obviated at the next trial.

For the error in admitting the testimony of the declarations of Kizer Allison in regard to his ownership of the note, the judgment must be reversed and the cause will be remanded for a new trial.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. BRITTON.

Opinion Delivered February 24, 1913.

1. PRACTICE IN CIRCUIT COURTS—DIRECTING VERDICT OF JURY.—The circuit court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses for the plaintiff, and giving full effect to every legitimate inference that may be deduced from their testimony, it is plain that the plaintiff has not made out a case sufficient in law to entitle him to recover. (Page 169.)

2. PRACTICE IN CIRCUIT COURT—GRANTING A NEW TRIAL.—In passing upon a motion for a new trial on the ground that the evidence is not legally sufficient to sustain the verdict, the trial court is required to consider the element of improbability, and, if the trial judge is of the opinion that the verdict is clearly against the preponderance of the evidence, it is his duty to grant a new trial. (Page 170.)

3. PRACTICE IN THE SUPREME COURT—REVIEWS ONLY FOR ERRORS.—A verdict of a jury will not be disturbed on appeal if there was any substantial evidence to support it. The Supreme Court reviews only for errors, and will reject testimony only when it is contrary to the laws of nature, or is opposed to the physical facts in the case. (Page 170.)

4. WITNESSES—CREDIBILITY—QUESTION FOR JURY.—In an action against a railroad company for damages for personal injuries caused by a severe jar, and plaintiff testified that she was injured by a sudden checking of the speed of the train, thereby throwing her against the window sill, and all the other passengers and trainmen testified that there was no jar or jerk. *Held*, the testimony of plaintiff was a statement of fact, not in itself impossible or opposed to any natural law, and the credibility, force and effect of her testimony in this respect was for the jury. Under the Constitution of the State, the credibility of witnesses is for the jury. (Page 171.)

5. VERDICT—PERSONAL INJURY—PHYSICAL CONDITIONS.—In an action against a railroad company for damages for personal injuries, the plaintiff's testimony will not be held contrary to the physical facts, when she testifies that she was sitting sideways in a seat in a coach, that the train was stopped suddenly by the application of the brakes, and that she was thrown against the window sill, and it is for the jury to consider the action of the car, the life and movement of the person of the plaintiff in determining whether her testimony was in conflict with the physical facts. (Page 171.)

6. WITNESSES—CREDIBILITY—QUESTION FOR JURY.—Where there is an irreconcilable conflict in the testimony of physicians as to the cause of plaintiff's paralysis the question of the credibility of the witnesses is one solely to be determined by the jury. (Page 173.)

7. APPEAL AND ERROR—REFUSAL TO GIVE INSTRUCTION COVERED BY ANOTHER INSTRUCTION.—It is not error for the trial court to refuse to give an instruction asked by defendant, which is covered by another instruction given by the court at defendant's request. (Page 174.)

Appeal from Calhoun Circuit Court; *Geo. W. Hays,* Judge; affirmed.

STATEMENT BY THE COURT.

Willa Britton instituted this action against the St. Louis Southwestern Railway Company to recover damages for personal injuries alleged to have been caused by the negligence of the railway company while she was riding as a passenger on one of its trains. She originally brought an action in the Federal court where there was a verdict and judgment in her favor. The Circuit Court of Appeals reversed the judgment on the ground that the testimony tending to support her cause of action was opposed to the physical facts. See *St. Louis Southwestern Ry. Co.* v. *Britton,* 190 Fed. 316. Upon the remand of the case the plaintiff took a non-suit and afterwards on the 11th day of December, 1911, commenced the present suit against the defendant railway company in the Calhoun circuit court, and a trial was had at the July term, 1912, of said court.

Willa Britton, for herself, testified substantially as follows: I am twenty-one years of age and live at Little

Rock, Arkansas. I am five feet and eight inches tall, and at the time I received the injuries complained of was perfectly well and weighed about one hundred and sixty-five pounds. I have had several operations performed. On June 27, 1907, I had a curettement done by Doctor Miller of Little Rock. On September 11, 1909, Doctor Ellis, of Chattanooga, Tennessee, removed a cyst off of my right ovary. The incision was made on the right side. I had been in good health after the curettment up to that time. I was in bed about two weeks from that operation. On the 13th of December, 1909, Doctor Ellis operated for appendicitis and my appendix was removed. In February, 1910, I came back to Little Rock and on the 18th of April following Doctor Miller operated on me for gall stones. He cut into my abdomen and found no gall stones, but said I had intestinal adhesions and that this was the cause of the pain in my right side. I had been up after this operation about eight weeks, when I took a trip to England, Arkansas. My wounds had healed entirely and except for the intestinal adhesions I was in perfect health. I suffered great pain from the adhesions, and Doctor Miller said they were caused from exercise. The pains would occur sometimes one in two or three weeks and sometimes two in one week. To alleviate my suffering they would give me hot baths, hypodermics of morphine and massages. When I went to England as above stated, I went out into the country to visit relatives and stayed three days. On the 11th day of July, 1910, I came to England and late in the afternoon boarded a train for Little Rock. I took passage in the rear coach and sat about the middle of the coach on the left-hand side of the aisle. On the right-hand side of the coach every seat was full of passengers and there was one on the left-hand side besides me. Two ladies were on board. The seats in the coach were cushioned seats and not chairs. Something like two miles out of England there was an accident. There was a terrible impact and it threw my body against the

window. I had a severe pain to strike me in the side and back. The train ran a little distance, then stopped and made another little jump. My side hurt me considerably and after a while got a little better. When the train came to a stop I walked to the water cooler and my side and back pained me severely. When I walked to the back end of the car I saw that the ties were broken for quite a distance back and could see where the wheels had cut into the ties. When the accident happened I was sitting on a seat facing the front of the car and looking out towards the aisle. The shutter to my window was broken and the sun was coming in the car. I shifted my position so that I was sitting near the center of the seat. I can not give the exact position, but know that I had my back towards the window so that the sun would not shine in my face, and I was looking at the scenery out of the window just in front of me on the opposite side of the car. The impact of the train threw my back and side against the window sill, which projected over the window I judge about three inches. (Here the witness indicates on the back of her counsel that part of her body and side which struck the window sill.) The window sill struck me on the left side. The accident happened about six o'clock in the afternoon. At the time I received the injury the train was "running along I suppose at the average rate of speed and all at once there was a lunge and it threw me against the window and I suffered severe pain. It was just for the distance the train run. It was just bounding and it was very rough."

After the train started again I was suffering very much and inquired if there was any doctor aboard the train. There was not. One of the ladies on the car bathed my face with water and did what she could for me. It was nearly eight o'clock in the evening when we reached Little Rock. When we arrived there the conductor and train auditor came to my seat. I put my arms around their shoulders and they supported me and carried me out of the car. I could make a step but was

suffering severely. They sat me down on the car steps and then got an invalid's chair and carried me into the station. They telegraphed for the company's physician and one of them came. He gave me a hypodermic of some kind. Later I was carried in an ambulance to the Physicians and Surgeons Hospital in Little Rock. One of the company's physicians directed a nurse to sit by me during the night and he also gave me another hypodermic. There was no examination of my back made until the next morning. On the morning of the 12th inst. Doctor Runyan examined my back and told me I had a very bad sprained back. He directed the nurse to rub it with liniment and strip with adhesive plasters across by back and side, that is, the left side where the injury was. He said it was swollen a little. Later in the morning Doctor Corney, who was a friend of mine, came in and examined my back. I have never been out of bed to walk around since I sustained the injury and have never walked a step since I went to bed in the hospital that night. For a few days I was able to turn myself in bed. Now I suffer excruciating pains along the waist line and in my back, side and spine, clear up to my neck. The pain goes clear into my head and my left side bothers me some. From the point where I was struck in the back down I am perfectly helpless. I have no sense of feeling whatever and can not use myself at all. I have no feeling in my lower extremities down to my toes. I can not control my urine and bowels and can not tell when they move. The day after the injury my back pained me severely and I suffered much with my side. The second day I could not have the pillow under my head. About the third day my limbs were numb and would go to sleep and were heavy for me to lift. About the 25th of July I could not move my limbs and had no sense of feeling so far as pinching myself was concerned. That was the first day I could not move myself. On the 2d day of August I was moved from the Physicians and Surgeons Hospital to St. Vincent's Hospital. Up to about two weeks after I was carried to St.

Vincent's I could still work my toes and then the paralysis was complete. The paralysis first appeared in my left limb. I could lift the right limb about a day longer than the left. And about the same time I lost control of my urine and bowels. I have suffered pain in my back from the day I was injured continuously until today. Sometimes I suffer more than at others. My appetite is poor and the pain keeps me from sleeping much. I never had hysterics in my life. After I looked at the track and saw the ties broken I did not go back to my seat and have a spell of hysteria. Up to that time I had not suffered with any pains in my back and left side. I was not quite sixteen years of age when I married.

I have had several operations performed on me, being the ones mentioned above. My nurse has done everything advised by the physician to avoid bed sores, but I have three bed sores now, one on the right hip and two on the back. Since I was hurt I have not been anywhere except in the hospitals, the court room at Little Rock and the court room here. My limbs have wasted away and I would judge I weigh near one hundred pounds now. If I was lifted up quickly it would cause me great pain in my back just at the waist line. I was brought here on a cot from the hospital and suffered much on the way. I can move the muscles in my shoulders and in my head and neck but I am not able to turn myself at all. (The plaintiff here indicates the point on her body from which point down she says she is absolutely helpless.) At the request of counsel for plaintiff the nurse sticks pins in the plaintiff's limbs, and counsel for the defendant objects, saying that they concede she is paralyzed. Plaintiff testified that she did not feel the sticking of the pins in either of her limbs, which were exposed to the jury at the time the pins were stuck into them.

Miss Sallie Crow testified: I commenced nursing the plaintiff in the early part of October, 1910. She complained of a pain in the small of her back and thigh,

spinal column and head. She has complained of that ever since. I was with her six or seven weeks the first time and she suffered intense pain. I had to administer morphine hypodermics to alleviate her pain. At another time I nursed her about five weeks, and again two or three weeks. I have seen her practically every day since she has been in the hospital. I have never seen in her any evidences of nervousness or hysteria. My judgment is that she was suffering real pain. She suffered great pain on the train on her way down here yesterday. Her lower limbs are wholly paralyzed and she can not move them. She has no control over her urine and bowels and she does not know when her kidneys and bowels act. She has three bed sores, one on the right hip and two on the back. They have been there since last March. Doctor Carl Bentley is her physician.

Doctor Carl Bentley testified: The first time I examined the plaintiff she had just been brought to St. Vincent's Hospital in an ambulance and put in bed. The places at the point of injury on her back were covered with strips of adhesive plaster. They had been there for some time and I took them off. When I took the plasters off there was some swelling in the left side involving the spinal column. This suffering was of such a nature that it was difficult to tell positively but it felt like that there might be a slight displacement of one of the vertebrae that would be replaced in its natural position. The spinal column is composed of vertebrae which are connected by cartilage. They are formed so the body can be bent up and down at any angle. At the time I examined her first I found what seemed to be a slight displacement of one of the vertebrae at the point where the plaintiff said she was injured. There was not then a total paralysis of the lower limbs, and it would naturally follow that there was not a total lesion of the spinal cord at the point of the injury. Basing my opinion on the progress of the case, I think there is a permanent injury. The complete

paralysis as it now exists in plaintiff did not come for perhaps two months after it commenced. She can not now move her limbs and there is no sensation of pain in the limbs and body from the umbilicus down. If you move her limbs she will not have any sensation there but will complain of pain in her back at a place above the point of injury. The point of injury was just a little to the left of the median line. When she suffers intense paroxysms of pain we give her hypodermics of morphine which is the only thing that will ease her. During the paroxysms she has exhilarated heart action, and this indicates that she is suffering real pain. In my opinion she is suffering from paralysis resulting from a lesion of the spinal cord and not from hysteria. It is difficult to tell how long the plaintiff will live. She may die at any time, and I have known of cases where they lived twenty years or more. The doctor also testified that the plaintiff had developed bed sores, although he had taken every precaution to prevent it.

Doctor Corney also testified that he examined the plaintiff on the morning after she received her injury and found some contusions on her back, that is to say, a little enlargement of the back, some slight redness and bruised condition like she had been slapped or hit on the back. That the injury was on the left side of the small of the back between the lower dorsal and lumbar region. That he noticed no evidences of hysteria outside of the natural nervousness of a patient in her condition.

The evidence for the defendant is substantially as follows:

There were eight or nine passengers on the train the day the plaintiff claims to have received her injuries. All of them testified that the stopping of the train was not accompanied by any jar or jolt. That there was practically no jar, no more than there would be when at any ordinary stop a train pulls into a station. That they did not know that the trucks were off the track until after the train had stopped. One of the passengers

said that he was looking directly at the plaintiff at the time of her alleged injury and that she was not thrown back in her seat at all. Another passenger stated that he had an order pad on his knee and was copying his orders on the typewriter. That he felt no jar and did not stop writing. Still another witness says he was looking forward at the time and just before the train stopped and saw the plaintiff. He said that she was not thrown out of her seat in any way. The express and baggage man said that he was sitting on a sample trunk leaning against the partition of the coach. That he was writing up his way-bills and that the stop did not affect him any more than an ordinary stop at a station. On cross examination he stated that there was no side-swinging of the train for several hundred feet before the train got to the place where plaintiff said she was injured. He said that a train would naturally rock some, but that there was no hard swinging. That he noticed no lateral movement of the train and no jumping along there. That the stop was a gradual one, like stopping at a station.

Neither of the two lady passengers weighed as much as the plaintiff and both said that they noticed nothing unusual until the train stopped. That the train stopped just like it would stop for a station.

John Matz testified: I am foreman of the coach shops of the defendant company. I have made measurements of the car in which the plaintiff states she was injured. The window sill on the inside of the coach projected inside the car about five-sixteenths of an inch. It is half round, that is, oval on the inside. The top of the window ledge is nine inches above the seat on the front end and ten or ten and a half inches on the back. The back of the seat extends about twenty-six inches above the coach seat. The seats are nineteen inches in width and forty inches in length. There is a window to each seat.

John Lebosquet testified: I was conductor on the

train on the day plaintiff claims to have been injured. One pair of the front truck wheels of the tender got off the track. The engineer applied the emergency brake and stopped the train. There was no jar or jolting about it. The train was about three hundred and fifty feet long. The two truck wheels being off the rail had no effect whatever on the rear coach in which the plaintiff was sitting. The train had two coaches, a baggage car and engine and tender. There was no defect in the trucks. There was a low joint in the track there caused perhaps by the wet weather with the trains running back and forth over it. Some of the ties behind the train after it stopped were marked where the wheels had ran over them, but the track was all right. There might have been a half dozen broken ties here and there.

DeWitt Hope testified: I was engineer of the train on the day the plaintiff claims to have been injured. The front pair of wheels of the front trucks of the tender jumped the track about one mile south of Keo, and we ran about four hundred and fifty feet with that one pair of wheels off. After I discovered it we ran between three hundred and three hundred and fifty feet before we stopped. The train was equipped with Westinghouse air brakes and the coaches contained what we call a quick action tripple, and the engine was equipped with the same kind of brake, but not the same kind of tripple. A quick-action tripple will take hold at once. On that day the stop was not quicker than we make lots of other times but was a little quicker than we generally make at stations.

Cross Examination: The schedule time of the train was twenty-five miles per hour. You have to make thirty miles between stations to make the schedule. At the time of the accident I was going between sixteen and eighteen miles per hour. I did not think the track at that place was in condition to run any faster. It was in a rough but not dangerous condition. The conditions that caused me to go slow was on account of the water

over the fields and on both sides of the track that had been there and soaked in. The track was twenty inches above the water. I think the low joint and the water together caused the derailment. Where the wheels left the rail the track looked to be level but there was a swing that started the tender to rocking and there was a low joint there. You can not see the low joints until you hit them. The emergency brake is for a quick stop. I applied the emergency brake to stop the train on the day in question.

Doctors J. L. Green, J. P. Runyan, E. P. Bledsoe and W. H. Miller, all of whom are eminent physicians and surgeons, testified that they had examined the plaintiff. They admitted that she was paralyzed, as stated by her and her physician, but gave it as their unqualified opinion that the paralysis was caused by hysteria and was not due to a lesion of the spinal cord. They said that she had no bed sores on her and that these would naturally result if her spinal cord had been injured on the day in question. They detailed at length the scientific and physical tests that they made to detrmine whether her paralysis was caused by hysteria or by an injury to her spine, and, as above stated, testified that it was caused by hysteria. They stated that her injuries were not permanent, and that under proper treatment she would recover.

Doctor Runyan, one of the physicians for the defendant company, examined the plaintiff the next morning after the accident and says there was no injury to her spinal column.

Other evidence will be stated or referred to in the opinion. The jury returned a verdict for the plaintiff in the sum of twenty-five thousand dollars. The defendant filed a motion for a new trial and when it came on for hearing the court announced that he would grant the new trial unless the plaintiff entered a remittitur in the sum of twelve thousand five hundred dollars. The remittitur was entered and judgment was rendered in

favor of plaintiff in the sum of twelve thousand five hundred dollars. The defendant has appealed.

Sam H. West and *Gaughan & Sifford,* for appellant.

1. Upon the facts presented in evidence the court should have instructed a verdict for the defendant. The decision of the Federal court upon the same facts presented here sustains our contention that the evidence is not legally sufficient to support a verdict in favor of appellee. 190 Fed. 316. See also 79 Ark. 622.

2. The court erred in refusing instruction 5, requested by appellant. If in stopping the train the resultant jar was the same as that resulting from the usual ordinary manner of stopping a train, appellant was without fault, hence not liable.

Powell & Taylor and *Davis & Pace,* for appellee.

1. There is sufficient substantial evidence to sustain the verdict. A verdict of a jury will not be disturbed even though this court may differ from the jury as to the preponderance of the evidence. 73 Ark. 383. The evidence will be given the strongest probative force of which it is susceptible in determining whether there is substantial evidence to sustain the verdict. 76 Ark. 116; 79 Ark. 608; 3 Am. St. Rep. (Ind.), 630.

2. Instruction 5, requested by appellant, was properly refused. The proposition to be submitted was whether or not appellee was injured by the negligence of the appellant, and if, without fault on her part, she was so injured, appellant was liable, without reference to how great or little the jar was that brought about her injury. 79 S. W. 508.

HART, J., (after stating the facts). The principal ground relied upon by counsel for appellant to reverse the judgment in this case is that the evidence is not legally sufficient to support the verdict, or to put it in a different form, that the court should have directed a verdict for the defendant. Under the provision of the Constitution that "judges shall not charge juries with regard to matters of fact but shall declare the law," it has been

repeatedly held that the circuit court has no power to determine the facts of the case and direct a verdict for either party, even though if returned for the opposite party it would set it aside as against the weight of the evidence. The only remedy in such cases is for the circuit court to promptly set aside verdicts that are clearly against the weight of the evidence. *L. R. & Ft. Smith Ry. Co.* v. *Henson,* 39 Ark. 413; *L. R. & Ft. Smith Ry. Co.* v. *Barker,* 39 Ark. 490. That is to say, it is the settled rule in this State that a court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses for the plaintiff and giving full effect to every legitimate inference that may be deduced from their testimony, it is plain that the plaintiff has not made out a case sufficient in law to entitle him to recover. In passing upon a motion for a new trial on the ground that the evidence is not legally sufficient to sustain the verdict, the trial court is required to consider the element of improbability and, if the trial judge should be of the opinion that the verdict is clearly against the preponderance of the evidence, it is his duty to grant a new trial. Not so with this court. It only reviews for errors. We can not reject testimony unless it is contrary to the laws of nature or is opposed to the physical facts in the case. It is a settled rule of this court that a verdict of a jury will not be disturbed on appeal if there was any substantial evidence to support it. The only difficulty is in the application of the rule to a given state of facts, and that is the close question in this case. In the instant case the plaintiff testified that the speed of the train was suddenly checked, and that she was thrown against the window sill of the car and that thereby her spine was injured. All the other passengers and the trainmen, as well, testified that the train stopped by slowing down gradually and that there was no jar or jerk. Two of the witnesses testified that they were writing and suffered no more inconvenience than they would have done if the train had been stopped in the regular way at a station. Another witness testified that he was looking directly at the

plaintiff and that she was not thrown or jostled in her seat. As far as the record discloses these witnesses had no interest in the case, were all credible persons and had no motive whatever to testify falsely. The strong probability then is that they were telling the truth. The plaintiff, however, testified that there was a jar, and that she was thrown from her seat. Her testimony in this regard is the statement of a fact, and is not contrary to the law of nature. She testified to a fact not in itself impossible, nor opposed to any natural law. Hence, the credibility, force and effect of her testimony in this respect was for the jury. The credibility of witnesses is the very matter which our Constitution says must be submitted to the jury.

It is insisted, however, by counsel for defendant that the physical situation as conclusively proved to exist at the time plaintiff claims to have received her injuries so clearly overcomes the testimony of plaintiff as to render it of so little probative force as not to create a conflict in the testimony for determination by the jury. This leads us to consider the physical situation as it was shown to exist.

The testimony of the plaintiff, viewed in the light most favorable to herself, was that she was a large woman, five feet eight inches in height, weighing about one hundred and sixty-five pounds. That she sat on a cushioned seat in the middle of the car. That the shutter of the window to her seat was broken so that the sun shone in upon her. That she was sitting facing the front of the car in the direction the train was going. That to avoid the sun she turned her head towards the aisle and was looking out of a window on the opposite side of the car at the scenery, at the time of the accident. The regular schedule of the train was twenty-five miles per hour and this, taking into consideration the time for stops at stations, required the engineer to make thirty miles per hour between stations. The condition of the road bed near the place of the alleged injury was such that the engineer deemed it prudent to check the speed

of his train, and the train was running at the rate of eighteen miles per hour when the derailment occurred. The water was standing over the fields at that point and stood within twenty inches of the top of the road bed. The road bed was not ballasted at that point and there was a low joint caused by the running of the trains over the soft road bed. This low joint in the opinion of the engineer was the cause of the derailment. Therefore, counsel for the defendant insist that, if the speed of the train had been checked suddenly the plaintiff would have been thrown forward and that her testimony to the effect that she was thrown against the window sill was in direct violation of a well known and established physical law. As above stated, in testing whether or not the court should have directed a verdict for the defendant, the evidence must be viewed in its most favorable light to the plaintiff. No accurate law of physics can be invoked to determine just how the plaintiff fell under the circumstances as detailed by her. The jury had a right to consider the action of the car, the life and movement of the person of the plaintiff in determining whether her testimony was in conflict with the physical facts. They were not required to judge the issue upon any rule which might be applied to an inanimate object.

The engineer testified that when he put on the emergency brake it would take the brake only a few seconds to take hold of the cars. That the air would cause the brake to take effect on the cars first and then travel towards the engine. The jury might have found that when the engineer applied the emergency brake on account of the road bed being softened by the water the side of the car next to the window sank down in the road bed lower than the opposite side. The engineer also testified that the road was rough and uneven. The jury might have found on this account and on account of the road bed being softened by the water standing around it that the cars did not run along smoothly, but that there would be more or less swaying from side to side. They might consider any involuntary movement of the plain-

tiff's body. When all these matters are taken into consideration, we do not think it can be said that the plaintiff necessarily must have fallen forward and could not have fallen back against the window sill at the time and in the manner she claims in her testimony.

All of the eminent specialists placed on the stand by the defendant say that they have examined the plaintiff thoroughly and that she is suffering from paralysis caused by hysteria, and not by a lesion of the spinal cord. They detail at length the physical and scientific tests to which they subjected her and which they say conclusively demonstrates that her paralysis was caused by hysteria, and they state that her injuries are not permanent. On the other hand, the physician who has attended the plaintiff for the most of the time since she received her alleged injuries testified in positive and direct terms that the paralysis was caused by an injury to the spine and that the plaintiff has never suffered from hysteria. He gives at length the scientific and physical tests from which he says he has reached this conclusion. He gives it as his opinion her injuries are permanent. Here again we may not invade the province of the jury, and the question of the credibility of these witnesses was solely one to be determined by the jury. Therefore, it can not be said, as a matter of law, that the verdict of the jury was without any substantial evidence to suppor it. See, *Fidelity Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995. In reaching this conclusion we are not unmindful of the fact that the Court of Appeals reversed the judgment of the Federal court on the ground that the plaintiff's testimony was irreconcilable with the physical facts.

The testimony in the instant case, however, presents a different case to that passed upon by the Court of Appeals. It appears from the record in the Court of Appeals that the plaintiff was sitting next to the aisle and the court laid stress upon the fact that if she had been suddenly thrown sidewise against the window sill she would not have been struck in the side and back below the ribs, but much higher up at or about the shoul-

ders. The plaintiff says that she testified in the Federal court that she was sitting in the middle of the seat just as she did in the present case. She claims that the record of her testimony in the Court of Appeals was incorrect. But be that as it may, the jury heard her testimony and were the sole judges of her credibility and had the right to pass upon the discrepancies, if any, in her statements. Moreover, the condition of the road bed is gone into more in detail in the present case and the physical situation as it existed at the time of the accident is more particularly described, as far as we can tell by reading the opinion of that court.

Counsel for the defendant insist that the court erred in not giving instruction numbered five. In it the court was asked to tell the jury that if the jar which the plaintiff claims to have caused her injury was not greater than that caused by the train stopping at a station in the usual and customary manner the plaintiff could not recover. This proposition was fully covered by instruction numbered six, given for the defendant. In this the court told the jury that, in order to entitle the plaintiff to recover, she must have shown some unusual stopping of the train which caused her to be thrown violently against the edge of the window, striking her back and left side and from which her spinal cord was injured.

The instructions given by the court covered fully the respective theories of the parties to the suit, and the judgment will be affirmed.

CITY OF LITTLE ROCK *et al.* v. REINMAN-WOLFORT AUTOMOBILE LIVERY COMPANY.

Opinion delivered February 24, 1913.

1. LIVERY STABLES—RIGHT OF MUNICIPAL CORPORATION TO REGULATE.—Under section 5454 of Kirby's Digest, which provides that cities shall have the power to regulate livery stables, a municipal corporation may pass an ordinance excluding any person or corporation from carrying on a livery stable business within a certain defined area, within the corporate limits. (Page 179.)

2. LIVERY STABLES—SUBJECT TO REGULATION BY CITY.—While a livery stable is not a public nuisance *per se*, and conducting same is recognized as a legitimate and necessary business, a city ordinance prohibiting the operation of livery stables within a certain defined area is proper and does not deprive the owners of their property without due process of law. (Page 181.)

3. MUNICIPAL CORPORATIONS—RIGHT TO REGULATE LIVERY STABLES.—A city ordinance prohibiting the carrying on of a livery stable business within a certain limited area, is not unreasonable or an improper restraint upon a lawful trade or business, nor an improper restraint upon the lawful and beneficial use of private property, nor an arbitrary or unjust classification of business for the purpose of regulation, nor is it unjustly discriminative. (Page 182.)

4. MUNICIPAL CORPORATIONS—REGULATION OF LIVERY STABLES.—A city ordinance excluding livery stables from certain defined territory, does not amount to a prohibition of the business, nor is it necessary to show that the business, as conducted, amounts to a nuisance before it becomes subject to the provisions of the ordinance regulating it. (Page 182.)

5. CITY ORDINANCE—EXCESSIVE PENALTY.—Although a city ordinance may impose a penalty for the continuance of the offense in excess of the amount prescribed by section 5466 of Kirby's Digest, it is not invalid for that reason since it is also provided by section 5467 of Kirby's Digest, that, in a prosecution under such an ordinance, judgment will be rendered for such amount only as the act authorizes. (Page 184.)

Appeal from Pulaski Chancery Court; *J. E. Martineau,* Chancellor; reversed and dismissed.

Harry C. Hale and *J. W. & J. W. House, Jr.,* for appellant.

1. The State has the right, under its police power, to prohibit the carrying on of a livery stable business within certain designated limits, and having such power it can delegate it to cities. 22 S. W. 470; 16 Mo. App. 131; 16 Wal. 62; 5 Am. St. Rep. 331; 37 Am. Rep. 564; 41 Am. St. Rep. 630; 53 *Id.* 325; 91 Am. Dec. 472; 83 *Id.* 740; 90 *Id.* 278; 34 *Id.* 637; 33 Pa. St. 202; 18 O. St. 563; 54 Wis. 376; 90 Am. Dec. 279; 90 S. W. 874; 83 Am. Dec. 203; 26 Am. St. Rep. 664.

2. The power to pass this ordinance was delegated by the State. By section 5454, Kirby's Digest, the power

was granted to regulate all livery stables; and the power to regulate includes the power to restrict to certain limits. 41 Am. St. Rep. 630, 633, and other authorities cited above.

The ordinance may be sustained as a delegation of power by the State to the city, by section 5648, Kirby's Digest, sub-div. 4, which provides that the city may prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health and safety. 49 Am. St. Rep. 227; 26 *Id.* 664; 30 *Id.* 214; 100 Ind. 575-578; 7 Cow. 606; 12 Wheat. 19; 4 Rob. 1; 90 Am. Dec. 281. See also Kirby's Dig. § § 5437-8, 5454, 5461; 70 Ark. 12. When a city has by ordinance exercised the police power delegated to it by the State, it is as conclusive upon the courts as any legislative enactment, so long as such power involves a matter of discretion only, and not the fundamental law. 204 Ill. 456; 162 Ind. 399; 33 Mass. 442; 58 N. E. 551; 49 Am. St. Rep. 93; 197 Fed. 516; 26 Am. St. Rep. 659, 662, 666; 96 Ark. 199; 16 Wal. 62; 113 U. S. 703; 113 U. S. 27; 96 Am. St. Rep. 95, 97; 152 U. S. 136; 113 U. S. 27; 128 U. S. 1; 225 U. S. 623; 194 U. S. 361.

3. The chancery court had no jurisdiction to restrain the enforcement of the ordinance. 85 Ark. 230; 34 Ark. 375; 34 Ark. 559; 39 Ark. 412; 44 Ark. 139; 7 Ark. 520; 13 Ark. 630; 26 Ark. 649; 27 Ark. 97.

4. All reasonable presumptions will be indulged in favor of the validity of the ordinance. 88 Ark. 263; 52 Ark. 301; 64 Ark. 152; 63 Atl. 930; 107 N. W. 502; 105 N. W. 794; 42 N. E. 622.

Morris M. Cohn, for appellees; *Baldy Vinson,* of counsel.

1. The ordinance is discriminative and invalid in that it is made to apply to livery stables and not to sales stables, whereas, if there be any serious objection to either, the sales stables are more objectionable. 2 McQuillan, Mun. Corp. § 738; 48 Minn. 236, 51 N. W. 112; 75 Ark. 542; 184 U. S. 540; 165 U. S. 150.

It is unreasonable because it improperly discriminates between localities within which substantially the same conditions exist, and discrimination in that it forces the business into the residential section.

2. The penalties prescribed are beyond the charter powers of the city, rendering the whole ordinance void. 2 McQuillan, Mun. Corp. § 722; 94 N. C. 883; 27 N. J. L. 286.

3. A livery stable is not a nuisance *per se*. 85 Ark. 544; 64 Ark. 424; 87 Ark. 213; 93 Ark. 362, 367; 95 Ark. 545; 11 Humph. 406, 54 Am. Dec. 45. And before it can be suppressed it must be proved to be an irremediable nuisance in the particular case. 93 Ark. 362; 95 Ark. 545, 548. Such proof must be irresistible. *Id;* 92 Ark. 552-3.

Because a given occupation may become objectionable, it does not follow that it may be suppressed within the city or any business portion of it. 85 Ark. 554-5; 95 Ark. 548; 41 Ark. 526; 52 Ark. 23; 45 Ark. 336; 49 Ark. 165.

A city can not by legislation make a nuisance of a business or occupation which is not *per se* a nuisance. 92 Ark. 456; 64 Ark. 609; 41 Ark. 526.

Under the power to regulate the city may license, but may not tax. 43 Ark. 82; 52 Ark. 301; 83 Ark. 351; 93 Ark. 362. It follows that the city can not under the same power suppress or prohibit, since the power to regulate does not include the power to prohibit. 31 Ark. 462; 111 Cal. 46, 50; 95 N. E. 456; 250 Ill. 486; 44 Ill. 81, 83; 61 Md. 297, 308, 309; 124 Cal. 344, 349; 3 McQuillan, Mun. Corp. § 990. The city council could not, under this power, by anticipation, prohibit the carrying on of the business. *Supra;* 47 L. R. A. 652, 656. Nor prohibit the maintenance of a livery stable in a prescribed locality in the business part of the city. *Supra;* 34 Pac. 902; 19 Col. 179; 41 Am. St. Rep. 230; 27 So. 53; 46 Ia. 66; 98 Cal. 73; 30 Ore. 478.

This being a legitimate business, which could only become a nuisance by the act of the parties, to condemn

it for a certain locality where other legitimate business is carried on, is to deprive appellees of their constitutional rights. 195 U. S. 223; 118 U. S. 356; 31 Fed. 680; 13 Fed. 229; 82 Fed. 623; 10 Wall. 497; 79 Ill. 26, 39; 46 Ia. 66; 26 Fed. 611; 127 S. W. 860.

The power to regulate does not include partial prohibition. 107 Mo. 1, 24-26; 34 Pac. 902; 47 L. R. A. 652-656; 85 Ark. 511; 83 Ark. 355.

4. The city having allowed the business to be established and maintained for many years at a great expense, is estopped to prohibit it. 92 Ark. 546; 5 Ga. 315; 79 Ill. 26, 39; 73 N. E. 1035; 214 Ill. 628, 642.

5. As to the matter of jurisdiction, see 88 Ark. 358; 35 Ark. 352; Martin's Decisions, 386, 402-3, 404-5; 223 U. S. 605, 620, 621; 195 U. S. 223, 241; 209 U. S. 145; 2 McQuillan, § 805; 4 Dillon, Mun. Corp. § 1573; 2 *Id.* § 612, note 1; 74 Ark. 421; 34 Ark. 603, 609; 15 L. R. A. 604, and cases cited.

KIRBY, J. This suit challenges the validity of the following ordinance of the city of Little Rock:

ORDINANCE No. 1729.

AN ORDINANCE TO REGULATE LIVERY STABLES.

"Whereas, the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the city of Little Rock; therefore

"Be it ordained by the city council of the city of Little Rock:

"Section 1. That it shall be unlawful for any person, firm or corporation to conduct or carry on a livery stable business within the following area, towit: Beginning at the intersection of Center street and Markham street, thence east on Markham street to Main street, thence south on Main street to Fifth street, thence west on Fifth street to Center street, thence north on Center street to Markham street, the place of beginning.

"Section 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be

deemed guilty of misdemeanor and shall be fined in any sum not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars for each violation and each day any person, firm or corporation shall conduct or carry on a livery stable business within said limits shall be deemed a separate offense.

"Section 3. This ordinance shall take effect and be in force sixty (60) days after its passage."

From the decree declaring it invalid, an appeal was duly prosecuted.

It is contended that the ordinance is invalid, because, first, it prohibits the operation of a livery stable business, which is not *per se* a public nuisance within the area defined therein in which appellee's business is, and has long been conducted and deprives them of their property without due process of law.

Second. It deprives them of the equal protection of the law and is an unjust discrimination against them.

Third. It fixes greater penalties for its violation than the city has power to impose.

The city derives its power from the State, and section 5454, Kirby's Digest of the Statutes, provides: "They shall have the power to * * * regulate or prohibit the sale of all horses or other domestic animals, at auction in the streets, alleys, or highways, *to regulate* all carts, wagons, drays * * * and every description of carriages which may be kept for hire and *all livery stables.*" * * *

The State has the right under its police power to make regulations relative to the carrying on of certain lawful pursuits, trades and business, and as said by the United States Supreme Court in *Williams* v. *Arkansas,* 217 U. S. 79, quoting from a former decision in *Gunning* v. *Chicago,* 177 U. S. 183, "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determina-

tion comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

The State in the exercise of its police power has given to the city the power to regulate certain callings, pursuits, trades and business, as specified in said section of the statutes. The power to regulate gives authority to impose restrictions and restraints upon the trade or business regulated. "Regulate" means "to direct by rule or restriction, to subject to governing principles or laws." Webster's Dictionary. In *City of Rochester* v. *West,* 164 N. Y. 510, 58 N. E. 673; 53 L. R. A. 548, 79 Am. St. Rep. 659, the court said, "To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted." (*Cronin* v. *People,* 82 N. Y. 318.)

Judge Dillon says: "To regulate is to govern by or subject to certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specific business and also as to the building or erection in or upon which the business is to be conducted. By virtue of the power to regulate, it has been held that the city council may by ordinance prohibit the carrying on of a business within certain specified portions of the city. By virtue of a similar power, it has been held that it is within the authority of the common council reasonably to limit the manner by prohibiting one or more methods * * * ". 2 Dillon on Municipal Corporations (5 Ed.) § 665.

In re *Wilson,* 32 Minn. 148, the court said: "Under

a grant of police power to regulate, the right of municipal authority to determine where and within what limits a certain class of business may be conducted has been often sustained. For example, the place where markets may be had, butcher stalls or meat shops kept * * * the limits within which certain kinds of animals shall not be kept, the distance from a church within which liquor shall not be sold, etc."

In *City of St. Louis* v. *Russell,* 22 S. W. 470, the Supreme Court of Missouri, passing upon the validity of an ordinance enacted by the city of St. Louis under its charter giving it the power to license, tax and regulate livery and sales stables, said: "The first question for our consideration is whether or not the power to regulate livery and sales stables includes the right to designate the places and in what part of the city they may be located, and to prohibit their erection at other places," and further after quoting from other cases, "We think that the city has the power under its charter and ordinances to regulate the place of building livery stables and confine them to certain localities within the corporate limits, as well as to regulate the manner of their keeping, as to cleanliness, that they may not be or become obnoxious and deleterious to the health of her citizens."

Although it is true as claimed by appellee that a livery stable is not *per se* a public nuisance and is recognized as a necessary and legitimate business, still the ordinance does not attempt to prohibit the operation of the business within the limits of the city but only within the small area defined therein and the city having express authority to regulate all livery stables could make the restrictions notwithstanding the business regulated is not a nuisance *per se.*

McQuillan says: "While a livery stable in a populous community is not *per se* a public nuisance, it may become such and hence it has long been recognized as a subject necessarily within reasonable police regulations. Power to regulate livery stables and sales stables in-

cludes the power to limit them to certain localities and provide for their cleanliness so that they may not become injurious to health." 3 McQuillan Municipal Corporations, § 910.

In Ex parte *Lacy,* 49 Am. St. Rep. 93, the court, construing an ordinance in which the city attempted to regulate the business of beating carpets by steam power, said: "Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se,* and to stand upon different grounds from powder factories, street obstructions, and the like, still, the case is made no better for petitioner. This is not a question of nuisance *per se,* and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances *per se,* the general laws of the State are ample to deal with them. But the business here involved may properly be classed with livery stables, laundries, soap and glue factories, etc., a class of business undertakings, in the conduct of which police and sanitary regulations are made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: 'I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact.' In this class of cases a defendant has no such right. To the extent that it was material in creating a valid ordinance, we must assume that such question was decided by the municipal authorities and decided against petitioner and all others similarly situated."

The livery stable has long been a business well-nigh universally recognized and regarded as belonging to a class subject to police regulation for the protection of the public health and the promotion of the general welfare and appellees necessarily knew in engaging in such business that it was subject to reasonable regulation by the State and by the city under authority from the State.

The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict

and limit it to a certain defined territory, or rather, to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business, nor was it necessary to show that the business, as conducted amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said. the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State was given the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business nor an improper restraint upon the lawful and beneficial use of private property.

It is contended further that there are other ordinances, requiring the securing of a permit from certain city officials, before a livery stable business can be conducted in other portions of the city, outside of this restricted limit, or district, and that, such ordinances with the probable action of the city officers thereunder and this ordinance, making such restrictions, amount to a prohibition of the business in the entire city.

We have no question, however, of that kind here, and it will be time enough to determine it when it shall come before us. Neither do we think it provides an arbitrary or unjust classification of business for the purpose of regulation. The city council doubtless passed the ordinance to meet and remedy a condition actually existing and if it be conceded that it had power to regulate likewise "sales stables" and if they can not be reasonably included within the terms "livery stables" as a business usually conducted with and incidental thereto, still there is a discretion left to the council in

making the classification and we do not regard it unjustly discriminative. It operates alike upon all persons similarly situated within the territory defined and the council had the right to pass it even if it should not meet all possible conditions that might exist, as said in *Ozan Lumber Co.* v. *Union Nat. Bank,* 207 U. S. 251. "It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case and the Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there can not be an exact exclusion or inclusion of persons and things." See also *Williams* v. *State,* 85 Ark. 464.

It is next contended that the ordinance is void because it fixes penalties for its violation beyond the power of the city to prescribe. But if this contention be well founded it does not render the ordinance invalid since under its terms, by a statute expressly authorizing it to be done the penalty would be reduced upon convictions for its violation to the amount prescribed by law in such cases. §§ 5466-7 Kirby's Digest; *Eureka Springs* v. *O'Neal,* 56 Ark. 352.

The ordinance was a valid exercise of the city's power, under the statute authorizing it to regulate livery stables, and the decree of the lower court is erroneous.

It is reversed and the cause remanded, with directions to dismiss the complaint of appellees for want of equity.

SMITH v. PINNELL.

Opinion delivered February 24, 1913.

1. ACTIONS—TRANSFER TO EQUITY—PRACTICE.—When a complaint fails to state a cause of action at law, but the court permitted plaintiff to amend and file a motion to transfer to equity, the cause should be transferred when the amendment states a cause of action cognizable in equity. (Page 188.)
2. ACTIONS—REFUSAL TO TRANSFER—REMEDY.—When a law court refuses to transfer a cause to equity, appellant's only remedy is by appeal. (Page 188.)
3. JUDGMENTS—EFFECT OF IMPROPER ORDER OF PROBATE COURT.—Under section 201 of Kirby's Digest, where the estate of decedent is inadequate to complete payments on land purchased by him, the probate court may order the sale of the decedent's interest; and the probate court acts without authority when it orders the contract of sale canceled, and such order does not bind the minor heirs of the deceased. (Page 189.)

Appeal from Lawrence Circuit Court, Eastern District; *R. E. Jeffery,* Judge: reversed.

STATEMENT BY THE COURT.

Appellants brought suit in ejectment against appellees for certain lands, describing them, and alleged that their father, Z. Smith, died January 27, 1896, and that they are his sole surviving heirs. That on that date Delia M. Dobbs was of the age of ten years, J. A. Smith seventeen years and W. E. Smith twenty years of age and that Z. Smith was the owner and occupied said lands as the homestead at the time of his death. It was further alleged that appellees were occupying same and had been for tewlve years and that the rental value of the lands was $150 per year.

Appellees denied that Z. Smith was the owner of the lands and in possession thereof as a homestead at his death; that appellants are his sole surviving heirs; and their ages as alleged. They admitted that they were occupying the lands and had been for some years, denied the rental value thereof as alleged and claimed to be the owners of the lands, deraigning title thereto as set out. They also claimed title by adverse possession, plead the

statute of limitations and answered further, stating that they, in good faith believed that they were the owners of said lands under color of title thereto and had improved them, expending in making improvements thereon $1,000 and $300 in the payment of taxes, for which amount they prayed judgment in the event the lands were adjudged not to belong to them.

A jury was empaneled to try the cause and after a statement by appellant's attorney of what they expected to prove, towit: that Z. Smith, the father of appellants, purchased the lands in controversy from J. F. Phelps in 1893 and received a bond for title therefor; that the purchase price of the land was $1,800, which had been partially paid by him at the time of his death in 1896; that the remainder of the purchase money was due at his death and that the administrator by an agreement with Phelps and the direction of the probate court, had surrendered the title bond to Phelps, upon his satisfying the old judgment he had obtained upon the purchase money notes and the return of the purchase money notes to him, and delivered the possession of the lands to Phelps. That the probate court order authorizing this settlement was not binding upon appellants; that appellees had been in possession of the lands and collecting the rents for a long period of time and that the rents and profits were more than sufficient to pay the balance of the purchase money due. That appellants were entitled to an accounting and that the lands were the homestead of their father at the time of his death and that they were entitled to its possession.

Thereupon, appellees made a motion to dismiss the suit and the court took the matter under advisement until the next day.

Appellants then filed an amendment and motion to transfer to equity, alleging that J. M. Phelps was the owner of the land and sold the same, delivered possession thereof to Z. Smith, their father, who occupied the lands as his homestead, from the date of sale to his death, which occurred January 27, 1896.

That at the time of the purchase Phelps executed to Z. Smith, their father, a bond for title, reciting the consideration of $1,800 paid and to be paid; that A. B. Israel was administrator of the estate of Z. Smith, disposed of the assets thereof and as such administrator, on the 20th day of January, 1898, he reported to the probate court the sale and that Phelps had recovered judgment against the estate for $640.75 of the purchase money notes and asked permission to cancel and surrender the bond for title upon delivery of the other purchase money notes and the cancellation of the judgment, stating that there were no assets of the estate to pay for the lands and that it would be to the best interests of the estate to settle the matter in that way. The court, after a hearing, directed the administrator to deliver the bond for title to the maker of it and the possession of the land and take up the notes of Z. Smith and let the judgment thereon be satisfied in full, which was done. They alleged further that in pursuance of said order J. M. Phelps went into possession of the lands, to which they claimed title. Prayed that the cause be transferred to equity, that an accounting be had and appellees charged with the rents derived from the lands, and for the possession of the lands, etc. In this motion, they offered to pay any sums that might be found due appellees in excess of the rents collected from the lands.

Upon the filing of this amendment and motion, the court withdrew the case from the jury, denied the motion, dismissed the complaint and from its judgment appellants prosecute this appeal.

W. E. Beloate, for appellant.

Plaintiffs had a right to bring an action in ejectment. 31 Ark. 334; 34 Ark. 547; 60 Ark. 432; 98 Ark. 30.

The plaintiffs did not claim title by right of a vendor's lien, but by a prior title. A mistake in the forum or in the remedy sought did not authorize dismissing the action, but the cause should have been transferred to equity. Secs. 5991-1282; 51 Ark. 257; 81 Ark. 51; 71

Ark. 484; 85 Ark. 208; 87 Ark. 207; 84 Ark. 551; 88 Ark. 153.

Defendants did not set up their equitable title and can not resist the transfer.

H. L. Ponder, for appellee.

1. By filing the so-called amendment the plaintiff abandoned his original suit. 71 Ark. 222; 59 Ark. 441; 70 Ark. 319.

2. The complaint as amended did not state a cause of action either at law or in equity. 36 Ark. 456; 98 Ark. 30; 87 Ark. 207; 64 Ark. 213; 76 Ark. 67; Art. 9, § 3 Const.; 62 Ark. 398; 42 Ark. 503; 69 Ark. 123; 66 Ark. 442; 66 Ark. 367-373; 49 Ark. 469; 16 Ark. 164; 46 Ark. 438.

KIRBY, J., (after stating the facts). The complaint stated a cause of action at law, which, of course, would not have been sustained by the facts appellant's attorney stated he expected to prove upon the trial and if no amendment had been filed and motion to transfer to equity made, the court's action in dismissing the suit would have been proper, but such dismissal would not have precluded the bringing of another suit in equity upon the facts as alleged in the amendment. The court, however, permitted the filing of the amendment and motion to transfer and upon renewal of the motion to dismiss thereafter, granted it. Its action in doing so was erroneous. The cause should have been transferred to the chancery court. Sec. 5991 Kirby's Digest; *Rowe* v. *Allison*, 87 Ark. 211; *Newman* v. *Mountain Park Land Co.*, 85 Ark. 208; *Lucas* v. *Futrell*, 84 Ark. 551; *Wood* v. *Stewart*, 81 Ark. 51.

The court having refused to transfer it appellants' only remedy was by appeal. *Dunbar* v. *Bourland*, 88 Ark. 153.

The probate court order, set out in the pleadings, as amended, directing the settlement of the administrator of Z. Smith with J. M. Phelps and the surrender of the title bond and possession of the lands upon the

cancellation of the notes for the remainder of the purchase money thereof and the satisfaction of the judgment obtained upon such notes was without authority and did not operate to bind appellants.

The law provides in cases where a decedent has purchased lands during his life time and not completed the payment therefor at the time of his death that the probate court, if it shall be of the opinion that the assets of the estate are not sufficient to pay for the lands that the court may order the administrator or executor to sell at public sale all the right, title, interest and claim of the testator or intestate in and to said lands. Sec. 201 Kirby's Digest.

The case being undeveloped, we will not attempt to pass upon the question of whether appellants are barred by laches or limitations from the prosecution of this suit.

For the error indicated, the judgment is reversed and the cause remanded with instructions to transfer it to the chancery court and for further proceedings there in accordance with law and not inconsistent with this opinion.

THE GOYER COMPANY v. WILLIAMSON.

Opinion delivered February 24, 1913.

1. GARNISHMENT—PERSONS SUBJECT TO GARNISHMENT—GOVERNMENT AGENCIES—LEVEE BOARD.—A levee board is an agency of the Government, created for public purposes, and is not subject to garnishment at law. (Page 198.)

2. EQUITABLE GARNISHMENT—LEVEES—SUBCONTRACTOR—INSOLVENCY OF CONTRACTOR.—Although a subcontractor has no lien upon the levee, if he alleges the insolvency of the contractor and that he is without remedy at law, he may in equity, subject the funds in the hands of the levee board, due to the contractor, to the payment of the debt due to him. (Page 199.)

3. MECHANICS LIENS—PUBLIC PROPERTY—LEVEES.—Neither the contractor nor sub-contractor can have a lien upon a levee for labor performed or materials furnished. (Page 199.)

4. CREDITORS' SUIT—LIENS—PRIORITIES.—A subcontractor on the work of constructing a levee has no lien on funds in the hands of the levee board until the filing of his suit in equity, and the filing of such suit does not give him a right to said funds superior to the right of an equitable mortgagee and assignee of the principal contractor, when said mortgage and assignment of the funds due the principal contractor from the board, has been recorded and the assignment turned over to the levee board, before the filing of the suit in equity by the subcontractor. (Page 199.)

5. CREDITORS' SUIT—LIENS—ESTOPPEL.—Where the equitable mortgagee and assignee of funds due a principal contractor, in the hands of a levee board, recognized the rights of a subcontractor, and proposed to pay to the subcontractor the amount the principal contractor agreed to pay him, and after the principal contractor collected amounts due it from the board and had paid them over to the mortgagee, and the mortgagee did pay the subcontractor all amounts due him under his subcontract, and agreed with the subcontractor to pay him the balance due, upon his completion of the work, out of the retained percentage in the hands of the levee board, the mortgagee and assignee is estopped from claiming the percentage retained, as against the subcontractor. (Page 199.)

Appeal from Chicot Chancery Court; *Z. T. Wood*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal presents a question between Goyer & Company, intervenors in the lower court, and N. C. Williamson, appellee, over a sum of money owing by the Board of Levee Inspectors of Chicot County, Arkansas.

In November, 1910, Williamson filed a suit and attachment against T. S. Shields & Company, in the circuit court of Chicot county and garnished the said board of levee inspectors, alleging that T. S. Shields and John Nystrom, as partners, under the firm name of T. S. Shields & Company, were indebted to him in the sum of $1,628.33 for work and labor done in the construction of a portion of the Sterling enlargement of the levee in Chicot County, filing therewith a statement of the indebtedness. A writ of garnishment was issued and the board admitted an indebtedness of $2,680.21. A demurrer to the complaint was filed and an amended complaint, stating the amount of the indebtedness of

Shields & Company to him and the items thereof, and that the board was indebted to said company in the sum of $1,594.99; that it refused to recognize his rights to the money and that Shields & Co. were insolvent and seeking to deprive him of the compensation for the work and would do so if they were permitted to withdraw the funds leaving the plaintiff remedyless. He alleged that he had a laborer's lien and was entitled to be subrogated to the rights of Shields & Co., who were further indebted to him in other amounts. That the work was completed and that there remained in the hands of the levee board $2,680.21 unpaid on said work and prayed judgment against Shields & Co. for $1,628.33, with interest and that the cause be transferred to the chancery court and upon a final hearing that the sums of money due him be declared a lien on the sums of money in the hands of the board of levee inspectors; that pending the hearing, said levee inspectors be made a party and enjoined from paying any of the sums to Shields & Co. until a final disposition of the cause. A demurrer to this amended pleading was overruled and the cause transferred to the chancery court, with leave to make up proper pleadings after the same had been lodged in that court. An injunction was also granted against the board of levee inspectors, restraining them from paying out as much as $2,000 of the money in their hands. Shields & Co. filed no answer to the complaint. The board of levee inspectors answered that it had in its possession $2,000 held by it to await the result of Williamson's suit as sub-contractor against Shields & Co., as contractors, for the levee work in Chicot county.

The Goyer Company made itself a party and intervened on March 29, 1911. It filed an answer and cross complaint, denying that the board had any sums of money due T. S. Shields & Co., to which Williamson was entitled, denying that he had a laborer's lien upon the funds or debt and his right of subrogation to the rights of Shields & Co. and also denying that Shields & Co. had any right to the money in the hands of the levee

inspectors. It set out that it was a corporation in Mississippi, that it had furnished Shields & Co. money, supplies and outfits for levee construction work and had taken deeds of trust to secure the payment therefor, in which all sums of money due or to become due to said company for levee construction work were assigned to the Goyer Company. These deeds of trust were filed as exhibits to the cross bill. It was alleged also that they were of record in Chicot county, Arkansas, at the time of the sub-contracting of the levee work by the complainant, Williamson. They further alleged that on March 7, 1911, Shields & Co. transferred and assigned to them all the sums of money or accounts due them, or either of them by the Board of Levee Inspectors of Chicot County, naming the amount then due of $3,250 to the Goyer Company and on that date gave an order to the Goyer Company on the board of levee inspectors for said money, or a warrant for the same, exhibiting a copy of the order with the complaint. That on March 11, 1911, said company with Shields & Co. and John Nystrom gave an order to the board to pay said company whatever sum might be due to Shields or Shields & Co. and John Nystrom, reciting that Goyer & Co. had an order for the transfer of the same and this order was filed by Mr. Shields with the board on March 24, 1911, and a copy exhibited with the pleadings, setting up that the said fund was owned by the said Goyer & Co. before the bringing of the suit in the circuit court, the transfer being alleged to have occurred March 29, 1911, and denying that the complainant had any right to the said fund. It prayed that the board of levee inspectors be required to pay the sums over to it, that complainant be denied any right thereto and made its answer a cross bill. Notes and deeds of trust securing them of date June 22, and August 27, were introduced in evidence and contained the following clause:

"It is hereby understood and agreed that the proceeds of all contracts entered into by T. S. Shields & Co., Shields Bros., and Nystrom, or that may hereafter be

entered into by us or either of us or any of us during the life of this contract for levee or other construction work, are hereby assigned to the said Goyer Company, which said proceeds shall be duly applied when collected to the credit of our account and indebtedness to said Goyer Company, as the same may accrue, and if such estimates and proceeds shall not be paid over to said Goyer Company, the said Goyer Company shall have the right to declare all of such indebtedness owing by us to be due, and shall have the right to foreclose the same."

The deed of trust of June 22, 1909, was filed for record on July 7, 1909, in Chicot county, and the one of August 22 was filed there on September 27, 1909, for record. It was agreed that Shields Bros., and Nystrom owed the Goyer Company $19,906.43 on account; that copies of the order attached to the answer and the assignment of Shields & Co. of $3,250, or whatever might be due them by the board of levee inspectors were copies of the original.

Williamson testified that he was a resident of Louisiana, sub-contracted a part of the Sterling enlargement of the Chicot levee from T. S. Shields & Co. and the work he did under the contract amounted to $9,599.79 and that said company lacked paying for the work and still owed balance thereon of $1,628.33. That Shields & Co. contracted with the board of levee inspectors and that there was on November 10, 1911, ten per cent of the contract price retained by the board and three cents per cubic yard on 27,967 yards of dirt removed in making the drainage ditch, the contract price for the removal being twenty-one cents, of which amount eighteen cents had been paid. He also stated that he had a conversation with Edmond Taylor, general manager of the Goyer Company, in the presence of T. S. Shields, and that Taylor agreed to pay him all this retained percentage, admitted at that time to be $1,000, approximately.

The testimony shows that all the money he had received for the work done under the sub-contract had

been first paid to Shields of Shields & Co. by the board, by him turned over to the Goyer Company and by the Goyer Company to him, Williamson. There had been some trouble between him and Shields about the collection of certain of the money, after Shields had made a collection from the board and lost a certain sum of money dealing in cotton futures and failed to turn the collection over to the Goyer Company. He tried to get Shields to go with him afterwards to the Goyer Company and make satisfactory settlement, but Shields disliked to go, claiming that if Taylor, the manager of the company, knew he lost money dealing in cotton futures that he would take his outfit away from him and close him out entirely, and he went and asked Taylor if he would pay him the money Shields owed him and that Taylor stated he would pay him every cent he had received on the Sterling work, which was his sub-contract under Shields. At the time, there was ten per cent held back on the work completed; that the Goyer Company paid him this ten per cent and Mr. Taylor assured him when the contract was completed he would pay the entire ten per cent held back by the board of levee inspectors, which was approximately $1,000. That Taylor was much put out when he found Shields had been dealing in cotton futures. Taylor and Shields both offered to turn over the entire contract to him; let him draw the money due on the contract on completion of the work, including the percentage retained by the board; that he refused to take the contract because the retained percentage would not cover the amount due him, and had Taylor's assurance that he would get the retained percentage without doing any work, except on his subcontract. Taylor told him the Goyer Company was furnishing all the advances to Shields & Co., enabling them to do their levee work and carry out their contract.

This witness further said that Taylor did not inform him of the assignments by Shields & Co. to the Goyer Company, but that Shields turned over all estimates to them after he collected the money from the levee board.

He stated when he first took the sub-contract with Shields he wrote the Goyer Company, having understood that Shields was tied up with them, and had a reply from them.

Edmond Taylor, general manager of the Goyer Company, testified as to the correctness of the accounts and the amounts due from Shields Bros., from T. S. Shields and John Nystrom to the Goyer Company and the execution of the mortgages and deeds of trust, securing the indebtedness, the assignment thereby of the proceeds arising from the contracts for levee work and that at the time of the execution of the trust deeds the contract between Shields & Co. and the levee board had already been entered into. That Shields & Co. had done business with their company for a number of years and all the property in the deeds of trust had been purchased by money paid and furnished by the Goyer Company. That they had made their bonds for levee contracts, etc. That all the estimates for the levee work were turned over to the Goyer Company by T. S. Shields & Co., under these deeds of trust, except one item, which was used by him without the knowledge or consent of the company in a cotton future deal. That he was authorized to receive the estimates for the Goyer Company, and did it in every instance, except the one mentioned. He said Shields and Williamson came to his office and acknowledged that they had used a check from the Chicot Levee Board in cotton speculation and both insisted that he advance money to Shields so he could make advance to Williamson for the contract for the levee work, with which he had contracted with Williamson; and stated that he said he would not pay out any money until it came into his hands. That he was much put out that some of the money had been used in cotton future speculation and expressed himself so, emphatically, at the time. That Shields had no income, except estimates from the levee board, which were turned over to the Goyer Company, and that all payments of every description which Shields made to Williamson were made through the Goyer Com-

pany with the exception of the $600 used in the cotton future deal and a little cash item of $50. He denied that he told Williamson he would pay him the retained percentage when he completed the work and said:

"I didn't make any such statement to him. I did have a conversation with him, but didn't make the statement that I would pay him $1,000 when he completed his work. I stated to him that I would pay him nothing until the money was collected and paid over to me by Shields, but I did state to him that when all the work was completed on the contract I would pay him $1,000 retained percentage he claimed was owing to him." He said further that Williamson knew of the deeds of trust and the assignments therewith and that all payments to him had to come through the Goyer Company. That he had discussed it with him at the time.

The president of the levee board, I. M. Worthington, stated that the contract for the enlargement of the levee in Chicot county, known as the Sterling enlargement, stations 3950 to 3980 and 4030 to 4035, was let to T. S. Shields & Co. and by them sublet to Williamson, and further that there was ten per cent retained on the entire contract. That he had turned over no money since November 10, 1911, except under order of the court.

The contract of Shields & Co. with the board and the bond for the performance of it, both providing that the company should be responsible for and pay all liabilities incurred in the construction of the levee work, for the labor and materials used in its construction, were introduced in evidence and the Goyer Company was surety on the bond.

The court found that Shields & Co. entered into the contract to construct the levee work, pay for all labor and materials used in the construction thereof; that the Goyer Company became surety on the bond; that after the execution of the contract Shields sublet a portion of the work to Williamson; that the Goyer Company had notice of the sub-contract, assented to it and sold

Williamson all his supplies for which he paid and received money for his work through said company as the work progressed after it had been collected. That he completed his sub-contract and that there remained due on the work done by him for the levee board the sum of $1,591.99, made up of ten per cent reserved by the levee board, until the completion of the Sterling contract and three cents per yard retained on the contract price of removing 27,967 cubic yards of dirt in constructing a drainage ditch, necessary to the work. That the board owed Shields & Co. other sums on the remainder of the levee work besides that due on the Williamson sub-contract. On November 11, 1910, Williamson filed a suit in the circuit court against Shields and had garnishment issued against the board; that a demurrer was sustained to the complaint in the circuit court, amended complaint filed and the cause transferred to the chancery court and by agreement all sums, except $2,000 were paid over by the board to the Goyer Company on the order of T. S. Shields & Co.; that the Goyer Company asked and was allowed to be made party defendant and filed answer in the equity court claiming all the sums in the hands of the levee board due upon the Shields contract by virtue of an assignment from Shields Bros.

The court found that the assignment was sufficiently definite and certain to convey the interest of Shields & Co. in the funds, but that the Goyer Company by its action in approving the sub-contract with the plaintiff, Williamson, and its dealings with him in relation thereto, is estopped from claiming any of the funds due for work performed by him which amount to $1,591.99, until he is paid off and that Shields is indebted to him in the sum of $1,628.33, with interest at six per cent from July 1, 1910, and rendered judgment accordingly.

The Goyer Company appeals from the decree in Williamson's favor against it and the board.

Wynn, Wasson & Wynn, of Greenville, Miss., and *N. B. Scott,* for appellant.

The plaintiff below acquired no lien by his garnish-

ment. In this State garnishment proceedings against a public corporation are a nullity. 90 Ark. 118. The only lien plaintiffs acquired was when they filed the amended complaint in the chancery court. *Id.* The assignments in favor of Goyer & Company were prior to the general creditor's lien acquired by the filing of the amended complaint, and these assignments are not too general in their terms. 79 Miss. 650; 86 Miss. 520; 91 Miss. 834; 52 Miss. 653; 51 Ark. 218; *Id.* 410; 52 Ark. 37; 52 Ark. 439; 32 Ark. 390; 92 U. S. 325; 58 Miss. 903.

W. Garland Streett, for appellee.

It is not contended that the assignment by Shields & Co. of the proceeds of their contracts was void, but that the word "proceeds" as used could only be construed to mean the profits arising from such contracts after all bills were paid for labor and materials used in the construction of the levees and the carrying out of the contracts therefor. Under the prayer for general relief in the amended complaint, plaintiff in a court of equity will be granted all the relief he may be entitled to, though not specifically prayed for. 39 Ark. 531; 19 Ark. 62; 76 Ark. 551.

It is not material in this case whether or not any right or lien was acquired by the garnishment proceedings, nor whether Shields assigned to appellant before or after the suit was instituted or before or after the cause was transferred to chancery.

KIRBY, J., (after stating the facts). It is contended, first, that appellee acquired no lien by his garnishment proceeding in the circuit court and that the assignments from Shields & Co. contained in the deed of trust and also the order from them to the board directing the payment of the balance due upon his contracts to the Goyer Company were made prior to the transfer of the cause to equity and the fixing of the lien by the equitable garnishment and that he acquired no lien against said fund thereby.

The levee board was one created for public purposes and given certain powers and required to perform

certain duties for the public good and was an agency for the government in fact for such purposes, and, as such, was not subject to garnishment at law. Upon the transfer of the suit to equity, however, the allegations of the insolvency of the contractors and that appellee was without remedy at law, he could have subjected the funds in the hands of the levee board due the contractors to the payment of his debt within the doctrine heretofore announced in *Plummer* v. *School District,* 90 Ark. 236.

Neither the contractor nor the sub-contractor could have had a lien upon the levee constructed for labor performed nor materials furnished. It may also be conceded that the intervenor company had valid equitable mortgages and assignments of the funds in the hands of the levee board, due Shields & Co., contractors, for the construction of the levee under his contract with it, and that such mortgages and assignments were made and recorded in Chicot County, at the time Williamson contracted with Shields & Co. to do a portion of such levee work. It is also true that the written assignment of Shields & Co. of the balance of the fund due upon the completed work of date March 7, 1911, to Goyer & Co., was turned over to the levee board by said company before the transfer of this suit to equity. Under these conditions, he could not have acquired a superior right to subject any of the funds in the hands of the levee board, due to Shields & Co., for the construction of the levee to the payment of his debt against Shields & Co. for the construction of the work under his sub-contract, since he could have no lien for any such work done, nor materials furnished nor against the funds in the hands of the levee board until the filing of his creditor's bill in the chancery court.

The testimony, however, shows that at the time of entering into the sub-contract for the construction of certain of the levee work, he notified Goyer & Co., intervenors herein and mortgagees of T. S. Shields & Co., the principal contractor, of his sub-contract, and there

was no objection to it, upon the part of the intervenor. It is admitted that he bought his supplies from said intervenor company and that all the payments that were made to him for work done under the sub-contract were made through said Goyer & Co. after the estimates of the work had been made, the money collected by Shields, of the firm of principal contractors and turned over to said Goyer & Co. That they had paid him all the amounts so collected, shown to be due for his work under the sub-contract, except in one instance, where Shields had diverted some of the money and lost it in a cotton future deal. Williamson testified that thereafter he went to the Goyer Company for an understanding and settlement and was assured by the manager that he would be paid the amount of the retained percentage under the contract with the levee board, still in its hands, upon the completion of the work, if he would continue until his work was completed. It is true, the manager denies this, but he says: "I stated to him that I would pay him nothing until after the money was collected, and paid over to me by Shields, but I did state to him that when all the work was completed on the contract, and the Goyer Company was paid, I would pay him $1,000 retained percentage, he claimed was owing him." The contract had been completed and all the money due therefor under the contract with Shields & Co. for its construction had been paid to the Goyer Company, so far as the record discloses, except the retained percentage and the amount ordered held by the court's order, subject to the payment of the amount due Williamson under his sub-contract, if he should recover in this suit.

It is true, the testimony does not disclose that the contractor received a greater amount of compensation for the construction of the levee work than he agreed to pay to the sub-contractor upon the portion thereof constructed by him, but it may be assumed that they did, for otherwise there would have been no interest to the contracting firm to make a contract and allow the sub-contractor the same rate of compensation for a portion

of the work that was to be received by the principal contractor for the whole of it.

The chancellor could well have found from the entire course of dealing between the intervenor company and appellee herein that it recognized his sub-contract, expected to pay him the amount that was agreed to be paid by the principal contractor thereunder; that it did pay him all such amounts as were received by him under his sub-contract after the collections thereof by the principal contractor and delivery to them, except in the one instance of the cotton future deal, already mentioned, and that it agreed upon his completion of the sub-contract to pay him the balance due under his contract of the retained percentage thereon in the hands of the levee board. The manager's statement is really not in conflict with this finding. He said, "I did state to him that when all the work was completed on the contract, and the Goyer Company was paid, I would pay him the $1,000 retained percentage he claimed was owing him." He surely could not have expected Williamson to understand from this statement that he meant when all of the contract was completed and all the work was completed on the contract and the Goyer Company had been paid in full all indebtedness owed it by Shields & Co., the principal contractors, that he would then pay the amount of the retained percentage claimed. He certainly did not say that and from his own statement it could well appear that upon the completion of the whole work for the levee board and the final payment therefor by it that the sub-contractor should have the amount of the retained percentage claimed to be due; the Goyer Company, of course, then having received all the money that would come to it or was expected to come to it upon the contract of Shields & Co. after the sub-contract made with Williamson.

Under these circumstances, it would be unjust and inequitable to permit the Goyer Company now to claim and hold this fund when its whole course of dealing showed it expected Williamson to have the money earned

under his sub-contract, when it paid him all such sums as he received thereunder after having collected it through Shields & Co., and promised before the completion of the work to pay him the balance claimed to be due upon payment therefor by the levee board after he had completed it. Intervenors are now estopped to claim this fund as against him.

The decree of the lower court was correct and is affirmed.

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

Opinion delivered February 24, 1913.

1. RAILROADS—DISCOVERED PERIL—BURDEN OF PROOF.—Plaintiff was a railway section foreman and charged with the duty of keeping the track clear between certain points, and while riding on the track on a speeder, he suddenly discovered the approach of a train from behind, and while attempting to remove the speeder from the track, was struck and injured. *Held*, the burden of proof is upon plaintiff to show, in order to recover damages, that the employees in charge of the train discovered his perilous position in time to have avoided injuring him and negligently failed to use proper means to do so after discovering his peril. (Page 218.)
2. RAILROADS—DISCOVERED PERIL—NEGLIGENCE.—When a railway engineer sees a section foreman on the track ahead removing a speeder from the track, the engineer has a right to presume that the foreman would clear the track after he discovered the approaching train, and the railway company will be liable only if the engineer discovered the foreman in a place of peril from which he could not extricate himself, in time to have avoided striking the foreman, and failed to use proper care after making such discovery. (Page 219.)
3. RELEASE—BURDEN OF PROOF—RAILROADS.—Where plaintiff, an employee, was injured by a railroad and accepted a settlement, and executed a release in full to the railroad for all damages received by him, the burden of proof is on him to show that there was fraud in the procurement of the release, in order to avoid the same. (Page 220.)
4. MASTER AND SERVANT—RELEASE FROM LIABILITY—CONSIDERATION.—When a part of the consideration for a release executed by an employee releasing a railroad company from liability for dam-

ages is, that the railway company will give him permanent employment at his old position at a certain wage, it will not be held that the railway company must employ him without regard to whether he discharges the duties of the place in a manner reasonably satisfactory to his employer. (Page 220.)

Appeal from Jackson Circuit Court; *R. E. Jeffery,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought suit for damages for personal injuries, alleged to have been caused by the negligence of the railroad company in running him down and striking him with one of its trains, while he was attempting to remove a speeder from the track and after discovering his perilous position.

The answer denied any negligence on the part of the railroad company, plead assumption of risk and contributory negligence of appellee and also set up a settlement and release of the company from liability, executed by appellee for a stated consideration.

Appellee denied that he settled or compromised the matter complained of in the suit, as alleged, that he was paid $45 in consideration thereof and that he executed a release to appellant, discharging it from further liability thereon; alleging further that if appellant had a release it was obtained by fraud and misrepresentation of the facts. That he was suffering greatly from the injury and was greatly impaired in mind and body and could neither read nor write and that appellant's agents and servants "falsely represented to him that he should retain his employment in the position of section foreman with the company and by such false representation, which was relied upon by him, induced him to execute some paper, the contents of which were unknown to him, but was also represented to him to be an agreement further to employ him in consideration for his refraining to make claim for his injury."

That appellant knew such representations to be false and that plaintiff believed them to be true and acted under such belief. That if he signed the purported re-

lease, his consent was obtained through fraud and misrepresentation, avoiding same.

Appellee was twenty-seven years old, had been railroading about a year at the time of the injury, and was section foreman of section number seven on appellant's railroad at Olyphant. He had been section foreman about eight weeks at the time of the injury, and related the occurrence as follows: On that morning he had gone on a speeder with Ed Riley over his entire section to the yard limits at Newport. They had tightened some bolts there and were returning; all the regular passenger trains due to go south until late in the evening had passed; didn't know whether the regular freight trains had or not; couldn't tell what was in the yards at Newport from where he stopped. When he started back to Olyphant and reached the south end of the river bridge he stopped and listened but didn't hear any trains, went on around the point of the curve and stopped and listened and didn't hear any trains, ran about half or a third of the way around the curve and stopped again and listened and heard nothing, then moved on around the curve probably half the distance where he stopped again and didn't hear or see any trains, and then moved on two or three telephone poles when we saw the train. Ed Riley saw it first and says: "Will, there is a train right behind us." I reached down and threw the brake on and stopped as quick as I could without throwing the wheel off; I looked back over my shoulder and saw the train, saw the engineer standing up in the cab looking ahead; I stopped the car as soon as possible, got the pick and laid it down, stepped off the end of the ties right by the side of the track and stepped back on the end of the ties, picked up my end of the car and Ed Riley picked up his end, and we started off with it; this little wheel caught on the rail. There were a lot of tools in the car, which made it heavy in the center, and which made the little wheel drop down and it looked like the engineer was stopping. I thinks to myself, if I leave that on there it is liable to cause the death of several people;

and I think I can get it off; slide it off. I reached up and was stooping over, lifting on the axle of the little wheel, and while I was doing that the cow catcher struck the little wheel and struck me, and I have been injured ever since. When I got off, Ed Riley got hold of the front wheel on my right hand side and I got hold of the rear of the speeder, and we both lifted on that side until we got it clear of the track; that took us about four feet or a little more from the outside rail; if I had remained where I set the end of the car down, the engine would not have struck me.

Q. Why go back?

A. Simply because I knew if I didn't take that wheel off it was liable to cause a wreck and kill or injure several people. This was a passenger train and the wheel was right jam against the rail on the inside of the track; the wheel was on the east side of the west rail. There is timber all along there and a man on a speeder can not see more than two telephone poles behind him. This is a straight track down there a little ways to the curve. We were struck along about mile post 265 or 266.

Appellee stated that he didn't know anything after he was struck until late that night when consciousness returned to him in St. Vincent's hospital in Little Rock. He suffered much pain and for about three weeks there was a sunk-in and blood-shotten place in his back; that he passed some blood in his urine for two weeks.

Ed Riley stated that he was with appellee on the speeder, and after the bridge watchman told them the train was four hours late, they went on down to mile post No. 266, where there was a bad large curve this side of it extending about thirty telephone poles; there were a lot of saplings grown up there to the edge of the dump. That they listened upon reaching the head of the curve about five minutes and were sitting facing each other on the speeder, appellee being on the back and looking ahead and witness on the front end. He also had turned his head and was looking ahead, expecting a train from the south; they stopped again half way around the

curve and then ran on a little way and witness looked back north and "saw the train right at us." Appellee stopped the speeder as quick as he could, grabbing the brakes, and we started to take it off. He threw the back end down at the endge of the track and the little wheel hung. We got it all off but the little end of the wheel and he went around to get it off when the train hit him. He was stooping down to get the little wheel over the rail, this wheel being hung on the inside of the rail. I was helping him to get it off at the time he was struck; he had stooped down to pick up the wheel; the train knocked him down by the car and knocked me down the dump. I got up and got back to him and got hold of him. After the train got by it stopped and backed up and took us on to Bald Knob. He was hurt in the back and was unconscious. They took him to the doctor's office, reached there about 12:30. The doctor dressed his wound. It looked like blood was running out where the pilot hit him about the region of the kidneys, just above the hip bone. They carried him from there to the infirmary at Little Rock. Witness first saw the train and said, "There comes a train." The engine was about two telephone poles, or a little further distant. He didn't see any of the train crew at the time; when he had the speeder off the track, all but the wheel, and Mr. Morgan was trying to get that off, the engine was not over a rail and a half distant from him.

If witness had kept his natural position on the speeder, he would have been looking south as the speeder was going north. He did not know how far it was from the curve to the point where the speeder was struck but there was a little straight track north of the speeder where it was taken off the track. He heard no alarm sounded, but saw the train. He told Morgan as soon as he saw it and they got the speeder off, all but the little wheel. The speeder has two large wheels that run on the same rail while the little wheel goes out on the other rail, the small wheel being the guide wheel; the heavy part of the speeder is built over the two large wheels and the little

wheel running on the other rail is stretched out from the speeder by two rods; when we got the two wheels and the body of the speeder off, we had the most of the weight of the speeder off the track. Got the speeder clear of the track, with the exception of the little wheel, which hung on that rail. When we got the speeder off, all except the little wheel, Mr. Morgan was clear of the track, and of the train and saw the train before he went back; he saw the train coming when he started back. When he looked back he got clear of the track, and after that stepped back and got hold of the little wheel, but he did not step over the rail then. It was a passenger train, said to be the third section of No. 5. After the train struck Mr. Morgan it passed by us about three car lengths. It never touched me at all.

Con Riley, the engineer, said when there are three different sections of a running train, there is a green flag in the day time and a green light at night carried by the preceding sections that gives notice of the following section; when I came around the curve on the north end of the White river bridge I saw an object on the track about a mile ahead of me, and thought it was section men working on the track. When I got a little bit closer I blew four blasts of the whistle, thinking they would get off, and went a little bit farther and blew a crossing whistle; when in about 600 or 700 feet from them I began sounding danger whistle and also shut off steam and applied brakes to stop train. When I commenced sounding danger whistle they saw me and jumped off the car and jerked the car off of the track and the small wheel of the car caught on the inside of the rail and they left the car and ran away from it; when they first jerked the car off I thought they were going to take it off, and they had time to do so if they had not run away from it. Mr. Morgan ran back and grabbed the lever that runs from the large wheel to the small wheel, and as he did so he stepped upon the track and still had hold of the lever, but before I got to him he stepped out of the track and never let go of the lever and about that time

I struck the wheel, and although I was slowed down at that time to about six or eight miles an hour, but when he came back on the track the second time I did not have time to stop. When I first started to stop I could have stopped if they had not got off the track, but they had already got off the track themselves and I thought they would take the car off; they would have gotten the car off if they had not run away from it. When he went back I could not have stopped the train. In regard to section men and men on speeders as to looking out for trains, they have a time card and know what trains are due and also have a book of rules and know that trains carry signals for following sections. This was the third section of No. 5 and I was carrying signals for the fourth section following me. A speeder would not wreck a train because it is too small. I had about a 90-ton engine pulling a passenger train with nine coaches, a fast through train, and we were running about 40 to 45 miles an hour. I do not see how it would be possible for the small wheel of a speeder to wreck a train. I judge that the speeder wheel was about eight inches high. I have never struck a speeder before.

The fireman, D. T. Owens, stated: As we came around the curve, I saw the speeder with a couple of men on it, and told the engineer and he blew the whistle; they did not show signs of getting off, and we slowed down and kept blowing it and were pretty close before they showed signs of hearing it, and finally they got off the speeder and got the speeder, all but the little wheel, off and Mr. Morgan got back to get it off and we hit the wheel. I thought they were in the clear and it seemed to me they got the car off. I was on the left hand side and Mr. Morgan was on the right hand side. They were in the clear the last time I saw them. The train gave road crossing whistles and they did not seem to hear it, and we blew danger whistles, which is just one whistle after another. The men were in the clear the last time I saw them and in safety. I suppose

after we struck the speeder we went by about three car lengths. There were nine coaches in the train.

Appellant introduced in evidence a full release, signed by appellee and witnessed by John L. Riley and R. L. Higginbotham, for the receipt of $45 which was acknowledged to have been paid. Appellee was in the hospital a month and during a part of the time walked on crutches. During Christmas week he told the doctor he wanted to go home and stated: The doctor pronounced me all right; wrote a letter and told me to take it to the claim agent, over the union depot and said he would settle with me.

Q. Told you you were all right, did he?

A. Yes, sir.

He left Little Rock on the night of the 28th, and he suffered pain continuously from that time on, and was continuously taking treatment and had been under the care of a physician. Before leaving, he went to the claim agent, as he was directed by the doctor to do and admitted that he attempted to sign the release; said the doctor told him he was able to go back to work; that he felt like he was injured, but after the doctor told him he was all right and the claim agent told him the doctor said he was all right he thought he might get well. That the claim agent told him he couldn't get anything out of the company, but that he could get his job back again permanently. That he asked the claim agent how long the job would last and he replied: "As long as you want it." The claim agent then proposed to allow him straight time during the time he was in the hospital and let him have his job back permanently, and he believed he would do what he said and he agreed to it.

Q. State whether or not you relied upon these statements made to you by Mr. Higginbotham at that time.

A. Yes, sir; that is I thought he would do what he said. That is, I signed that on the promise of the steady job; permanent job.

Q. What did he tell you as to the contents of that paper?

A. He didn't tell me anything.

Q. He didn't read it to you?

A. No, sir; didn't read it to me; he handed it to me and asked me if I could read it; handed it to me and I told him, "No, sir; I can't read it." He said, "Well, you know what it is?" I says, "I don't know whether I do or not." He says, "Well, it is just like, just what you say," and that is the last of it, never had no more with it.

Q. Just like you say?

A. Yes, sir, just like you say. I told him about what I thought I ought to have. The $45 was for what time I spent in the hospital from the first of the month to the last. I don't know whether Mr. Higginbotham called up Mr. Cherry, but he called up Mr. R. C. White, the division roadmaster, who was above Cherry. He called up White and asked him if he had my job, and if I could go to work when I got back and White told him, "Yes, he can go to work any time he gets there, he has a job in the morning if he was there to go to work." And the claim agent told me what he said. And after the claim agent wrote my pass he wrote a letter to Mr. White. I gave it to Mr. White and he started to write me a pass. I told him I already had a pass. He said, "All right, I will see Cherry tonight, he is in town, and I will tell him to put you to work the first of the month. I told him all right, that it would be the first of the month before I wanted to go to work. And he said, "All right, I will see Cherry tonight and have him put you to work the first of the month." I got the $45.

He further stated that the $45 he received was for the time he spent in the hospital. He took the doctor's note to the claim agent but said it wasn't read over to him, and he didn't know its contents. The agent opened it and read it, but not so he could hear it. He denied that the money was paid him by check and that he endorsed the check, also said that there was no one in the

office at the time of the settlement except Mr. Higginbotham and he never saw the claim agent, Riley, until the time of the trial, that the paper was not dictated to a stenographer in his hearing and that there was none in the room. He said he agreed to the release under the circumstances in consideration of the $45 and the promise of his old job back again permanently.

Higginbotham stated that he was with the claim department and settled the claim against the railway company with appellee, and took the release introduced in evidence marked Exhibit "A" to plaintiff's testimony, the long form release, that Morgan signed the release in his presence and in the presence of Riley, that he wrote all of the signature himself and wrote his name across the face of the voucher for $45. He read the release to him before he signed it and tried to get him to write through the body of the release, "This release has been read to me and I understand it," but he said he was not a very apt student at writing, but could write his name, and I said, "All right, write your name there," and he wrote his name at the bottom. I read this release to him just as it reads now and he signed it. This other paper draft No. G-1470, shows the manner in which I paid Mr. Morgan; he endorsed this draft and I gave him the money on the draft; Mr. Morgan's name and my name are endorsed on the draft, and I turned it into the bank. The name on the back of the draft is Mr. Morgan's personal signature; he wrote it and wrote all of that name. When the release was drawn the draft was drawn, and Mr. Morgan endorsed the draft and I endorsed it, and paid him the money and put the draft through the ordinary manner of payment. I did not tell Mr. Morgan, during the progress of this settlement, or at any time relating thereto that he could get his job back at any time he wanted it, and I had no authority to say such as that; no member of the claim department has any authority to say anything like that; there was a conversation about his job, but I did not tell him he could get his job back as long as he wanted it, and did

not have the authority to hire him or anybody else or to tell him that he could get his job indefinitely; I had a conversation with Mr. White and Mr. Morgan heard my end of the conversation, and I told him Mr. White said he could go back to work; I did not tell him that Mr. White said he could have his job as long as he wanted it, and Mr. White never said that, and I had no authority to tell him he could get back to work. I dictated that release to a stenographer. I did not come here on a subpoena, but on a pass. In addition to dictating the release to the stenographer in his presence, I read the release over to him, and we talked about his injuries and this matter quite a while before the settlement was made; Mr. Morgan seemed to talk intelligently and understand these matters, and he made no complaint as to the terms during the dictation or the reading; I explained to Mr. Morgan that I had the entire record and the statements and it was just after Christmas and Mr. Morgan said he had been down there at the hospital, had a wife and a baby and was a poor man and had not been able to buy his wife and baby any Christmas presents: "I am going home and want to take them something." I tried to explain to Mr. Morgan that I did not think there was any liability in the case from the facts that I had, and finally said, "What do you think you ought to get?" and he said, "I think you ought to give me $50," and I said, "I had an idea of giving you $35 or $40 myself," and we finally agreed on $45, and I thought he was pretty bright in taking it, because I did not think he was entitled to it. He was entitled to treatment in the hospital, as we all pay for that. The reason I quit the service of the company was that I lost my father and went home to take care of his farm in which I have an undivided interest.

Riley stated that he was at present claim agent for the Missouri Pacific in Kansas, and that at the date of the execution of the release claim agent for the Iron Mountain and present when the execution was witnessed and signed. That Morgan signed the

release with his own hand and he was in the room with Higginbotham talking about the settlement. That they came to an agreement and Higginbotham called a stenographer and dictated the release to the stenographer in the presence of Mr. Morgan and after it was written called him to witness Mr. Morgan's signature, which he did. I saw him sign it and also saw him sign his name across the face in addition to his name at the bottom.

Cherry stated he was roadmaster for appellant company, having the territory from Hoxie to Little Rock, except that part now under construction between Bald Knob and Cabot. Mr. Morgan sent me a book signed "W. C. Morgan," and I told him he had better have somebody else make it out, that his writing was not very good, and he said, "All right," but did not say anything about not being able to write at all. I am familiar with the rules which the section foremen and men using speeders are required to observe as to looking out for trains and I have given instructions to Mr. Morgan not to use his speeder during the noon hours, and to be careful of trains and keep in the clear with their hand cars or push cars, or whatever they use, and it is their duty to do that.

The court instructed the jury, giving among others, over appellant's objections, instruction numbered three, as follows:

"If you believe that the defendant's employees in charge of the engine drawing said passenger train saw said plaintiff and the speeder on the track for some distance ahead of them and if you believe that at the time of such discovery or at any time thereafter, the life of plaintiff or his body was in peril from such passenger train, then it was the duty of such person in charge of said train to employ all means and utilize all necessary appliances at hand to slow down and stop said train, consistent with the safety of the passengers thereon, and if you believe that at the time of the injury and at a sufficient time prior thereto for said person in charge of

said train to stop or slow down said train, plaintiff was engaged in removing the speeder from in front of the approaching train, and that he was so engaged for the purpose of preventing a wreck and derailing of said engine and said train, and you further believe that the manner in which the operators of said train acted was negligent and that the emergency causing plaintiff's injury was not due to plaintiff's negligence, then your verdict may be in favor of the plaintiff, unless you further find that the plaintiff has released defendant from such liability by the execution of a release."

The jury returned a verdict and from the judgment thereon this appeal comes.

E. B. Kinsworthy, S. D. Campbell and *W. G. Riddick,* for appellant.

1. Appellee was guilty of contributory negligence in not keeping a proper lookout, and in going back on the track after having reached a place of safety. 83 Ark. 69; 78 Ark. 251; 78 Ark. 355; *Id.* 520; I Shear. & Red., Negligence (5 ed.) § 99; 1 Thompson, Negligence, § 240; 97 Ark. 560; 62 Ark. 159; 48 O. St. 316; 42 L. R. A. 842; 67 N. W. 404.

On the theory that appellee was acting in an emergency, then he would be held to the degree of care that an ordinary person would observe under the same circumstances; and if he was reckless or rash he can not recover, however good his intentions or imperative the need of the persons for whom he acted. 2 Thompson on Neg. (2 ed.) § 1780; 2 Bailey on Pers. Injuries, § 497; 83 Wis. 459; 170 Mass. 168.

2. A servant assumes the usual and ordinary risks incident to his employment; also the risks of a dangerous position into which he goes voluntarily. 87 Ark. 511; 100 Ark. 380; 65 Ark. 126; 100 Ark. 380; *Id.* 156; 65 Ark. 126; 97 Ark. 486. Appellee assumed the risk due to extra or special trains as well as regular trains. 61 Md. 395; 161 Mass. 125; 80 Fed. 260; 4 Thompson on Neg. (2 ed.) § 4771.

3. No negligence is shown on the part of the train operatives. 4 Thompson on Neg., § 4443. The engineer had the right to assume that the section men on the hand car knew of the train's approach, etc., and was bound to use all his efforts to stop only when it appeared that they were not aware of the approach of the train and were not likely to leave the track in time to avoid collision. 67 N. W. 404; 90 Ark. 403. The burden was on appellee to prove that there was time to stop the train and avoid injuring him after he returned to the track. 97 Ark. 560.

4. The proof fails to show fraud in the execution of the release. 116 Fed. 913; 79 Ark. 356; 99 Ark. 442; 98 Ark. 48; 97 Ark. 268; 111 Minn. 193; 116 Fed. 93; 129 Mo. 629; 71 Miss. 1029; 61 Kan. 758; 75 Ark. 266; *Id.* 72; 71 Ark. 614; 74 Ark. 336; 70 Ark. 512; 95 Ark. 375; *Id.* 523.

5. Instruction 3 given by the court errs in ignoring the rule of law that the train operatives were under no duty to act until they discovered appellee's peril, and makes appellant liable because of the mere fact of the peril of the plaintiff. 90 Ark. 413; 46 Ark. 513. The instruction also errs in making appellant liable if appellee received his injury in an attempt to prevent a wreck, etc., and in assuming that he was acting in any emergency. It was for the jury to say whether an emergency existed. 66 Ark. 506; 71 Ark. 38; 76 Ark. 468.

Jones & Campbell, for appellee.

1. Contributory negligence is a defense the burden of proving which is upon the defendant. 81 Ark. 276; 67 Ark. 384. Under the facts in this case it will not be inferred that appellee was negligent when he could not have seen the train even if he had looked. 100 Ark. 527.

2. The evidence shows negligence on the part of the train operatives. When the person in charge of a train observes the perilous position of one on the track, it is his duty to employ all means and utilize all necessary appliances at hand, consistent with the safety of the passengers thereon, to stop the train. 89 Ark. 496

and cases cited; 99 Ark. 423; 94 Ark. 524; 87 Ark. 628; 96 Ark. 347; 74 Ark. 407.

3. There was no negligence in the attempt to remove the speeder. Negligence will not be imputed to one who endangers himself in an effort to save human life unless he acts recklessly and rashly. 1 Thompson on Neg., § 198; 82 Ark. 11; 92 Ark. 560; 43 N. Y. 503; 115 N. Y. 22; 83 Mo. 560; 104 Mass. 137; 195 Pa. 461; 152 N. C. 505; 132 S. W. 95; 81 S. W. 998; 18 L. R. A. 827.

4. The doctrine of assumed risk does not apply in this case. The rule that a servant does not assume the risks growing out of the master's negligence is as well settled as that ordinarily he assumes the risks incident to his employment. 90 Ark. 223.

5. The release was fraudulent and void because (1) of a misrepresentation of a material fact made for the purpose of inducing the execution of the paper, and (2) a misrepresentation of a material part of the writing and a material fact which went to its execution. 94 Ark. 524; 87 Ark. 624; 9 Cyc. 411.

6. The appellant's objections to the third instruction are without merit; but if it had any meritorious objections to the instruction they should have been presented in specific form to the trial court. 65 Ark. 255; 73 Ark. 594; 76 Ark. 468; 99 Ark. 226; 100 Ark. 269.

KIRBY, J., (after stating the facts). It is insisted by appellant that there is no testimony sufficient to warrant a verdict against it, nor to avoid the release executed by appellee upon a settlement of his claim for damages for the injury inflicted.

It was the duty of appellee to keep the track in condition for the passage of trains, to take notice of the operation of all trains upon the road, so far as the observation of them was necessary to the performance of his duty and the protection of himself and his men and to keep the track clear and free of obstructions for the operation of trains upon the road including any furnished by himself and his men in the performance of their duties. He had been over his section in the morn-

ing with one of his men and they were returning from the other end at the time of the injury, after having been notified by the bridgeman that a certain train was four hours late, which usually passed along there about that time. Appellee states that he was not aware that passenger train No. 5 was running in sections; that he paid no attention to the signals upon the train and was not expecting a train, except from the south. And, although he had another man on the speeder with him, who sat facing to the north, both of them testified that they were looking towards the south as they proceeded that way. Their testimony, it is true, shows that they exercised some care, both at the beginning of the curve and at one or two places in rounding it, to ascertain the approach of trains, but the fact remains that they had passed the curve a long way before the accident occurred, and did not discover the approach of the train from the north until it was close upon them. Upon discovering it, they immediately set about removing the speeder, lifted the front end of it from the track four or five feet and were both in the clear, when they discovered that the little hind wheel had lodged on the inside of the rail and appellee turned and took hold of the connecting rod and continued trying to remove it until it was struck by the train and he was injured.

It was his duty, as already said, to clear the track of any obstruction that might otherwise result from his use of it with the speeder to this approaching train and to discover the approach of the train in time to clear the track, but if it be said that he was negligent in failing to discharge his duty, it would not excuse the railroad company for injuring him, if it failed to use the proper care to prevent injury to him after he was discovered to be in a position of peril.

The evidence is undisputed that a lookout was kept by the trainmen, that the speeder was discovered more than a mile away when the train was going at 40 to 45 miles an hour; that warnings were given, crossing whistles blown and danger signals and when the men on the

speeder gave no evidence nor showed any signs of being aware of the approaching train, the engineer slowed down the speed of his train and had gotten it under control where he could have stopped it before reaching and striking the speeder, if the men had not attempted to remove it, and he had not thought that they had removed it and were in the clear, or would be by the time he reached them. He stated that both men after discovering the train, jumped off of the speeder, took hold of it and carried the front end of it four or five feet from the track; that he saw they were removing it, that they were in the clear and had time to complete the removal of it before he would reach them. That later, when he discovered that Morgan had again taken hold of the back end of the speeder and the little hind wheel had not been removed from the track, he could not stop the train in time to avoid the accident, although it was running slowly at the time and then there was no danger of a wreck from striking the speeder.

The testimony of all the witnesses shows that the men on the speeder discovered the approaching train in time to have removed it from the track if the wheel had not hung on the rail and that they did remove the front end of it and were entirely in the clear and in places of safety themselves before the train reached them. Appellee stated that before stooping over to try to release the little wheel to remove it, he looked and saw the engineer standing in the cab, looking at him, and thought the train was going to stop.

The engineer had the right to rely upon the presumption that appellee would clear the track of the obstruction and remove himself to a place of safety, until he discovered that he would not do so, for it was only then that he would have known him to have been in a perilous position.

The burden of proof was upon appellee to show, in order to recover damages, that the employees in charge of the train discovered his perilous position in time to have avoided injuring him and negligently failed to use

proper means to do so after discovering his peril. *St. Louis, I. M. & S. Ry. Co.* v. *Watson,* 97 Ark. 560-564; *St. Louis & S. F. Rd. Co.* v. *Townsend,* 69 Ark. 380; *Chicago, R. I. & P. Ry. Co.* v. *Bunch,* 82 Ark. 522.

The engineer saw appellee get off the speeder and remove the front end of it from the track, and thought, as he had a right to do, that it all would be entirely removed before his train reached the place, unless he sooner discovered the speeder was hung and that appellee was going to continue to try to remove it and was in a place of danger. Appellee said he saw the engineer looking at him and thought the train was going to stop and he continued to try to remove the speeder, thinking he could do so and that it was necessary to do it, in order to prevent a wreck.

Under these circumstances, we are not able to say that there was not sufficient testimony to have submitted the question of negligence on the part of the railroad company in failing to use proper means to stop the train and avoid the injury after the peril of appellee was discovered.

Said instruction numbered three, however, does not correctly state the law. It told the jury that it was the duty of the enginemen in charge of the train to employ all the necessary means and appliances consistent with the safety of the passengers of the train to slow down and stop it, if they discovered the appellee with his speeder on the track some distance ahead of the train and the jury believed that at the time of such discovery or at any time thereafter the appellee's life or body was in peril from such passenger train. It also told them that if they believed at the time of the injury, or a sufficient time prior thereto for them to stop or slow down said train, appellee was engaged in removing the speeder from the track in front of it and was so engaged for the purpose of preventing a wreck of the train and they believed that the manner in which the operatives of the train acted was negligent and that the emergency caus-

ing appellee's injury was not due to his negligence they should find for him.

The instruction took away from the jury entirely the consideration of the question of the engineer's right to assume that appellee would clear the track of his speeder after he discovered the approaching train, and of their judgment that he had done so and told the jury that if he was imperiled from the train any time after his discovery by the enginemen and they could have stopped the train it was necessary for them to do so and if they discovered him so engaged a sufficient time prior thereto and he continued engaged in removing the speeder, in the honest belief that it was necessary to prevent a wreck, that the company was liable if the manner of the operation of the train was negligent and the emergency was not caused by appellee's negligence.

This question has nothing to do with the case and should not have been submitted at all. The only question in it was whether the enginemen discovered appellee to be in a position of peril from which he could not extricate himself in time to have prevented the injury to him and failed to use proper care to avoid the injury after such discovery.

It is next contended that the release executed by appellee was valid and that the court erred in not declaring it so.

The answer alleges that it was obtained fraudulently by false representations to the appellee inducing him to sign it, the particular representations relied upon to avoid it being that the employees of the claim department told appellee that they would give him $45 in settlement and permanent employment in his old position and that the release as executed recited this fact. No reliance is placed upon any misrepresentation of the existing physical condition of appellee by the doctors at the time of sending him from the hospital, nor any representation by them as to the time required for the complete recovery from the injury. The evidence may be

regarded undisputed thus far. The claim agent admitted that he told appellee he did not consider the company liable for his injury; that he would give him $45 on account of it, as that would about pay him for the time lost and appellee then suggested that he would like to have his old place back and the claim agent assured him that it would be given to him. He called up the roadmaster on the phone, in appellee's presence and hearing, and after he finished talking told appellee the roadmaster said he cold have his old place back again any time he was ready to go to work. Appellee took a letter from the claim agent to the roadmaster and was likewise informed by him that he could have his place again; and he did go back and was given his old position. He, himself, does not state that the claim agent told him that the agreement or stipulation that he should have his old position back permanently was recited in the release. Nowhere does he claim that, except in the answer, but only says that that was a part of the consideration for the release and agreed upon by the employees of appellant and himself, and but for it he would not have signed the release at all.

Waiving the determination of the question of whether such a representation so made of a promise to employ in the future without any false statement as to any such stipulation being contained in the release at the time of its execution would constitute such a false representation as would avoid the release, it would certainly be necessary in order to avoid the effect of the release if it be held that such promise was a part of the consideration therefor, that the promise was made without any intention to perform or fulfill it and to induce appellee to sign an instrument, which he would not otherwise have executed. The burden of proof is, of course, upon him to show such circumstances, as would relieve him from the effect of a release which he admits having signed, and although he states that he was "fired" from his old position shortly after it was given back to him, he does not deny that it was because of incompetency

or inefficiency in the discharge of his duties, as testified to by the roadmaster who relieved him of employment. The burden being upon him, he can not escape the effect of the release without showing that fraud was practiced upon him in its procurement and if the agreement he claims to have been made to permanently employ him at his old position at a certain wage was made by those in authority to employ him, it certainly can not be held that he should be so employed without regard to whether he discharged the duties of the place in a manner reasonably satisfactory to his employer.

For the error in the giving of said instruction numbered 3, the judgment is reversed and the cause remanded for a new trial.

RHODES v. PORTER.

Opinion delivered March 3, 1913.

APPEAL AND ERROR—CONFLICTING TESTIMONY—QUESTION FOR JURY.—In an action in ejectment, where the testimony is in conflict as to whether or not plaintiff sold the land in controversy to the party through whom defendants claim title, the question should have been submitted to the jury.

Appeal from Yell Circuit Court, Danville District; *Hugh Basham,* Judge; reversed.

STATEMENT BY THE COURT.

Appellant brought suit in ejectment against Mary Porter and Anna Porter and two other children of A. P. Porter, deceased, for two acres of land, claiming to be the owner thereof and deraigning his title thereto. Two of the children answered, admitting the allegations of the complaint and disclaiming any interest in the land. Mary Porter and Anna Porter answered, denying the allegations of the complaint as to the ownership of the land, claimed to be the owners thereof, through A. P. Porter, their husband and father, having purchased same from the plaintiff and been delivered possession thereof during his life time. They alleged further that the said

A. P. Porter purchased the lands from the plaintiff; that he paid the consideration therefor; that he had peaceable and adverse possession thereof for more than seven years and had made sundry improvements upon the land.

The evidence upon appellant's part tends to show that he was the owner of the land and agreed to sell A. P. Porter the two acres in controversy in 1898, for which he was to receive in October, thereafter, $150, and upon the payment of which a deed was to be made. When the purchase money became due, Porter objected to paying it, claiming the land belonged to plaintiff's wife, who had since died and that he could not convey the title and wanted him to take the two acres back, saying he was unable to pay for it in any event; that he finally agreed to take the land back and he did so, Porter agreeing to pay him $18 per year rent therefor, thereafter, as long as he should live. He introduced other witnesses, whose testimony tended to corroborate his statements. He testified further that he had always paid the taxes on the land and exhibited his tax receipts and also books of account showing the payment of rent by Porter for the land in controversy.

Mrs. Mary Porter testified that her husband purchased the land, where she lived, from appellant, and paid him for it and that he died in March, 1910.

After the testimony was introduced and the jury instructed and had retired to consider of their verdict and reported a disagreement the court instructed them to find for the defendants on the ground that Mrs. Porter's homestead right attached to the property in controversy and that she could not be divested of it during life, over her objections.

From the judgment on the verdict, this appeal is prosecuted.

Jo Johnson, for appellant.

Since the testimony was conflicting as to appellant's right to recover, it was error to take the case from the jury.

KIRBY, J., (after stating the facts). The testimony is in conflict and the court was not warranted in directing a verdict on such testimony. It developed, from plaintiff's testimony that he had sold the lands and delivered the possession thereof to Porter, that Porter failed to pay for them, as agreed and the trade was rescinded and no conveyance of the lands was ever made. It was undisputed that no conveyance of the land was made by Porter and that same was part of the premises occupied by him at the time of his death.

If the lands had been conveyed to the husband of appellee during his lifetime there is no question but that she could have held same as part of the homestead, but the undisputed proof shows that no such conveyance was made and appellant's testimony is all to the effect that the land was never paid for; that the trade was rescinded and that, after such rescission, Porter thereafter paid him rent for the lands. If this state of facts be true, appellee could have had no homestead right, while, upon the other hand, if her statement that her husband purchased the land and possession thereof was delivered to him and he afterwards paid for same, is true, her homestead right would have attached, without regard to whether or not a deed of conveyance had, in fact, been made and she would have been entitled to hold possession of the lands as against appellant in this suit. The testimony being in conflict about this matter, however, the question was one which should have been submitted to and determined by the jury. *Williams* v. *St. Louis & S. F. Rd Co.*, 103 Ark. 401; 147 S. W. (Ark.) 93.

For the error in directing the verdict, the judgment is reversed and the cause remanded for a new trial.

HALE v. MATTESON.

Opinion delivered March 3, 1913.

1. CONTRACTS—MUTUAL ASSENT.—In order to constitute a binding contract of sale, there must be the mutual assent of both parties, to

the essential terms of the agreement. The intention of the parties is the first consideration. (Page 230.)

2. CONTRACTS—SALE OF CHATTELS—QUESTION FOR JURY.—When parties enter into an agreement to sell and buy a grocery store, and all the terms of the sale except the amount to be paid for the stock, are agreed upon, and the goods were actually delivered to the buyer, there is sufficient evidence to show a binding contract of sale, and the question should have been submitted to the jury. (Page 231.)

3. SALE OF CHATTELS—DELIVERY—PARTIAL PAYMENT.—A sale of chattels may be made by delivery and a partial payment only, even though the parties contemplated that there should be a further written contract, evidencing the sale upon the completion of an inventory. (Page 231.)

Appeal from Garland Circuit Court; *George W. Hays,* Judge; reversed.

STATEMENT BY THE COURT.

Appellants brought suit for damages for the breach of an alleged contract of sale of a stock of goods. They were the owners of a grocery store in the city of Hot Springs, known as the "Elite Grocery," together with the wagon and team and other property used in connection with said store, and on April 8, 1911, claimed to have sold and delivered through their agent, Hale, the grocery store, consisting of the stock of goods and merchandise, the wagon and team of mules and harness, and the good will of the business to the defendants, L. F. Matteson and Willie Johnson; the goods being sold at invoice price as shown by the inventory, which was taken immediately after the contract of sale was entered into; the mules, wagon and harness being sold for the sum of $335. The manner and time of the payment was also alleged and that the stock of goods, wagon, team and harness were delivered to the defendants on April 8, 1911, memorandum of the sale being executed in writing at the time, a copy of which was exhibited with the complaint. It was further alleged that the defendants took charge of the business and carried same on for the period of eight days, buying new groceries and selling the old stock and receiving pay

therefor and thereafter abandoned same, and that the defendants had wholly failed to pay the purchase price of the property. That plaintiffs carried out all the terms of their agreement with the defendants, and had been damaged in the sum of $750, for which they prayed judgment.

Willie Johnson denied the allegations of the complaint and alleged that he was not a party to the alleged contract. L. F. Matteson filed a separate answer, denying each allegation of the complaint, admitted that she had negotiated for the purchase of the grocery store, as alleged, but denied that the agreement was ever consummated and that she was put in possession of the stock of goods or the store. She alleged that there was an understanding and she did enter into an agreement to purchase the stock of goods, but that the details of the agreement were never settled and the purchase was not made; that the inventory of the goods was not taken as it was agreed to be taken and denied the authority of the agent to sell the goods. She alleged that she was damaged by the failure of the plaintiffs to carry out the contract in the sum of $500, for which she prayed judgment.

H. L. Hale testified that he acted as the agent for the owners of the Elite Grocery Store; that Mrs. Matteson came to the store and said she desired to buy a grocery store and he talked with her about the sale of the Elite Grocery; that she looked over the stock and they went somewhat into detail about it; in the next day or two they came back and made another examination of the stock and talked further the terms of sale. She said she would have $1,000 or $1,200 to put in it, cash, and he instructed her to get the money and put it into the bank, as there would be some expense, time and trouble attached to the taking of the inventory and he did not care to do this unless she was in a position to buy. She afterwards returned and said she had the money in the bank and was ready to make the first payment and asked

how much it would be. He said $100, and the following temporary agreement was then executed:

ARTICLES OF AGREEMENT.

Between Mrs. L. F. Matteson and Elite Grocery Company, by H. L. Hale, Mrs. Matteson and Willie Johnson agrees to buy the stock of groceries of the Elite Company, and wagon and team and pay $100 cash at completion of invoice and $125 the 15th day of February; $125 the 15th day of March, and $125 the 15th day of April, 1911. Balance due on stock, wagon and team to be paid $100 per month, fixtures to be used without cost till January, 1911.

H. L. Hale, for Elite Company.
L. F. Matteson.

H. L. Hale for the Elite Grocery Company, agrees on his part to deliver to Mrs. Matteson the Elite Grocery stock, consisting of about one thousand eight hundred ($1,800) dollars worth of groceries and team of mules, wagon and harness and the good will of the business, at the completion of the inventory and acknowledges the receipt of $100 as part payment thereon.

The Elite Grocery Co.,
By H. L. Hale.

That she gave her check for the $700 in payment. That the inventory was completed the first night, except some heavy goods and case goods that had not been opened and that when they finished everything was satisfactory and that he turned over the key to the store to her and went away. That he came back the next day and assisted in the store and introduced them to customers; that he did this for two days; introduced them to the wholesale men and that they told the customers and wholesale men that they had bought the store and that the name of the new firm was Matteson & Johnson, and that he did the same thing and instructed the old customers to that effect. That the temporary agreement was drawn up because it was not convenient to have everything agreed upon and the papers finally drawn

until the inventory had been taken. That she was in a hurry to take possession and that her daughter wrote one of the books when the inventory was made, while Johnson helped to take the goods and called them out during the making of it.

After the inventory was completed and the agreement drawn up, Mrs. Matteson refused to sign it, and finally abandoned the store without notice, leaving it in charge of the porter, who advised him that they had gone away. The first inventory, the one under which she purchased, showed $1,851, including the wagon and team, the stock of goods amounted to $1,516.81, the price of the wagon and team being $335.

Mrs. Matteson admitted making negotiations for the purchase of the store, that she signed the written agreement and had been in the store two or three days, telling some of the customers that she had purchased same and that she had purchased a few new goods; goods; that she became dissatisfied about the matter and when the final contract was presented to her, refused to sign it, claiming to be dissatisfied with the terms and that she did not care to buy certain fixtures. In her testimony she stated that the terms of the contract of sale, as finally written were not as agreed on, and she would not sign it at all. She denied that she ever was in possession of the store or that same had ever been delivered to her, although she admitted having told some of the customers that she had purchased the store and having bought certain bills of goods during her stay there for the new firm. She also claimed that the book in which the list of the goods had been taken down had been in the possession of Hale since the list was first made and that she would not take the stock on that account. She made other objections about the rent.

Willie Johnson testified that they were in the store from the 8th until and including the 14th, and they sold credit sales amounting to $98.36 during that time and that Hale was there every day during that time. They did not have their hands on the invoice books and that

his mother, Mrs. Matteson, refused to sign that contract after it was drawn up and after the inventory was taken, claiming that it was not in accordance with the first agreement made. She also claimed that the price of the goods in the inventory were to be figured by the wholesale merchants, while Hale claimed that it was only in the event of a dispute about the price that they were to be so figured. It was not disputed that her daughter made one list of the inventory as the goods were taken down and called off, and Mr. Hale stated that list was kept in the safe by appellees; that he had nothing whatever to do with it; that it was their copy. He said further that when Mrs. Matteson objected to the terms of the contract as finally drawn up, being too rigid, that he agreed to make any changes in it which she thought would rectify it in accordance with the agreement first entered into, and she declined to sign it at all and claimed she did not want the stock and was not going to have it.

There was a good deal of other testimony introduced and when it was all in the court instructed a verdict for the defendants and from the judgment thereon this appeal is prosecuted.

J. B. Wood, for appellants.

1. There was evidence to establish a valid sale. 63 Ark. 94; 77 *Id.* 556; 71 *Id.* 305; 73 *Id.* 561; 71 *Id.* 445; 76 *Id.* 520; 97 *Id.* 438. The question should have been submitted to a jury. 37 Ark. 483; 62 *Id.* 592; 116 N. Y. 371; 186 Mass. 495.

2. There was a completed sale; part of the purchase money paid and delivery of the goods. Cases *Supra*; 27 Pac. 713; 35 Cyc. 520; 4 Am. Dec. 374; 63 Am. St. 692; 33 Mo. 391; 84 Am. Dec. 52; 41 Miss. 164; 13 S. E. 660; 134 N. W. 174.

S. W. Leslie, for appellee.

1. The sale was never completed. 5 Ark. 161; 25 *Id.* 545; 19 *Id.* 566.

2. There was no delivery of possession.

3. The court properly directed a verdict for de-

fendants, as there was no evidence to establish plaintiff's claim. 71 Ark. 447; *Ib.* 305.

KIRBY, J., (after stating the facts). In order to constitute a binding contract of sale there must be a mutual assent of both parties to the essential terms of the agreement. Mere negotiations between them as to the subject matter or the terms of the sale will not be sufficient to make a binding contract and in determining whether such a contract has been made the first consideration is the intention of the parties.

As said in *Summit Lumber Company* v. *Shepherd,* 102 Ark. 88, 143 S. W. (Ark.) 102, "If it appears from the contract or the plain intention of the parties that there remains something to be done relative to the property as between the vendor and the vendee—as, for example, to ascertain the amount, quantity or price thereof before the title thereto shall pass—then the sale would not be complete and binding. In such event, the title to the property would not pass, and therefore no corresponding obligation to pay therefor would be assumed. On the other hand, if from the contract it clearly appears that it was the intention of the parties that the title to the property was actually passed and the ownership thereof transferred by the seller to the purchaser, then the contract of sale will be mutually binding and effective, although there remains something to be done in order to determine the total quantity of the property sold, or the total price thereof (citing cases). Where the property sold is identified, and a method is agreed upon for determining its price, then the mere fact that the total amount of such price is not definitely fixed in the contract, will not render the sale incomplete or ineffective."

In *Emerson* v. *Stephens Gro. Co.,* 95 Ark. 426; 130 S. W. 543, the court said: "If the contract is actually entered into and made, whether by messages, correspondence, or 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 be drawn and executed." *Friedman* v. *Schleuter,* 105 Ark. 580, 151 S. W. (Ark.) 697; *Cage* v. *Black,* 97 Ark. 613.

If appellant's testimony, that the terms of the sale had been agreed upon, except the amount that was to be paid for the stock of goods, which was to be determined by the inventory to be taken as agreed and that the goods were actually delivered to appellees, be true, as the written agreement entered into at the time tends strongly to prove, and their other testimony as to the conduct of the parties relative to the delivery of the goods be taken as true, it would doubtless prove the sale, as alleged. A sale of the goods could have been made without any writing whatever, if accompanied by delivery and a partial payment therefor, and even though the parties contemplated that there should be a further written contract, evidencing the sale upon completion of the inventory it would not have prevented the contract of sale already made being effective, if it was in fact made. *Friedman* v. *Schleuter, supra.*

In any event there was material testimony, tending to show there was a valid contract of sale made by appellant, as alleged, and the question should have been submitted to a jury under proper instructions and the court erred in directing a verdict. *Williams* v. *St. Louis & S. F. Rd. Co.,* 103 Ark. 401, 147 S. W. (Ark.) 93, and cases cited; *Hutchinson* v. *Gorman,* 71 Ark. 305; *St. Louis, I. M. & S. Ry. Co.* v. *Coleman,* 97 Ark. 438.

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

BANK OF HARTFORD v. McDONALD.

Opinion delivered March 3, 1913.

1. CORPORATIONS—BANK—WHEN NOT BOUND BY OFFICERS' ACT.—S., the president of the plaintiff bank, in partnership with the other defendants, borrowed money from the bank, giving it their note. It was agreed among the partners that S. should handle the property purchased with the proceeds of the note, and should apply the rents and profits derived therefrom to the payment of the note. S. deposited such funds to his individual credit, in plaintiff's bank, and died without applying them as agreed. *Held*, the knowledge of S., the president, of the rights of the co-partners in the funds deposited can not be imputed to the bank to put the bank on notice that these were trust funds. (Page 240.)
2. CORPORATIONS—BANK—WHEN NOT BOUND BY ACT OF OFFICER.—When an officer of a bank is individually interested in a note or other matter, his knowledge is not to be imputed to the bank, when his acts conflict with the interests of the bank. (Page 240.)
3. CORPORATIONS—SAME—SAME.—A bank is not bound by the acts of its president, who makes a contract with himself against the interest of the bank. (Page 240.)
4. BANK—WITHDRAWAL OF TRUST FUNDS BY TRUSTEE.—A trustee with full control over trust funds in a bank may draw them out *ad libitum*, and the bank incurs no liability in permitting this to be done so long as it does not participate in any breach of trust resulting in a misapplication of the funds. (Page 241.)

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

STATEMENT BY THE COURT.

This action was instituted by the Bank of Hartford to recover the sum of $2,141.66 upon a promissory note, executed on September 9, 1907, to the bank by appellees, A. A. McDonald, M. L. Croom and by one Joseph M. Spradling, who was the president of the bank, but died before the institution of the suit; and his administrator was made a party defendant. The note sued on was as follows:

"($2,141.66) Hartford, Ark., Sept. 9, 1907.

Ninety days after date, without grace, we promise to pay to the Bank of Hartford, or order, at the banking house of said bank, in Hartford, Ark., for value received,

twenty-one hundred forty one and 66-100 dollars, with interest at the rate of ten per cent per annum from maturity until paid. The makers of this note hereby severally waive presentation for payment, notice of nonpayment, protest and consent that time of payment may be extended without notice thereof.

A. A. McDonald,
Jos. M. Spradling,
M. L. Croom."

In their answer, appellees admitted the execution of the note sued on, but they allege that said note was given for money loaned to them and Spradling for the purpose of buying certain real estate in the town of Hartford, in Sebastian County. They further alleged that at the time of said loan, Spradling was in entire charge of the business of the bank; and that it was agreed the title to the property should be taken in the name of Spradling and that he should have the right to rent, sell or otherwise dispose of it; and that any money derived from the property should be deposited in the bank for its protection; and that this money should be applied, first to the payment of the note sued on; second, to the discharge of a mortgage on said property; and, third, that the surplus, if any, less the expense of management, should be divided equally between the three makers of the note.

The property purchased belonged to the estate of Rogers and Stefani, which was being administered in bankruptcy at the time. Appellee McDonald was the attorney for certain claimants and filed the petition for the petitioning creditors and appellee Croom was the trustee in bankruptcy, and at this sale, Spradling was the purchaser, and the deed was made to him individually. The purchase price of the property was $7,000, and at the time of the sale, the property was incumbered by a mortgage to the Arkansas Valley Trust Company for $4,000 and interest. This mortgage was discharged and balance of purchase money paid out of the proceeds of the note in suit and a loan of $5,000 made by one John Goset, and secured by a mortgage on the property. This

mortgage in favor of Goset was foreclosed by a suit in the chancery court brought for that purpose and all of the property was sold and that sale was confirmed.

The testimony on the part of the appellees was to the effect that they had signed Spradling's note as sureties and that Spradling had complete control of the property and collected a considerable sum of money, and sold one of the lots for $500, of which $100 was cash, and that the balance of $400 of purchase money was evidenced by a note, which was assigned to the bank; and that Spradling deposited to his individual account all sums of money collected from the sale or rental of the property.

There appears to be no real question, but that as among the makers of the note, these were trust funds, but the real question is as to the bank's liability for their misuse. It appears that Spradling exercised considerable influence in shaping the policy of the bank and that his son was its cashier; and it appears further that appellees were not called upon to pay any interest on the note, until after Spradling's death. Neither the bank nor Spradling ever at any time rendered appellees any statement of this account, in fact, Spradling had but one account at the bank, and these funds were deposited as a part of his general account there. It is not contended that the bank was ever asked to furnish appellees any statement of the account, although Croom testified that Spradling told him that the property was bringing in a pretty fair income and that if he and McDonald desired, he would furnish them an itemized statement. This request was not made and the statement was not furnished.

The only proof of the bank's knowledge of the source of these funds and their intended use is the fact that Spradling was its president and gave its affairs his personal attention and appeared to have had much to do with its general policy and the fact that his son was the cashier, and the two letters written by McDonald to the bank which will be set out in full, and the bank's failure to require appellees to pay interest. McDonald under-

took to sell his interest in the deal to Spradling for $250, but Spradling refused to buy, but instead authorized the bank to make McDonald an individual loan. This note was not paid at its maturity and the bank wrote the following letter to McDonald:

"Hartford, Ark., November 21, 1908.

A. A. McDonald, Fort Smith, Ark.

Dear Sir: Having heard nothing from my notice sent you in regard to your past due note of $250, due December 30, 1907, will say I must insist on you letting me know, as I will proceed at once to collect same some other way.

Respectfully,

J. L. S.

(Index.) Your credit at this bank will depend largely on the attention that note receives at maturity, which has not received any.

J. L. S."

And McDonald wrote the following letters to the bank:

November 21, 1908.

Bank of Hartford, Hartford, Ark.

Gentlemen: I am sorry that I did not receive your notice promptly, but have been absent from the office for several days.

I enclose check for $6.25 to pay interest on my note. Thanking you, I am,

Yours truly,

.....

November 28, 1908.

The Bank of Hartford, Hartford, Ark.

Gentlemen: Your letter of the 21st inst. with some name attached which I can not make out and which, in view of the relation existing and the explanation I made in my letter of the 21st inst., I consider rather insulting, is not understood, as I sent you check at that time for $6.25 to pay interest for ninety days; perhaps, however, I should have explained to you at that time that this loan was made with your Mr. J. M. Spradling, president

of your bank, with the understanding that he would carry it for me until the Stefani property was disposed of, unless something unforeseen happened, but on account of the relations between Mr. J. M. and Luther Spradling of your bank, I presume the matter was understood by all. As I notice your letter is dated November 21, I presume you have received my check since you wrote it.

Yours truly,

. . . . . .

These letters above referred to, which appellees say, in connection with the other evidence in the case, impute to the bank the knowledge that Spradling was handling trust funds and imposed upon it the duty of seeing that they were not misappropriated. It is not contended that Spradling's son, the cashier, had any knowledge of these transactions, except in so far as knowledge would be imputed to him from the above facts and such inferences as would arise from their existence. Upon the contrary, appellees admit that the note was executed at the office of McDonald in Fort Smith, and McDonald testified that when he received the bank's letter, set out above, dated November 21, 1908, he became angry and reminded Spradling that he had agreed to carry this individual note until this Stefani property had been disposed of, and that Spradling said, "You know it is not best for the kids to know everything sometimes," but that Spradling also said he had explained the situation to his son and there would be no further trouble about the interest, but that witness did not personally know what Spradling had told his son; and Croom testified that Spradling had told him and McDonald that his son had no knowledge of the conditions existing between them prior to this correspondence, but that he had then fully explained to his son the interest of the parties in the property. Croom testified that Spradling told him once at Hartford that he deposited the proceeds of the property to a separate account, and had a separate bank book, showing that fact; and that he thought the cashier was standing at the window when this conversation occurred, but

he does not appear to be certain of that fact and does not contend that the cashier participated in the conversation, nor does he say that the cashier overheard it, but he did admit that in this conversation nothing was said about any interest which he or McDonald had in the property, and he further admitted this was the only conversation he had ever had with Spradling about this money in the bank. And Croom, like McDonald, admitted that Spradling had never been called upon to furnish, and had never furnished, either of them, any written statement of this account; and neither contend that they had ever had any conversation with any one connected with the bank except Spradling. Upon the other hand, the cashier of the bank testified unequivocally that he had no notice of any understanding or agreement between his father and appellees that the bank should hold the proceeds of the property for the protection of the bank, and that there was no understanding that the proceeds should be applied to this note, but that his understanding was that the property belonged to his father, who was entitled to all the rents and that they were deposited to his father's private account; and that neither his father nor appellees ever had any partnership account at the bank. Prior to Spradling's death, which occurred in July, 1909, there were only five directors of the bank, and the only two of these who testified said that they had no intimation that Spradling was not the sole owner of the property, and that the board of directors never in any way authorized Spradling to make the arrangement which appellees say he made. The property was taken charge of by Spradling in March, 1907, and remained under his control until his death.

Various pleadings, which it will be unnecessary to discuss, were filed in the cause before the final decree was entered, but upon final hearing the court found that Spradling had taken the title to the property in trust for himself and appellees, and that the bank knew of this trust and knew that the deposits, although placed to Spradling's personal account, was a trust fund and

that in so crediting said fund it was misapplied, misappropriated and lost to the *cestui qui trust,* and that the bank knew of and participated in the misappropriation of said funds and that the bank is liable for the sum so misappropriated. There was a reference to a master, and on the coming in of his report the court charged the bank with all deposits made by Spradling on account of rents collected, and the part of the property which he sold, including the purchase money note for one of the lots, which he had assigned to the bank, and after allowing interest upon the note rendered judgment in favor of the bank for the balance.

At the time of Spradling's death, he had $988.27 on deposit in the bank, which was transferred to the account of his administrator on July 28, 1909.

George W. Dodd, for appellant.

1. An agent can not prostitute the name of his principal to serve his own personal ends. 65 Ark. 546. Spradling was a stranger to the bank.

2. Where an officer is individually interested in a note his knowledge is not to be imputed to his bank. 5 Cyc. 461 and note 22; 63 Ark. 418; 62 *Id.* 33; 65 *Id.* 546.

3. The rents were not trust funds, and the bank had notice. 10 Cyc. 1063; 5 *Id.* 461; 65 Ark. 543; 69 *Id.* 140; 98 Tex. 569; 141 S. W. 300.

A. A. McDonald and *M. S. Croom, pro se.*

1. The bank had knowledge of the trust and of its breach. 96 Ark. 163; 91 *Id.* 400.

2. The knowledge of the president and cashier is imputed to the bank. 77 Ark. 172; 8 Am. St. 632; 35 Conn. 93; 80 N. Y. 162; 70 Wis. 92; 2 Col. 565; 68 Ark. 299.

3. The rents were trust funds as the bank knew. 2 Am. St. 600; 12 A. & E. Cas. 666; 68 Ark. 71; 69 *Id.* 43; 84 *Id.* 189; 92 *Id.* 55.

4. The findings of the master are conclusive unless clearly against the evidence. 92 Ark. 41; *Ib.* 359; 96 *Id.* 354.

SMITH, J., (after stating the facts). Pretermitting a decision upon the competency of the evidence herein detailed and to which there were a number of objections, we are of opinion that the evidence is not sufficient to charge the bank with liability for the misappropriation of these funds. Except the correspondence, above set out, there is no proof that any officer of the bank, except the president, knew anything about the interest of appellees in the property and the rents and proceeds of the sale thereof and this correspondence is insufficient to charge it with such notice as would make it liable for any misappropriation. It does not advise the bank of their interest in the land and does not request that it hold the funds for their protection. The bank under these circumstances can not be charged with Spradling's knowledge nor be required to perform his agreements.

In these transactions, Spradling was a stranger to the bank, although its president, for the law does not allow the president of the bank to make contracts with himself, against the interest of the bank, so as to bind the bank, because the weakness of human nature and the probability of the agent giving himself the advantage of the bargain is recognized.

In the case of *City Electric Street Ry. Co.* v. *First National Bank,* 65 Ark. 543, where a question similar to the one here considered was involved, the court said: "The contention of counsel on this point is plausible, but underlying it, there is the fallacy that in negotiating the notes in question the action of Allis was the action of the bank. Allis was the president of the bank, it is true, but he was also payee of the notes, and he was personally interested in their negotiation. This of itself made him a stranger to the bank, so far as the handling of these notes was concerned. An agent can not prostitute the name of his principal to the service of his own personal ends, and this rule applies with full force to the official of a corporation in making use of the corporate name." It is not contended here that the bank was a trustee nor is it said that it derived any benefit from the

misappropriation of the funds. Spradling had the title in trust for the benefit of himself and his copartners, and his control of the property and his right to dispose of it was without limitation, except the duty of finally accounting to appellees for his stewardship, and his knowledge of the rights of his copartners can not be imputed to the bank for the rule is that where an officer is individually interested in a note or other matter his knowledge is not to be imputed to his bank, since his interest is best served by concealing it. 5 Cyc. 461, and note 22; *City Street Ry.* v. *First National Bank, supra; Home Ins. Co.* v. *North Little Rock Ice & Electric Co.,* 86 Ark. 538; *Klein* v. *German Nat. Bank,* 69 Ark. 140; *City Street Ry.* v. *First Nat. Bank,* 62 Ark. 33.

There was no relation of trust between Spradling and the bank, there was no obligation to deposit the funds in this particular bank, and Spradling could without question have deposited them in any other bank. The appellant bank had no interest whatever in the property and derived no benefit from the venture and was in no way responsible for its success or failure, and it has been held that where a trustee has full control over the funds deposited in a bank, he may draw them out of the bank *ad libitum,* and the bank incurs no liability in permitting this to be done, so long as it does not participate in the breach of trust, resulting in a misapplication of the funds. *First State Bank of Bonham* v. *Hill,* 141 S. W. 300; *Interstate Bank* v. *Claxton,* 80 S. W. 604, 65 L. R. A. 820.

Appellee insists that if it were conceded that the president of the bank alone knew of the agreement this knowledge would be imputed to the bank and would bind it and make it liable for any misappropriations of the funds, and cites in support of that proposition the case of *Skillern* v. *Arkansas Woolen Mills,* reported in 77 Ark. at page 172. The facts in that case were that the Woolen Mills Company owned a mill and leased its entire plant to one D. P. Terry, who was the cashier and managing officer of a bank, and two others, and these

lessees took possession of the mill and operated it in the name of the lessor, but for their own personal benefit. They kept an account with the bank in the name of the lessor and transacted their business in its name. They overdrew the amount of their credit and at the instance of Terry, one of the lessees, and the cashier of the bank, and without authority of the mills company executed the note sued on by Skillern, the receiver of the bank, and it was there held that the bank, through its cashier and managing officer, had notice of the foregoing facts as they occurred, and was not misled, and that the mills company was not estopped from taking advantage of them. This is a full statement of the effect of that decision and, in our opinion, there is nothing there decided that gives support to appellees' contention under the facts here shown to exist.

Appellees cite cases to the effect that if a bank learns that a trustee is committing a breach of trust by an improper withdrawal of funds, or participates in the fraud, it is liable and that where a deposit of trust funds is made by a trustee in his own name with the knowledge of the depositing bank that such deposit is wrongful, the bank is liable to the *cestui qui trust* upon the trustee's withdrawing and converting the funds and among other cases cited are *Carroll County Bank* v. *Rhodes,* 69 Ark. 43; and *Boone County Bank* v. *Byrum,* 68 Ark. 71. In the Byrum case the facts were that the bank knew the funds deposited with it had been derived from the collection of taxes and that the money belonged to the State, yet it appropriated it to the payment of an individual indebtedness of the collector due it, and it was there held that the sureties on the collector's bond, who paid the State the amount misappropriated by the collector were entitled as against the bank to be subrogated to the State's right to the deposit. In the Rhodes case, *supra,* a county collector deposited in the bank money collected for the State, and drew a check to pay a debt due by him to the bank, and the bank knew that the money belonged to the State, and it was held that the bank will be liable

to the State for the money so appropriated; and in that case Judge BATTLE, speaking for the court, said: "When money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of the bank, and the bank his debtor; and the bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit. When his checks are drawn in proper form, the bank is bound to honor them. It can not excuse a refusal to pay them by showing that it had reason to believe that the checks were given for an unlawful purpose, or that other persons had liens or claims on the money deposited. But there is an exception to this rule. If the banker has notice that the fund does not belong to the depositor and the check is drawn to pay a debt due the bank, then the banker would be affected with a knowledge of the unlawful intent, and would be in duty bound to dishonor the check, and, if he did not do so, would be a participant in the profits of the fraud, and liable to the owner of the fund for all moneys appropriated to its payment."

But we have shown that the bank had no knowledge that this was a trust fund, and, moreover, it would not come within the exception above mentioned for the reason that it did not participate in and was not a beneficiary in any misappropriation.

Accordingly the decree of the chancellor is reversed and the cause remanded with directions to enter up a judgment against all the defendants in this cause for the amount of the note and interest.

WALTER v. SWAIM.

Opinion delivered March 3, 1913.

1. TAXATION—WEEKLY PUBLICATION OF DELINQUENT LIST.—The requirement in Kirby's Digest, § 7085, that the list of lands delinquent for taxes, shall be published "weekly for two weeks between the second Monday in May and the second Monday in June in each year," is not met by a publication, the first insertion of which is

on May 22, and the last on June 5, because these two dates are not weekly in succession, and there being no affirmative showing that there was an intermediate publication. (Page 245.)

2. TAXATION—INSUFFICIENCY OF NOTICE.—Failure of the clerk to publish the delinquent tax list for two weeks in succession as required by Kirby's Digest, § 7085, rendered the tax sale void. (Page 245.)

Appeal from Poinsett Chancery court; *L. C. Going,* Special Chancellor; affirmed.

Appellant pro se.

The clerk's certificate on its face shows a full compliance with the requirements of the statute. This record is conclusive and evidence *aliunde* would not be received to contradict it. Kirby's Dig. § 7086; 65 Ark. 599; 55 Ark. 218; 80 Ark. 31.

Clyde Going, for appellee.

The clerk's certificate showing the publication of the notice on May 22 and June 5, and not showing a publication between those dates is evidence that the publication was not in compliance with the statute, and avoids the sale. 55 Ark. 192; 92 Ark. 211, 212; 84 Ark. 1.

Appellant pro se, in reply.

The clerk's certificate in plain language states that the notice was published "two weeks in succession" in a "weekly newspaper," etc. The omission in the certificate of the intervening date does not invalidate the notice. 97 Ark. 76; 91 Ark. 117; 30 Ark. 732; 2 Cyc. 22.

SMITH, J. Appellee brought this suit in the Poinsett Chancery Court to cancel a deed to appellant for the fractional north half, northwest quarter, section 18, township 10 north, range 2 east, situated in that county, from the State Land Commissioner.

The appellee deraigns his own title, and it is unnecessary here to set it out, as the only cloud on it, which appears from the record, is the deed which it seeks to cancel. The land was sold on the 8th day of June, 1896, for the State and county taxes for the year 1895, and at said sale the State of Arkansas was the purchaser, and the land not having been redeemed, the clerk of that

county, on the 16th day of June, 1898, certified the forfeiture to the State Land Commissioner, who on April 26, 1910, executed to appellant the deed above mentioned. The question involved is the validity of this tax sale, which is attacked upon the following grounds:

1. No notice of the sale of said tract of land was published in the form and manner and for the time prescribed by law.

2. No record of said alleged tax sale was made by the clerk in the manner and form by law required.

The clerk's certificate to the notice of sale was as follows:

"State of Arkansas,
County of Poinsett.

I, J. C. Mitchell, clerk of the circuit and county court within and for the county aforesaid, do hereby certify that the above and foregoing list of lands returned delinquent for the nonpayment of taxes for the year 1895 was filed in my office on the 11th day of May, 1896, and that the same was carefully compared, recorded and published for two weeks successively in the Modern News, a weekly newspaper published in the said county, the first insertion being on the 22d day of May, 1896, and the last insertion appearing on the 5th day of June, 1896.

In testimony whereof I have hereunto set my hand and affixed the seal of office, date and name. This the 6th day of June, 1896.

J. C. Mitchell, Clerk."

Section 7085 of Kirby's Digest provides for the publication of the list of delinquent lands and its provisions are as follows:

"Section 7085. The clerks of the several counties of this State shall cause the list of the delinquent lands in their respective counties, as corrected by them, to be published weekly for two weeks, between the second Monday in May and the second Monday in June in each year. Such list of delinquent lands shall be published in some newspaper of the county, if any be published

therein; if not, in some newspaper published nearest to said county having a circulation in such county. He shall also keep posted up on or about his office such delinquent list for one year."

This section was construed in the case of *Byrne* v. *Less*, 92 Ark. 211, and Justice BATTLE, speaking for the court, there said: "The statute provides that the delinquent list shall be published weekly for two weeks between the second Monday in May and the second Monday in June, in each year. Kirby's Digest, 7085. 'Weekly for two weeks' means two weeks in succession; for the two weeks it must be weekly. It would not have been weekly if a month had intervened between the two insertions. A newspaper published every two weeks would not be a weekly, but a bi-weekly, and was not in compliance with the statute." And he further said: "In this case the notice required by the statute was not given. The owner of the land was not legally notified, and the sale is void." This opinion fits the facts of this case perfectly. The certificate recites that the delinquent list was published for two weeks successively in the Modern News, a weekly newspaper published in the said county, but it also recites that "the first insertion being on the 22d day of May, 1896, and the last insertion appearing on the 5th day of June, 1896." Publication on these dates could not have been weekly in succession and there is no affirmative showing that there was an intermediate publication.

We conclude, therefore, that the sale in question was void and that the chancellor was correct in so holding and the decree of the court below in cancelling said deed as a cloud upon appellee's title is affirmed.

MARIANNA HOTEL COMPANY *v.* LIVERMORE FOUNDRY & MACHINE COMPANY.

Opinion delivered March 3, 1913.

1. MECHANICS LIEN—CONTRACT.—When a material man agreed with a contractor in writing to furnish structural iron, and at the same

time agreed orally to furnish sash weights, for the purpose of acquiring a mechanic's lien, the contract is to be treated as one contract, and is not a case within the prohibition against varying a written contract by parole. (Page 254.)

2. MECHANICS LIEN—CONTRACT—LIMITATIONS.—The date from which the limitation of the time of filing a mechanics' lien is to be taken is the date on which the last article is furnished under the contract. (Page 254.)

3. MECHANICS LIEN—RIGHT TO LIEN.—Where it appears that plaintiff furnished the materials used in defendant's building, that the amount charged for same was less than the contract price for the construction of the building, and has not been paid, he has established a *prima facie* right to a lien on the building for the balance due, and the burden is on defendant to show that plaintiff is not entitled to a lien. (Page 254.)

4. MECHANICS LIEN—RIGHT OF MATERIAL MAN.—Where the owner paid money to the contractor with which to pay laborers and material men, and the contractor converted it to his own use, and abandoned the contract, and the cost of the completion of the building with the payments made exceed the contract price, the claims of a material man must be pro rated with other claimants. (Page 254.)

5. TRIAL—CONFLICTING INSTRUCTIONS—CURE.—When an incorrect instruction is given, the error is not cured by the giving of a correct instruction; when there are conflicting instructions, the jury is without a correct guide. (Page 255.)

6. MECHANICS LIEN—EVIDENCE—ADMISSIBILITY.—In an action to enforce a mechanics lien, where the amounts paid the contractor for labborers and material men, and the amount necessary to complete the work, after the contractor has abandoned the same, are in excess of the original contract price, it is proper to admit evidence of the filing of other liens, the same being material to the question of pro rating the claim of the plaintiff and other claimants. (Page 255.)

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

STATEMENT OF FACTS.

This is a suit by the appellee against the appellant in the Circuit Court of Lee County to have a judgment for building material furnished by the appellee which it alleged was used in a certain hotel building belonging to the appellant. The complaint set up that the material was furnished to B. M. Nelson, the contractor, who had been employed by the appellant to construct the

building in the city of Marianna. The complaint was filed on the 27th of July, 1911. It had as an exhibit an itemized account showing a balance due for materials furnished in the sum of $412.79. There was a prayer for judgment in this sum, and that same be declared a lien upon the building.

The answer denied the material allegations of the complaint. Denied that the materials were furnished within ninety days before the suit was brought and the lien filed. It set up that all of the material furnished by the appellee under its original contract was sold on November 30, 1910; that the small amount for sash weights, $77.87, was furnished on April 29, 1911; and it averred that all except this amount was out of date and barred; that the other material included in the account was furnished under a different contract. The answer also set up that there had been payments made upon the account leaving a balance due January 30, 1911, of $334.92. The answer further set up that the contractor abandoned his contract before the building was completed and that the appellant was compelled to complete the building, and did so according to the original plans and specifications, paying therefor a greater sum than the original contract price. It averred that it had paid no part of the contract price to the contractor for his own use. It alleged that it had paid the sum of $23,442.48 in strict accordance with the terms of the contract before the contractor abandoned the same, and that it had paid $7,346.20 to complete the building according to the original plans and specifications.

The manager of the appellee testified that appellee's account was for structural iron and some other small articles furnished the contractor for appellant's building; that the largest item of the account was for structural iron furnished on November 30, 1910.

The material was all used in the building. The last shipment was made May 2, 1911. The account shows that on April 29 there was furnished sash weights amounting to $77.87. Witness testified that the struc-

tural iron was furnished under a written proposal made by his company to the contractor, which he accepted on condition that the company would furnish sash weights at a certain price. The company agreed to that and agreed to protect him on the price on a rise in the market. There was nothing said about that in the written proposal nor in the acceptance endorsed on the proposal. There was but one contract; that was in writing, regarding the structural iron. The contractor signed an acceptance and put his name on the proposal and put it there upon that condition. But this condition was not in the proposal or in the acceptance endorsed on the back thereof. The sash weights are not classed as structural iron.

Witness stated that "the condition of his (the contractor's) giving the written contract for the structural iron was that we were to protect him on the rise in the price of certain window weights, and furnish them to him at a certain market price. We agreed verbally that when he ordered these window weights that we would protect him."

The testimony on behalf of the appellant tended to show that it entered into a contract with one B. M. Nelson to construct the hotel building for the price of $26,185. The contractor abandoned the contract before the building was completed.

The testimony was voluminous, and without setting it out in detail, it tended to show that the sum of $23,342.48 was paid in checks at the time the contractor quit work, and that this amount was paid to the material men and laborers. Most of the checks state on their face for what purpose they were issued. They were made payable to the contractor, but went to the material men and laborers.

The evidence tended to show that the money was paid out by the appellant to the contractor before he quit work, towit, the sum of $23,342.48, for the purpose of paying for material and labor that went into the build-

ing, and that none of it was paid to the contractor for his own use.

The appellee, over the objection of appellant, introduced testimony tending to show that the contractor on one occasion took $62.50 out of the sack that contained the pay roll money and converted it to his own use by paying same on a private debt for money borrowed.

The testimony on behalf of the appellant tended to show that it paid out after the contractor abandoned the contract the sum of $7,346.20 for the completion of the building. A witness was asked the following question: "Was that building completed according to the plans and specifications?" and answered, "Practically so. After we took charge we made one or two changes. Things not made before. We changed the tile in the lavatory and put some cement in the columns that was not in the original contract, and I don't recall anything else. The heating was changed and pipes put through underground."

Witness testified that there was no difference in the cost of the tiling.

There is a stipulation in the record as follows:

"After the court had declared the law as shown by the instructions the defendant offered to introduce a witness, W. S. McClintock, for the purpose of showing by the said W. S. McClintock that there are now pending the following actions against the hotel company for the purpose of enforcing accounts and claims for liens against the said hotel building, and that liens upon said accounts had been filed as provided by law in the Lee Circuit Court, as follows: W. F. Kershaw $569.95, Carl Sutton $49.60, and a suit in the United States District Court by Crane Company seeking to enforce a lien amounting to $3,013.97."

The court refused to allow the testimony to be introduced, to which appellant duly excepted.

The court, at the request of appellee, granted, among others, the following prayers:

"1. You are instructed that if you find from the

evidence that plaintiff filed this action within ninety days from the date it furnished the last material to the defendant it is not necessary to give the ten days' notice as provided by the statute, or file its amount with the clerk as provided by the statute."

"2. If you find from the evidence that plaintiff furnished the materials as alleged in the complaint; that the same were used in the building of the defendant and that the amount charged for said material was less than the contract price for the construction of said building and has not been paid, then plaintiff has established a *prima facie* right to a lien on said building for the balance due it, and casts the burden of proof on defendant to show that plaintiff is not entitled to a lien, provided this suit to recover said money due and established said lien was filed within ninety days after the last material was furnished."

"3. You are instructed that if you find from the evidence that defendant paid B. M. Nelson, the contractor, any moneys which were used by him for other purposes than the payment of debts due for labor or material used in the construction of the building, then you will find for plaintiff, provided such sums paid to the said Nelson are in excess of the amount of plaintiff's claim. If you find the sums of money paid said Nelson less than the amount of plaintiff's claim you will find for plaintiff for such amount."

"4. You are instructed that even though you find from the evidence that the defendant has expended in the construction of its building more than the amount originally contracted therefor, such finding will not defeat the plaintiff's right, as the plaintiff would be entitled to *pro rate* with all lien holders. To arrive at the ratio of payment due all lien holders you will deduct the amount necessary to complete the building from the original contract price, and add thereto any amount you find was paid by the defendant to the contractor and used by him for purposes other than the payment of liens on the building. This will be the amount to be *pro rated*

among the lien holders. The amount of liens to be allowed are the amounts paid out by the contractor before the abandonment of the original contract, and the amount of plaintiff's claim herein."

"6. You are instructed that it is incumbent on the defendant to show that any moneys paid out directly to the contractor Nelson were used by him for the purpose of paying for labor done and material furnished on defendant's building."

"7. You are instructed that the issuance of checks by the hotel company payable to the contractor, B. M. Nelson, and his endorsement thereon, showing that he received the proceeds of said checks, is *prima facie* evidence of the payment of the proceeds of such checks to the said Nelson and the burden of proof is on the defendant to show that the moneys received by the said Nelson were paid for labor done on said building or for materials used in the construction thereof."

The court refused the appellant's prayers for instructions, as follows:

"1. If the jury find from the evidence that the contract for the iron work was made by a written proposal and acceptance and that some verbal agreement was at the same time made about the price of sash weights and that the said sash weights were subsequently ordered by Nelson, and sold to him by the plaintiffs, there was two separate contracts, and if you find that the iron work was delivered more than ninety days before plaintiff filed its lien, the plaintiff is barred as to the account for the iron work."

"2. If the jury find from the evidence that the contract of Nelson was for $26,185 and that he failed to complete the building and that the defendant took charge of the building and completed it according to the plans and specifications, and that the amount of moneys paid out by the hotel company for labor and material exceeded the amount of the contract you will find for the defendant."

The court granted appellant's prayers for instructions as follows:

"3. If the jury find from the evidence that the hotel company paid to Nelson individually any money for pay rolls and material, and that such pay rolls and material were estimated by the superintendent and were for the correct amounts and that the hotel company entrusted the same to Nelson to carry to the laborers and Nelson misappropriated part of the funds, the hotel company would not be responsible for the same to any contractor or debtor of Nelson except the laborer to whom the money was sent."

"4. The hotel company would not be responsible in any event to any person for moneys entrusted to Nelson and wrongfully appropriated by him further than the amount actually shown to have been misappropriated."

There was a verdict and judgment in favor of appellee for $448.70 and the appellant duly prosecutes this appeal.

F. N. Burke and *H. F. Roleson,* for appellant.

1. All of the account was barred except the last item for sash weights. Plaintiff had no lien for the structural iron and steel at the time it sold the sash. weights and could have created none. Its right to do so could not be created or revived by the sale of more material. 32 N. W. 24; 63 N. W. 5; 57 N. W. 648; 56 Ark. 516; 33 Mo. App. 31; 7 Mo. App. 133.

2. Instruction 3 given at plaintiff's request errs in that it assumes that the payment direct to Nelson for any purpose at all would authorize a recovery for the plaintiff. 85 Ark. 407. Instruction No. 7 is erroneous for the same reason.

Daggett & Daggett, for appellee.

1. There was but one contract. When the proposal made by appellee was accepted by Nelson on condition that the sash weights be furnished, this constituted a proposal on Nelson's part, and its subsequent accept-

ance by appellee constitutes the only contract between the parties.

2. Instruction 3 and other instructions given at appellee's request, correctly declare the law as declared by this court. 77 Ark. 156; 85 Ark. 407; 84 Ark. 560; 99 Ark. 293.

WOOD, J., (after stating the facts). Under the undisputed evidence the contract to furnish structural iron and the contract to furnish sash weights should be treated as one entire contract for the purposes of having a lien declared upon the hotel building in suit. The acceptance by the contractor of the written proposal by the appellee to furnish structural iron for appellant's building was bottomed upon the condition that appellee would also furnish sash weights at a certain price. The rule that contemporaneous verbal agreements shall not be allowed to annul or vary the terms of a written contract is not applicable to the undisputed facts of this record. Here there is no attempt by one of the parties to a contract to vary its terms, but the evidence shows that the contracts, even though they were separate and independent, were entered into at the same time and each became binding at the same time.

The appellee was a material furnisher, and its account shows that it furnished the contractor for appellant's hotel building not only structural iron, but also agreed to furnish at the same time sash weights, which were just as much a part of the material with which the building was constructed as the structural iron and steel, although not nearly so great a part.

It is clear from the undisputed evidence that so far as the appellee and the contractor were concerned it was contemplated at the time the written contract for furnishing structural iron and the verbal contract for furnishing sash weights were entered into that they should be regarded as but one entire contract. At any rate, we are of the opinion that they should be so treated so far as the time for filing the lien is concerned.

The appellant, without objection, permitted the man-

ager of the appellee to testify as follows: "There was but one contract. There was a writing regarding the structural iron and Nelson signed an acceptance and put his name on the proposal, but he put it there upon that condition." That is, upon condition that appellee would "agree to furnish the sash weights at a certain price."

In a suit to declare the lien the obligations of this contract are collateral so far as the hotel company is concerned, the law fixes the time "within ninety days after the things aforesaid shall have been furnished," and, so far as appellant is concerned, we think, under the undisputed evidence, that the structural iron and steel were, in law, under the terms of the contract, furnished when the sash weights were furnished.

In *Kizer Lumber Co.* v. *Mosely,* 56 Ark. 544, it is said: "If the materials were furnished under one contract, he should file the account within ninety days after the last was delivered; but if the materials were furnished under separate and distinct contracts, it should be filed under each contract within the time limited."

The undisputed testimony, as we have stated, shows that the appellee and the contractor regarded the contract to furnish structural iron and steel and the contract to furnish sash weights as but one contract.

The court therefore correctly construed the contract, and did not err in giving instructions numbered 1 and 2 on behalf of appellee and in refusing the request for instruction numbered 1 on behalf of appellant.

Instruction numbered 3, given at the request of the appellee was erroneous and prejudicial. Taking all the testimony together, it was a question for the jury under the evidence as to whether or not appellant paid the contractor moneys in excess of the amount of appellee's claim which he used for his own private purposes.

The appellee (plaintiff below) contended that appellant paid Nelson, the contractor, sums of money largely in excess of plaintiff's claim, which he converted to his own use. Even if this were true, it would not, under the law, have entitled plaintiff to recover to the full amount

of its claim. In such case plaintiff (appellee) would not be entitled to the full amount of the claim, but only its *pro rata,* according to the rule announced in *Long* v. *Abeles,* 77 Ark. 156. Nor is it true that if appellant paid the contractor a less sum than the amount of appellee's claim which the contractor used for his own purposes, that the appellee (plaintiff) would be entitled to recover for this amount. In either event, the plaintiff (appellee) would be entitled to recover the amount of its *pro rata* with other lien claimants according to the rule announced in *Long* v. *Abeles, supra.*

The court correctly declared the law as to the *pro rata* in its instruction numbered 4, given at the instance of the appellee. But this instruction was in conflict with instruction numbered 3, and where there are conflicting instructions the jury would have no correct guide. That the appellant was prejudiced by the first part of instruction numbered 3, *supra,* is manifest from the fact that the jury did return a verdict in favor of the appellee for the full amount of its claim, whereas, if the jury had not been confused by the conflicting instructions and had the law been correctly declared they could only have returned a verdict for appellee, if they found the other facts in its favor, for the percentage of its claim when *pro rated* with the other lien claimants.

We find no prejudicial error in the giving and refusing of other prayers for instructions. We are of the opinion that they are in accord with the rule declared by this court in former cases. *Long* v. *Abeles, supra; Central Lumber Co.* v. *Braddock Land & Granite Co.,* 84 Ark. 560; *Cost* v. *Newport,* 85 Ark. 407; *Pratt* v. *Nakdimen,* 99 Ark. 293.

We find no prejudicial error in the rulings of the court upon the admission or rejection of testimony. Inasmuch as the case must be reversed and remanded for a new trial we deem it proper to say that the court should allow any testimony that may be offered tending to prove any valid liens existing against the hotel building of appellant as such testimony will be germane to

the question of *pro rating* the amount of appellee's claim with other lien claimants, and in determining what per cent, if any, appellee will be entitled to recover. See *Long* v. *Abeles,* and other cases *supra.*

For the error in granting the appellee's third prayer for instruction the judgment is reversed and the cause remanded for a new trial.

SULLIVAN *v.* WOOLDRIDGE.

Opinion delivered March 3, 1913.

1. SALVAGE—RIGHT TO.—A party to be entitled to salvage under section 7470 *et seq.*, of Kirby's Digest, must give the notice required by the statute. (Page 260.)
2. SALE OF CHATTELS—WARRANTY—FAILURE OF CONSIDERATION.—When W. sold logs to S. with covenants of warranty, and took a due bill in payment, and W. sued S. on the same, and B. claiming that the logs were his, was permitted to become a party to the action, and the action was treated as one between W. and B. to ascertain which one owned the logs, and it appearing that B. was the owner of the logs and entitled to payment therefor from S., it will be held that S. has suffered an eviction, and he may thereby defeat the action of W. against him, for the purchase price on the grounds of a failure of consideration. (Page 261.)

Appeal from Bradley Circuit Court; *Henry W. Wells,* Judge; reversed and dismissed.

STATEMENT BY THE COURT.

L. L. Sullivan owned and operated a saw mill on the banks of the Saline river where the railroad crosses it in Cleveland County, Arkansas. He entered into a written contract with W. W. Wooldridge whereby the latter agreed to deliver him logs at his mill at a certain price and to warrant and defend the title to the same against the claims of all persons. In May, 1911, Wooldridge found some logs in a draw-out or slough leading into the main channel of the river, and ran them down to Sullivan's mill. Sullivan scaled the logs, accepted them, and gave Wooldridge his due bill for $123.46 for the purchase price.

Wooldridge brought this suit against Sullivan before a justice of the peace to recover on the due bill. Sullivan filed an affidavit stating that the Bradley Lumber Company claimed that the logs were taken from its land, and that it was entitled to the purchase price of the same. He asked that the lumber company be made a party to the suit. The Bradley Lumber Company filed a petition in which it stated that the logs had been cut off of its land in Cleveland County, Arkansas, and that it was entitled to the purchase money claimed by Wooldridge. It asked to be allowed to intervene and show its claim to the money. No objection was made by any of the parties, and the plaintiff, Wooldridge, recovered judgment in the justice court for the amount of his due bill. Sullivan and the Bradley Lumber Company appealed to the circuit court.

The plaintiff, Wooldridge, testified to a state of facts substantially as follows: He admits that he did not own the logs for the purchase price of which the due bill sued on was given. He admits that he did not pay anything for the logs. He says that he found them in a draw-out or slough leading into the main channel of Saline river at a point not far above the mill of Sullivan. The logs were not marked or branded, and Wooldridge after holding them for about eight days carried them down to Sullivan's mill and sold them to him, taking his due bill for $123.46 for the purchase money. There were twenty-six pine and eight cypress logs. The pine logs were twenty-four feet long and the cypress logs varied from sixteen to thirty-two feet. Sullivan refused to pay Wooldridge because he said the Bradley Lumber Company claimed the logs.

The evidence of Sullivan and the Bradley Lumber Company is substantially as follows: J. E. E. Barker was at the time of the trial and for sometime prior thereto the representative of the Bradley Lumber Company. The Bradley Lumber Company owned some timber lands in Cleveland County, Arkansas, and the duties of Barker required him to make trips up and down the

river to find out if anyone was trespassing on said lands. On one of these trips in May, 1911, he ascertained that some timber had been felled and carried away from the land of the lumber company. The timber had been cut while the water was up and over the banks of the river. It appears that after the timber had been cut the logs had been floated out into the main channel of the river and carried down it. Barker examined the stumps and tops of the trees that had been cut down. He also made measurements of the size of the stumps and of the tops and estimated the size of the logs therefrom. He traced the logs down the river to a point some distance above Sullivan's mill and there lost track of them. He then went down to Sullivan's mill and found some logs which corresponded exactly in number, kind and size to the trees that had been cut down. These logs were the ones that Wooldridge had sold to Sullivan. There was one pine tree cut down that scaled forty-one inches across the stump. There was a distinct mark on the stump that timber men call a "cat face"—it came right across the face of the stump. There was a plug pulled out and Barker scaled right by the plug. When he got down to Sullivan's mill he pointed out a log which was similarly marked and said if it was the log taken from this stump it would scale forty-one inches across the stump. The log had a "cat face" across it and when it was measured it scaled forty-one inches. There was another log which had a hollow in it but the wood was perfectly sound and it had no other defect. This log by comparison with the stump showed that it was taken from the Bradley Lumber Company's land. The testimony showed that it rarely occurred that a log was found with a hollow in it and the timber around the hollow perfectly sound. The logs sold by Wooldridge to Sullivan were freshly cut and in measurement, kind of timber, and size corresponded exactly with the timber cut from the land of the Bradley Lumber Company. The testimony shows that no other timber was cut in that vicinity about that time.

In rebuttal, Wooldridge introduced testimony tending to show that other timber had been floated down the river before and after the time the logs in question were carried down, but the testimony does not show that any of this timber was lost; or that it had been freshly cut.

The jury returned a verdict for the plaintiff in the sum of $123.46, and both Sullivan and the Bradley Lumber Company have appealed.

D. A. Bradham, for appellants.

The evidence on the part of appellee shows that he found the timber on the lands of the Bradley Lumber Company and removed it therefrom. Appellee before he could claim the timber against the company would have to prove his ownership thereof, and in the absence of such ownership or permission from the company was not authorized to remove the timber. 102 Am. St. Rep. 648-655; 129 *Id.*, 404-406. See also 25 Cyc. 1577 (F).

The Bradley Lumber Company has so clearly identified the timber cut, and the evidence that the logs came from its land, that there is nothing left upon which to rest the verdict, and it should be set aside. 70 Ark. 385; 53 Ark. 96; 96 Ark. 500.

John E. Bradley, for appellee.

1. Sullivan is estopped to deny appellee's demand by his own admissions and the execution of the due bill.

2. Bradley Lumber Company could defeat appellee's recovery only by showing that it was the owner of the timber, and that was a question of fact which is settled by the jury's verdict.

HART, J., (after stating the facts). As will be seen from the statement of facts, Wooldridge brought this suit against Sullivan to recover on a due bill given by the latter to the former for the purchase price of some logs. Sullivan refused to pay the due bill because the Bradley Lumber Company asserted title to the logs and claimed that it was entitled to the purchase money. Wooldridge had warranted the title to the logs and admitted that he did not have any title thereto, and that he did not pay

anything for them. He did not give the notice required by the statute of persons taking up property and did not otherwise attempt to comply with the Salvage Act. Therefore, he even forfeited all claim to salvage. Kirby's Digest, § 7476. The Bradley Lumber Company without objection was permitted to become a party to the action for the purpose of asserting its title to the timber and claiming the proceeds. At the time that Sullivan purchased the logs, he did not know that Wooldridge did not have title to them.

In the case of *Hynson* v. *Dunn,* 5 Ark. 395, the court held that where a vendee of personal property protects himself by covenants of warranty and is let into possession, he can not defend against the payment of the purchase money without a pervious eviction. The court said it would be unjust to permit a vendee to retain possession of the property and put his vendor at defiance. This rule was also recognized in the case of *Brown* v. *Smith,* 6 Miss. 387. And the court there said that in general the rules which apply to sales of real apply also to those of personal estates, and gave as its authority for so holding 2 Kent's Commentaries, page 471.

In the case of *McDaniel* v. *Grace,* 15 Ark. 465, the court said: "Where the purchaser has taken a deed, with general covenants, of warranty, and there is a total failure of title and an eviction, or its legal equivalent, and the vendor sues for the purchase money, the purchaser may avail himself of the plea of failure of consideration, and will not be forced to pay the money, and then resort to cross action upon the covenants of his deed to recover it back" (Citing authorities). See also, *Benjamin* v. *Hobbs,* 31 Ark. 151.

As we have already seen, the Bradley Lumber Company was permitted to become a party to the action for the purpose of asserting its title to the logs and to recover the purchase price therefor. By its action the Bradley Lumber Company elected to confirm the sale by Wooldridge to Sullivan and to seek to recover the proceeds of the sale. No objection was made to this course

of proceeding and all of the parties to the action treated it as a contest between Wooldridge and the Bradley Lumber Company as to which one owned the timber and should be entitled to recover the purchase price of the logs. So in the application of the principles above announced, if the evidence in the case shows that the Bradley Lumber Company had the title to the logs, then treating the action as the parties themselves have treated it, the Bradley Lumber Company would be entitled to recover the proceeds of the sale, and this would be equivalent to an eviction of Sullivan. In such case Sullivan could defeat the action of Wooldridge for the purchase price of the logs on the ground that there was a failure of consideration. Viewing the testimony in its most favorable light to Wooldridge, we think the undisputed evidence shows that the logs belonged to the Bradley Lumber Company. The testimony which we have given in the statement of facts, and which need not be repeated here, we think conclusively establishes that fact. The evidence adduced for the Lumber Company shows that timber corresponding exactly with the size, kind and measurement of the logs sold by Wooldridge to Sullivan was cut from its land and floated down the river. The stumps of some of the trees had peculiar marks on them which corresponded precisely with the marks on the logs, and the size, character of timber, and measurements were the same. It is true Wooldridge introduced evidence tending to show that other logs had been floated down the river about the same time, but he does not show these logs were freshly cut and the other evidence in the case shows that there was no timber cut about this time on any lands in that vicinity except that cut on the lands of the Bradley Lumber Company.

The evidence adduced to establish the title of the Bradley Lumber Company to the logs in question was reasonable and consistent in itself and conclusively shows that the logs were taken from timber cut off of its land. The evidence of Wooldridge to the effect that

other logs were floated down the river was too slight and trifling to be considered or acted upon by a jury. It amounted to no more than a mere surmise or conjecture that the logs belonged to some other than the Bradley Lumber Company, and could by itself have no legal weight. To hold otherwise, would be to say that a scintilla of evidence is sufficient to send a case to a jury, and this doctrine has always been repudiated by this court. Therefore, we hold that the undisputed evidence shows that the title to the logs was in the Bradley Lumber Company and, treating the action and proceedings as the parties themselves have treated them, the court should have directed a verdict for the Bradley Lumber Company. In this view of the evidence the consideration for the due bill failed and Wooldridge was not entitled to recover thereon.

Because the court erred in not directing a verdict for the Bradley Lumber Company, the judgment in favor of Wooldridge will be reversed and, inasmuch as the record shows that all the facts in the case have been fully developed, the cause of action of Wooldridge will be dismissed, and the judgment will be entered here for the Bradley Lumber Company against Sullivan for $123.46 and the accrued interest.

JOHNSON v. JOHNSON.

Opinion delivered March 3, 1913.

1. DIVORCE—CONFLICTING TESTIMONY—BURDEN OF PROOF.—In an action for divorce for desertion and intolerable treatment, when the testimony is conflicting, the burden of proof is upon plaintiff, and conflicts between the testimony of the parties must be resolved in favor of the defendant. (Page 271.)
2. DIVORCE—WILFUL DESERTION—CONSENT.—Desertion as a ground for divorce must be without consent and against the will of the complainant, and a husband will not be held to have deserted his wife when she acquiesced in the separation, and did much to bring it about, no matter how long continued the separation may be. (Page 271.)

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

STATEMENT BY THE COURT.

The appellant, Mrs. Johnson, brought this suit against her husband for divorce, alleging wilful desertion for more than one year and such indignities as to render her life intolerable. She alleged that there were two children of the marriage, Ann T., two years of age, and Augusta, six years of age, and that appellee had wholly failed to provide for them. She prayed for absolute divorce, alimony and suit money. The complaint was filed on the 4th day of May, 1912.

The appellee denied the material allegations of the complaint, and alleged that he had been a loving and devoted husband; had kept his marriage vows, and had endeavored in every way possible to add to the happiness of the appellant; that for some reason unknown to him the appellant, prior to January 18, 1911, abandoned his bed and has ever since refused to cohabit with him as his wife and ever since preserved this attitude. He averred his willingness to have resumed the marriage relations with plaintiff if she had shown a disposition to treat him as a husband and was still willing, on that condition, to resume the marriage relations with her.

Appellee admitted that he had not contributed to the support of the children since the separation, but alleged that he and his mother had given them clothing and had endeavored to look after them; that the reason he had not contributed to the support of the children was that they were given to the appellant upon representations to the court that appellant's father was amply able and willing to provide for them, and alleged that he had only been allowed to see his children at stated intervals since appellant was entrusted with their custody, and that he had not had an opportunity to enjoy their society as a father should. He alleged that he would be glad to support, care for and educate them if the children were given to him.

The appellant was the daughter of Mr. Smith, a gen-

tleman of considerable means, who lived in the city of Fort Smith. Appellant was traveling in California for the benefit of her health. Appellee was a traveling salesman in California. He met the appellant there and became infatuated with her, and she received his attentions favorably, and they were engaged to marry. Appellee at the time was living with his mother. He was receiving about $125 per month as compensation for his services as traveling salesman. The appellee owed $800 for money borrowed to purchase stock in the wholesale drug house for which he was working. Appellee stated his financial condition to his fiance and he desired to postpone their marriage until he could get out of debt. Appellant was unwilling to this, and she wrote appellee the following letter:

"Sweetheart: Two letters from you today crashing our vacation scheme. My mind has been working at a furious rate ever since the receipt of the first one. November means no visit for I am sure he can not spare you when the holiday trade is at its heaviest. I have thought of everything, devised all sorts of schemes and this one seems to cling to me. Think it over. Get off for a few days while the rates are on and come to me and let us be immediately married and take me back with you. You say you can give me no comforts. I am sure I would not have to rough any more than the winter I spent in California, besides I care nothing for that—absolutely nothing. My inner life is the active one. Life isn't long enough to dally this way. I think if we make an effort to be agreeable to each other that we can live comfortably together. In this way your trip will not be any more expensive than as you had planned it. If you haven't the money borrow it; there are worse things than debt in the world; my father was in debt when he married and no prospects. We can borrow money from him to pay out that Braun stock; you can stay on the road until a good opening offers itself. We can manage some way. The main thing will be accomplished. We will be together and together I believe we can accomplish

more than apart. I am dreadfully afraid we will postpone this until it is too late. Besides two years from now you will find yourself as little ready as at present. I am not much on living in the tomorrow. I believe this coming winter would be more pleasant were we together, even under unpleasant circumstances. Perhaps there is some objection to this which I know nothing of; at any rate I ask you to think seriously of it."

Appellee immediately responded to this letter, asking appellant if she would marry him if he would come to Fort Smith, and she replied that she would. He went to Fort Smith and they were married. After a visit to the East they went back to California and lived at first with appellee's mother. After a time the relations between the mother of appellee and his wife became strained and as a result appellant left Mrs. Johnson's home, and appellee assented to this arrangement. Appellant's father and mother visited her in California. At that time appellant was nearing confinement and she became anxious to move back to her home in Arkansas. Her father and mother were also anxious for this, and appellant's father offered appellee employment at a salary beginning with $75 per month, which was to be increased to $150 per month. The result was that appellant and appellee moved to Fort Smith and lived with appellant's parents for nearly a year.

Appellee entered upon his work in the bank and insurance company at a salary of $75 per month, which was afterwards increased to $150 per month.

Without going into details, appellant claims that her father made contributions to appellee amounting in the aggregate to $9,700, and that upon the whole he was "an expensive son-in-law;" that after the birth of the second child they were in "quite impoverished circumstances;" that on account thereof it became necessary for appellant "to go to work to help to make a living for the family and to pay the household expenses which appellee at that time was unable to do; that on account of these things she resolved that "she would have no fur-

ther sexual relations with him," as she did not think it right to herself to bring other children into the world when she was unable to support those they had. Having lost confidence in him as a man and whatever affection, if any, she had for him, she determined to alter the relations that she had theretofore sustained to him, as evidenced by the following letter, written by her to appellee on August 3, 1910:

"Dear Jilson: Your request for an explanation is only just I suppose—only there is little to explain. When I married you I knew I did not love you but there was very small chance of my ever loving any man and I believed I would come nearer realizing my ideal husband and father in you than any man I had ever known and believed of course love would follow. I have no criticism to offer of you as a husband and father unless it is that you are too self-sacrificing, but I have learned this thing that love can not be coaxed, wheedled or forced. For six years I have sincerely tried to care for you; the nine months previous to the birth of the babe was a time of awakening. I realized the futility of my efforts and our relations have all the time become more and more distasteful until they border on torture. I am sorry for you, but I absolutely can not help it. It seems to me the only kind thing you can do is to alter our relations—a few words can not make a woman a slave of a man when a woman gives her body to a man she feels towards as I do towards you it is nothing short of adultery. I ask you to desist from caressing me. Of course, you can do as you choose with your life—I give you every liberty, and ask the same in return, but please do not force yourself on me. I would suggest that we continue as we are now living, dropping the relation of husband and wife, unless you have some more pleasant course in view for yourself. Now please accept this as a man—do not come to me crying and scolding; it can avail nothing, and it is quite as hard on me as it is on you. I ask you to face it as I do—try to be happy. I would will things otherwise were it possible." (Signed) "Bird."

In explanation of this letter, appellant testified that the occasion of it was her refusing to let appellee kiss her. He had become distasteful to her. She didn't love him when she married him. In regard to the statement about his being too self-sacrificing, she says she must have referred to the children in that, as she had nearly all of the correcting to do; that he didn't take the stand as a father should to command their respect. In regard to the statement that she would give him every liberty and ask the same in return, she says she meant the liberty of living in all the little things of life, her going and coming and his going and coming. This letter was intended to cut off all sexual relations of husband and wife between her and Mr. Johnson; that was its object. Her proposition was that they should occupy the same house but separate rooms or beds and live in that way and raise the children and make as pleasant a home as they could for the children.

In explaining why she said she lost confidence in his ability and respect for his character she gives the following reasons: He had not made a success. She was forced to go out and work. They were owing money all over town, and this was the only way she had to judge of his ability. So far as his character was concerned, she ceased to consider him an honest man. This opinion was caused by many small things. One was her father had offered him $5 to stop smoking cigarettes and he took the money and continued to smoke them. Another was that he had failed to turn over mining stock that her father had given him for her. These were the two principal things, but a thousand little things in every day life caused her to size him up in this way. She didn't give these reasons in her letter to him because she intended to give the one most forceful with him. In the letter she tried to shield him. "In fact," she says, "I think I laid it on pretty thick in trying to shield the blow." Notwithstanding she thought him inefficient and dishonest, she was willing to live with him in the same house and to all appearances as husband and wife, notwith-

standing his faults of character, in order to raise the children and avoid the disgrace of their separation, but she was unwilling to assume the sexual relation of husband and wife.

The appellant was asked whether or not she disliked her husband very much and answered: "My feeling is pretty largely one of indifference." If he should make advances "my feelings would be decidedly dislike."

The appellee claims, and his testimony tended to show, that out of the gifts he had received from Mr. Smith, the father of appellant, and out of his salary, he had expended over $8,000 on the lots which Smith had given appellee's wife for a home; that all that he had earned aside from the necessary support of his family had gone into improvements on this property, and that the same was then worth the sum of $12,545, and was in the name of appellant.

He borrowed $2,500 on his wife's property with which he purchased an interest in a furniture business. The net worth of the business is from $2,500 to $3,000. He has a half interest in it.

He explained the mining transaction by saying that "when the mining company was organized Smith was given $25,000 stock," and gave him (appellee) $12,500. The stock had not cost Smith anything. He (appellee) transferred sixty-five shares to his wife, ten shares to his partner and sold two shares. His wife wanted him to transfer all of the stock to her and because he would not do so she seriously objected. Mr. Smith didn't seem to object much. Appellee didn't regard the mining stock as of any value.

In regard to the cigarette transaction, he testified that Smith gave him $5 to throw away a cigarette which he was then smoking and he did so and called on him for the $5 and got it, and it passed off as a joke. He told his wife about it and they thought it was a good joke. Another witness who saw the cigarette incident testified that he considered it a joke.

The testimony of appellee tended to show that he

had never mistreated his wife, and witnesses testified to his good habits and to the cordial relations that seemed to have existed between appellee and Smith, appellant's father, and also to the apparently pleasant relations that existed between appellee and his wife.

It is unnecessary to set out this testimony in detail. His version of his demeanor towards his wife and his affection for her before and after he received the letter of August 3, 1910, is shown by the following excerpt from his testimony: "I tried to talk to her time and time again and to reason with her, and tried to find out why she treated me as she did, and she always said 'I don't care to discuss it,' and got up and left the room, and I tried several times, and in August, it was in the afternoon, I was going by there and I saw her in the sitting room with the baby and thought I would go in and reason with her and try to find out the trouble, and she said she didn't care to discuss it and I insisted a little. I told her that I thought it was just to me that she should explain to me; if I had done anything to give me a chance to explain, and she said, 'Go down town this minute; obey me and go down town this minute.' Then it went on until the 1st of January, 1911, and I was holding the baby, our youngest baby, while she (appellant) was bathing and getting ready for bed. When she came in for the baby, why, I said, 'Precious, this is the first of the year, and we can't go on living like this; let us talk this thing over, and get it straightened out and live right.' She grabbed the baby and said, 'I don't care to discuss it,' and ran into her own room. I hoped and hoped until January 18, when I left there."

When asked what he did after receiving the letter and whether he attempted to "make up with her" after that, he replied: "It went on just the same and I never spoke to her about it until a day or two after that I referred to it and told her that we were man and wife, both in the eyes of God and the laws of the land, and nothing could ever make me believe that our children were born in adultery. 'Well,' she said, 'I am not so

sure of that.' It went on until the 18th of January. I just put it off, hoping and hoping, and finally I left. I tried to talk with her; that last time was on January 1. I tried every now and then. I tried to go to her and talk to her and reason with her and see if we couldn't get together and it was absolutely impossible; she wouldn't listen to me."

Appellee was asked, "What were your feelings towards your wife up to the time of your separation?" and answered: "I don't see how a man could think more of his wife than I did because my whole life was for the benefit of my wife and children, and my wife I held paramount even to my children. I thought it was strange when the question came up something about whether we had rather give up first our husband or our children, and I says, why, if there was any deciding to be done and I had to give either my wife or my children by death and couldn't keep both of them, I would prefer to keep my wife more than anything. I would give up the children, and I believe everybody else would feel the same way, and she said, 'I don't know; I think I would give up my husband.' "

The court dismissed appellant's complaint for want of equity, and she duly prosecutes this appeal.

Hill, Brizzolara & Fitzhugh, for appellant.

Abandonment and desertion by the husband for more than one year constituted grounds for divorce under our statutes.

The withdrawal of the marital relation is not ground for abandonment and desertion. 50 So. Rep. 867; 68 S. E. 73; 129 N. W.; 68 S. E. 381; 110 N. W. 618; 56 Atl. 86. Brown on Divorce, 153; 21 N. J. Eq. 331; 78 Me. 548; 23 Pa. St. 343; 52 N. J. Eq. 349; Andrews on American Law, Vol. 1, p. 632; 138 Ill. 436; 14 Cyc. 612; 9 Am. & Eng. Enc. of Law (2 ed.), 769.

The testimony wholly fails to show any dereliction of wifely duly except her refusal of the connubial bed.

Read & McDonough, for appellee.

The testimony adduced on the part of appellant wholly fails to show statutory grounds for a divorce. 52 N. J. Eq. 349; 44 Ark. 429; Am. & Eng. Enc. of Law, Vol. 9, p. 773.

When there is conflict in the testimony that of the defendant has the greater weight. 34 Ark. 37.

WOOD, J., (after stating the facts). After the statement of facts, but little more need be said. It may be conceded that according to the decided weight of authority, a refusal by one spouse to have sexual intercourse with the other is not willful desertion and does not generally, under statutes like ours, constitute grounds of divorce. But that is not the question for our consideration. Appellee is not seeking a divorce from appellant upon such grounds. The question presented by this record is whether or not appellant has established a right to divorce upon the ground that appellee has willfully deserted her, or offered her such indignities as to render her condition in life intolerable. The chancellor found that "neither the leaving nor absence was willful upon the part of the defendant;" that "it was not only provoked by plaintiff, but consented to by her." The chancellor was correct in these findings. The burden of proof was upon appellant, and any conflicts between her testimony and appellee's must be resolved in favor of the latter. *Rie* v. *Rie,* 34 Ark. 37.

The principles announced by this court in *Rigsby* v. *Rigsby,* 82 Ark. 278, when applied to the facts of this record, show that there was no willful desertion of appellant by appellee. See 9 Am. & Eng. Enc. of Law, 223. Where the separation is by consent, there can not be willful desertion. *Reed* v. *Reed,* 62 Ark. 611. It is held in *Hankinson* v. *Hankinson,* 33 N. J. Eq. 66, that "the separation of a husband and wife, acquiesced in by the wife, and which she did much to bring about, however long continued, does not constitute desertion to authorize a divorce" on the wife's petition. "Desertion must be without the consent and against the will of complain-

ant." *Sergent* v. *Sergent,* 33 N. J. Eq. 204. The separation here was plainly not against the will of appellant as shown by her letter of August 3, 1910.

The opinion might be extended at length *(arguendo)* in discussing the facts. But inasmuch as the divorce can not be granted, and as nothing could be said in commendation, justification, or even extenuation of the conduct of appellant towards appellee, the least said the better.

Affirmed.

STATE *ex rel.* GRAY *v.* HODGES.

Opinion delivered March 3, 1913.

1. NOTARY PUBLIC—MINISTERIAL ACT—MANDAMUS.—The issuance of a commission to a notary public, appointed by the Governor under § 5743 Kirby's Digest, is a ministerial act, and mandamus is the remedy to compel its performance. (Page 273.)
2. CONSTITUTIONAL LAW—RULES OF CONSTRUCTION.—The Constitution must be considered as a whole and each part must be viewed in the light of other provisions relating to the same subject, as well as of the whole frame and purport of the Constitution. (Page 274.)
3. NOTARY PUBLIC—ELIGIBILITY OF WOMEN.—A woman is not eligible to hold the office of notary public, since she did not have the right at common law, and it has not been given by the Constitution. (Page 274.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

"The Governor may appoint a convenient number of notaries public for each county, who shall be citizens of the county for which they are appointed," etc. Kirby's Dig. § 5743. The only requirement is that they be citizens, and it is not necessary that one be an elector in order to be a citizen. 6 Am. & Eng. Enc. of L. 15; 21 Wall. (U. S.) 165, 169, 170; 24 Ark. 159.

Unless there is something in our Constitution to prevent, a woman may be a notary public in this State.

Since it is not an elective office but appointive, and there is no succession in the office, and no vacancies, section 3 article 19, of the Constitution does not apply, and no other provision appears to prevent. 92 Pac. 846. See also as supporting the view that a woman may be a notary public, 60 S. W. (Ky.) 186; 59 N. W. (Neb.) 803, 41 Neb. 535; 9 Fed. 78; 49 N. W. 868.

Wm. L. Moose, Attorney General, and *Jno. P. Streepey,* Assistant, for appellee.

Women were not eligible under the common law to hold the office of notary public, and since there is no express provision in our statutes giving them the right to hold the office, the prohibition in article 19, section 3 of the Constitution applies against appellant's contention. As to the point that a notary public is merely an appointive officer, and that there is no succession in the office, there is a legislative determination to the contrary. Kirby's Dig. § 5750. On the point that women are not eligible where there is no constitutional or statutory provision allowing it, see 6 L. R. A. (Mass.) 842, 843, 844; 32 L. R. A. (Mass.) 350; 41 L. R. A. (Ohio) 727; 20 L. R. A. (Tenn.) 311, 312; 22 Ky. L. Rep. 1169; 5 L. R. A. (N. S.) 416, note; *Id.* 415; 9 Col. 628, 21 Pac. 473.

HART, J. A petition for a writ of mandamus to compel the Secretary of State to issue a commission as notary public to Mary B. Gray was filed in the Pulaski Circuit Court. The petition states that Mary B. Gray is a citizen of Pulaski County and was appointed a notary public by the Governor of the State. That she applied to the Secretary of State to issue her a commission and that he refused to do so on the ground that she was a woman. The circuit court denied the petition for the writ of mandamus and the case is here on appeal.

Section 5743, Kirby's Digest, provides that the Governor may appoint notaries public. The issuance of the commission by the Secretary of State is a mere ministerial act, and mandamus is the proper remedy to compel its performance, provided the petitioner possesses the

qualifications to serve as a notary. 29 Cyc. 1372; 26 Cyc. 252.

A notary public is a public officer. *Sonfield* v. *Thompson,* 42 Ark. 46; 29 Cyc. 1069; Opinion of Justices, 73 N. H. 621, 6 A. & E. Ann. Cas. 283, 5 L. R. A. (N. S.) 415. This is conceded by counsel for appellant, but they contend that a woman is not prohibited by our Constitution from filling the office of notary public, and that she is a citizen within the meaning of section 5743, Kirby's Digest. Section 3, article 19, of the Constitution provides that no person shall be elected to or appointed to fill a vacancy in any office who does not possess the qualifications of an elector. Counsel for appellant contend that this section of the Constitution has reference solely to elective officers and has no application to the office of notary public. In making this contention we do not think that they have taken into consideration the other sections of the Constitution bearing on the question.

It is a cardinal rule of construction that the Constitution must be considered as a whole and to get at the meaning of any part of it we must read it in the light of other provisions relating to the same subject, as well as of the whole frame and purport of the Constitution. *Little Rock* v. *North Little Rock,* 72 Ark. 195.

Section 6, article 5, of the Constitution provides that certain named officers shall not be eligible to a seat in either house of the General Assembly. Notaries public are expressly excepted from the officers thus prohibited. Section 26, article 19, of the Constitution provides that militia officers, officers of public schools and notaries may be elected to fill any executive or judicial office. In the case of the *State* v. *Ashley,* 1 Ark. 513, the court said:

"There are two ways of imposing a constitutional restriction or limitation. The grant may contain negative words, denying in express terms the exercise of the power claimed or attempted to be usurped; or it may simply contain an affirmation, which amounts to as positive a negation of any other power upon the same subject, as if the grant itself had employed negative, and

not affirmative, words, in the declaration. The constitutions of the United States and of the States furnish satisfactory and conclusive proof of the truth and importance of the principle here stated. Indeed it will be found from an examination of those instruments that the usual and more general mode of imposing restrictions is by affirmative words, 'which in their operation imply a negative of other objects than those affirmed;' and in such cases a negative or exclusive sense must be given to the words, or they will have no operation at all.'' See also *Colby* v. *Lawson,* 5 Ark. 303.

It may be said that the purpose of section 26, article 19, was a declaration on the part of the framers of the Constitution that there was no incompatibility between the office of a notary public and the other offices named in the section, and executive and judicial offices. It must also be said, however, that to give this affirmation of the right of notaries to fill executive and judicial offices any operation it must be by way of excluding and denying all persons who are not qualified electors the right to hold the office of notary public. For none but qualified electors can fill executive and judicial offices. Our Constitution lays down that rule, and in the case of some officers adds further requirements. This view is greatly strengthened when we consider that, under the common law which was in force in this State at the time of the adoption of our Constitution, a woman could not hold a public office. Opinion of the Justices, 6 A. & E. Ann. Cas. 283, and case note. The *Atty. General* v. *Abbott* (Mich.), 47 L. R. A. 92; *Robinson's case,* 131 Mass, 376, 41 Am. Rep. 239. In the latter case the right of a woman to hold office was fully discussed, and the court, after citing and reviewing at great length the authorities bearing on the question, held that the political privilege of voting and holding public office was denied to women under the common law. Whenever our Legislature has intended to make a change in the legal rights or capacities of women it has used words clearly manifesting its intent and the extent of the change intended. Thus, it

will be seen the law of the State at the time of the adoption of the Constitution, the whole frame and purport of the Constitution itself and the general understanding and the practical construction given to the Constitution by the law makers all support the conclusion that women are not eligible to hold public office, and are inconsistent with any other conclusion. See Opinion of the Judges, 32 L. R. A. (Mass.) 350, and Opinion of the Justices, 5 L. R. A. (N. S.), (N. H.), 415.

It follows that if the petitioner had been issued a commission by the Secretary of State after her appointment by the Governor, she would have no constitutional or legal authority to exercise any of the functions of the office of notary public.

Therefore, the writ of mandamus was properly denied, and the judgment will be affirmed.

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

Opinion delivered March 10, 1913.

1. DAMAGES—OVERFLOW OF LAND.—When plaintiff's land is permanently damaged by the construction of a ditch by a railroad company, causing overflow of the land, the measure of damages is the difference between the market value of the land before and after the construction of the ditch. (Page 278.)
2. APPEAL AND ERROR—INSTRUCTIONS—MEASURE OF DAMAGES.—No prejudicial error is committed by a trial court in instructing the jury on the measure of damages to plaintiff's land due to overflow, by the use of the words "value" of the land, instead of "market value," when the record shows that the testimony was directed to the "market value" of the land damaged. (Page 279.)
3. DAMAGES—EXCESSIVE AWARD.—Damages awarded plaintiff by the jury for the overflow of plaintiff's land caused by defendant's act, will not be held excessive when there is ground for such award in the testimony of the witnesses. (Page 279.)

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

STATEMENT OF FACTS.

Appellee brought this suit against appellant to recover damages on account of his land being caused to overflow by the appellant digging a ditch near his land for the purpose of draining its road bed.

The facts as adduced by appellee are substantially as follows:

In the year 1910 the appellant, seeking an outlet for the water that accumulated near its right-of-way dug a ditch parallel with its line of railroad for a distance of about five miles. The railroad ran north and south. Appellant then dug a lateral ditch from the main ditch running east a distance of about two miles where it emptied into Bayou Two Prairie. Appellee owned a fractional forty-acre tract of land situated about half a mile south of where this lateral ditch emptied into the bayou. Appellee purchased the land in 1906 and the consideration recited in the deed was fifty dollars. The land was low, wet land, and at the time appellee purchased it none of it was in cultivation. Subsequently appellee cleared six acres of the land and began to cultivate it. He also built a house on the land. The natural drainage of the country at that point is south. The dirt that was taken out of the ditch was piled up on the south side of it and the water is collected in the ditch and prevented from flowing out by the embankment on the south side of it so that it is carried down the ditch to the bayou and then overflows it and runs down to appellee's land, and overflows it.

All of appellee's witnesses testify that the water is collected by the ditch and cast in a body into the bayou and then spreads out into the whole bottom, overflowing appellee's land much quicker than it did before the ditch was constructed. Some of the appellee's witnesses testified that the market value of his land before the ditch was constructed was twenty-five dollars per acre and others estimated its market value at fifteen dollars per acre. They all testify that appellee's land is damaged

by reason of the construction of the ditch and say that a considerable portion of the land is now worthless.

On the other hand, the testimony on the part of appellant tends to show that the land was only worth three or four dollars per acre and that the construction of the ditch did not materially damage it. The witnesses for appellant stated that the effect of constructing the ditch was to cause the water to rise on appellee's land a day earlier but said the water ran off the land quicker than before the ditch was constructed.

Other facts will be referred to in the opinion.

The jury returned a verdict for appellee in the sum of one hundred and twenty-five dollars, and the case is here on appeal.

Thos. B. Pryor, for appellant.

1. The measure of damages is the difference between the market value of the land before and after the construction of the drain.

2. The damages are excessive.

Chas. A. Walls and *Thos. C. Trimble, Jr.,* for appellee.

1. The court properly instructed the jury as to the measure of damages, and the verdict is not excessive. 93 Ark. 47; 95 *Id.* 297.

HART, J., (after stating the facts). It is conceded that the digging of the ditch diverted the water from its usual and ordinary course and collected it in a body and cast it in greater volume into the bayou, thereby overflowing appellee's land, and that whatever injuries were done to appellee's land were apparent from the time the ditch was constructed; and were permanent injuries to his land.

In such cases the measure of damages is the difference between the market value of the land before and after the construction of the ditch. *St. L. I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622; *St. L. I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46, and cases cited.

Counsel for appellant also concede that this is the measure of damages, but they contend that the court did not so instruct the jury. In the instruction complained of, the court in effect told the jury that the measure of damages in this character of cases is the difference between the value of the land before and after the construction of the ditch. Counsel insist that the instruction was erroneous because the court did not use the words "market value." The jury evidently understood the court to mean "market value." The appellee himself testified what the market value of his land was before and after the construction of the ditch. All his witnesses testified to what they considered the market value of his land. At one time appellee was asked what was the value of his land, and the court told him to confine his answer to the market value. If counsel for appellant thought that the jury did not so understand the instruction he should have made a specific objection to it. Again it is insisted by counsel for appellant that the court erred in not permitting appellee to state what was the value of the land at the time he purchased it. We do not think there was any error in this. Appellee purchased the land several years before the ditch was constructed, and the testimony shows that the value of lands in that vicinity had risen considerably since the date of his purchase. Besides, appellee might have purchased the land at less than its market value. Then, too, the deed to appellee was introduced in evidence and it recited a consideration of fifty dollars, which was not denied to be the true consideration.

Finally, it is insisted that the damages are excessive. It must be conceded that the jury was extremely liberal in awarding damages to appellee, but when we consider the market value of the land before and after the construction of the ditch, as testified to by the witnesses for appellee, we can not say that there was no testimony to warrant the verdict of the jury.

The judgment will be affirmed.

BOYCE v. CITY OF BRINKLEY.

Opinion delivered March 10, 1913.

EVIDENCE—HEARSAY TESTIMONY.—When defendant is charged with selling liquor in violation of a city ordinance, testimony by the town marshal in answer to the question, why he arrested defendant, "that six or eight persons told him that defendant was selling whiskey right along" is hearsay testimony and incompetent.

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

C. F. Greenlee, for appellant.

Hearsay evidence is not admissible. 6 Enc. Ev., 443; 16 Cyc. 1195; 10 Ark. 638; 16 *Id.* 628. The judgment should be reversed.

No brief for appellee.

WOOD, J. The appellant was convicted of selling liquor in violation of an ordinance of the city of Brinkley. The testimony tended to show that appellant sold whiskey in violation of the ordinance of the city. Appellant testified that he had not sold any whiskey. Witness L. C. Owen testified as follows: I am marshal of the City of Brinkley, and was Marshal in August, 1911. I made affidavit against defendant on August 25, 1911, and arrested him on that day. Witness was asked the following question: "Why did you arrest the defendant?" The defendant objected to the question. The court overruled the objection, and witness answered as follows: "Well, six or eight persons told me defendant was selling whiskey right along, and I was going to inquire of Will Grant if he had not bought whiskey from defendant." The answer was objected to, and the court overruled the objection, and defendant duly saved his exceptions.

The admission of this testimony is made the principal ground of the motion for a new trial. The court erred in allowing the witness to testify that six or eight persons told him "defendant was selling whiskey right along." The testimony was hearsay evidence and was

therefore incompetent. It was prejudicial to appellant. The court erred in not excluding it. *State* v. *Wooddy*, 10 Ark. 638; *Sadler* v. *Sadler*, 16 Ark. 628; 16 Cyc. p. 1195; Enc. Ev. vol. 6, p. 443.

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

HARRIS v. RAY.

Opinion delivered March 3, 1913.

1. APPEAL AND ERROR—FINDING BY CIRCUIT COURT—CONCLUSIVENESS.—A finding of fact by the circuit court, will not be disturbed if supported by legally sufficient evidence, even though the finding appears to be against the preponderance of the evidence. (Page 283.)
2. HOMESTEAD—ABANDONMENT.—When land has been impressed by appellee with the character of a homestead, she does not abandon the same when she marries and moves to another State, when it appears that her removal was only temporary and that she intended to return to the homestead. (Page 284.)
3. HOMESTEAD—ABANDONMENT.—A temporary removal from a homestead, once impressed as such, does not constitute an abandonment, even though the party exercises the rights of citizenship in another State. (Page 284.)
4. HOMESTEAD—MARRIED WOMAN—CHANGE OF DOMICILE.—A married woman does not abandon her homestead in Arkansas by a temporary removal with her husband to reside with him in another State, even though the domicile of the wife follows that of her husband. (Page 285.)

Appeal from Randolph Circuit Court; *J. W. Weeks*, Judge; affirmed.

T. W. Campbell, for appellant.

The effect of one's acts can not be defeated by an undisclosed purpose at variance with them. 2 L. R. A. 106; 101 N. C. 311.

A change of residence clearly manifested as a matter of law by acts can not be defeated by a subsequent declaration of the person that he did not intend his acts to have that effect. 101 N. C. 311.

The right of exemption of a homestead from sale under execution appertains only to residents of this State. Kirby's Digest, § 3898; 34 Ark. 111; 53 Ark. 182; 41 Ark. 249; 19 Tex. 275; 44 Ind. 269; 23 Cal. 108.

Appellee's husband's domicile was in Oklahoma and in law she must be deemed a resident of that State so long as her husband's home remained there. 29 Ark. 280; 49 L. R. A. 138; 42 S. W. 185. Being a non-resident of this State she is not entitled to a homestead exemption here. 43 N. H. 307; 13 Mass. 501; 27 Miss. 704; 12 Cal. 327; 20 Ala. 629; Story on Conflict of Laws, § 46; 58 Iowa 406; 10 N. W. 804.

McCaleb & Reeder and *C. H. Henderson,* for appellee.

As the question of residence is largely one of intention a debtor who is preparing to remove from the State may still be a resident of the State and entitled to her exemptions. 100 Ark. 540.

For removal from the homestead to be an abandonment there must be an intent not to return, and where the intent not to return has not been formed the homestead character is not destroyed, though another home has been acquired. 128 S. W. 699; 55 Ark. 55. Where a lessor leases his homestead and reserves the right to return, and it is his intention to do so, there is no abandonment. 48 Ark. 539. Continuous occupation is not necessary to preserve the homestead right. 37 Ark. 283; 56 Ark. 589; 66 Ark. 382.

Where it appears from the evidence that the premises had been occupied by the debtor as a homestead, the burden is on the execution creditor to show both removal therefrom and intentional abandonment. 62 Neb. 227; 71 Kan. 665.

Where the facts establish a homestead right it will be presumed to continue until the contrary is shown. 97 Tex. 137.

McCULLOCH, C. J. The controversy in this case arises over the right of appellee to claim a homestead in Randolph County, Arkansas, from sale under execu-

tion in appellant's favor. The circuit court decided the issue of fact in appellee's favor upon conflicting testimony, and if the finding of the court is supported by legally sufficient evidence it is our duty not to disturb it, even though the finding appears to us to be against the preponderance of the evidence. *Robinson* v. *Swearingen,* 55 Ark. 55; *Gazola* v. *Savage,* 80 Ark. 249.

Appellee was a widow and occupied as her homestead a tract of land in Randolph County, in which she owned a life estate, conveyed to her many years ago by her father. In January, 1911, she intermarried with George Ray, who was a railroad conductor and resided in Oklahoma, where he had been for five or six years. Ray formerly lived in Arkansas, at different points, and afterwards moved to Texas, and thence to Oklahoma, being a railroad man during all that time. Appellee went to Oklahoma with her husband, and leased the tract of land in controversy for a limited period. She left some of her personal property in Randolph County, and testified in this case that she left with the intention of returning and occupying the homestead. During the few months she remained in Oklahoma an application was made to her to sell the place, which she declined to do, the testimony tending to show that her husband acquiesced in this purpose and intended to sell his property in Oklahoma and return to Arkansas with his wife.

The judgment in appellant's favor was rendered in July, 1911, and execution was sued out and levied on this land a short time thereafter. In November, 1911, appellee returned to Arkansas and again occupied the homestead.

It is undisputed that the tract of land in controversy had been impressed by appellee with the character of a homestead and that she occupied it until the time she intermarried with Ray and removed with him to Oklahoma. She claims that her removal was only for a temporary purpose and that she intended to return.

Appellant adduced testimony tending to establish the fact that appellee had no intention of returning to

Arkansas and so declared herself to her neighbors and friends.

The question presented is, whether or not the evidence is sufficient to warrant the finding that there was no abandonment of the homestead.

Numerous decisions of this court establish thoroughly the principle that a temporary removal from a homestead, once impressed as such, does not constitute an abandonment. *Euper* v. *Alkire,* 37 Ark. 283; *Robinson* v. *Swearingen,* 55 Ark. 55; *Gates* v. *Steele,* 48 Ark. 539; *Robson* v. *Hough,* 56 Ark. 621; *Gazola* v. *Savage,* 80 Ark. 249; *Gebhart* v. *Merchant,* 84 Ark. 359.

Our conclusion is that the evidence is sufficient for the purpose of showing there was no abandonment of the homestead. It is unnecessary to enumerate all the facts and circumstances which can be regarded as supporting the finding; but giving it its strongest probative force in appelles favor it is legally sufficient, we think, to support the finding of the trial judge.

It is contended by counsel for appellant that appellee's intermarriage with a man who lived in another State *ipso facto* operated as an abandonment of the homestead merely for the reason that her legal domicile followed that of her husband.

It is true that in law the domocile of the wife follows that of the husband. *Johnston* v. *Turner,* 29 Ark. 280; *Hairston* v. *Hairston,* 27 Miss. 704; Story on Conflict of Laws, § 46. But this does not necessarily result in a holding that, regardless of the intention of the parties, the homestead must be treated as abandoned. The Constitution of this State confers homestead rights upon a *resident* of the State who is a married person *or* the head of a family, and when a homestead is acquired by a resident, temporary absence, even in another State, does not work an abandonment. Even where one exercises, during the time of temporary absence from the homestead, the rights of citizenship at another place, such as voting, this does not necessarily imply an abandonment of the homestead. In other words, where an actual res-

ident of this State acquires a homestead here, the mere exercise of acts of citizenship in another State while temporarily absent from the homestead does not necessarily amount to an abandonment, though it may be considered strong evidence of such abandonment. *Rand Lumber Co.* v. *Atkins,* 116 Iowa 242; *Cincinnati Leaf Tobacco Warehouse Co.* v. *Thompson,* 105 Ky. 627; *Minnesota Stoneware Co.* v. *McCrossen,* 110 Wis, 316; *Corey* v. *Schuster,* 44 Neb. 269; *Myers* v. *Elliott,* 101 Ill. App. 86. Even though the legal domicile of the wife follows that of the husband to another State, if she continues to reside upon the homestead or leaves it for a temporary purpose with intention to return, there is no abandonment.

Of course, there is no presumption that the wife will desert her husband and choose to return to the homestead without him, and if the evidence was clear that there was no intention on the part of the husband to return, that would negative any intention on the part of the wife to return. The evidence in this case does not, however, show that there was no intention on the part of the husband to join the wife in her return to her homestead after a temporary absence. There is some evidence to the contrary, and we are of the opinion that the court was warranted in finding that there was a *bona fide* intention on the part of the appellee to return to her homestead with her husband after a temporary absence and re-occupy it as her home. This being true, the court was warranted in its finding that there was no abandonment of the homestead. The judgment is therefore affirmed.

BOARD OF DIRECTORS OF CRAWFORD COUNTY LEVEE DISTRICT *v.* DUNBAR.

Opinion delivered March 10, 1913.

1. PLEADINGS—DEMURRER TO ANSWER.—When defendant demurred to the complaint, and after the court overruled the demurrer, he answered, *Held,* where the issue is as to the validity of an amend-

ment to a statute, the grounds of the demurrer to the complaint were not waived by pleading over, and the demurrer to the answer reached back to the defective complaint. (Page 289.)

2. LEVEE DISTRICT—DISMEMBERMENT—ANTICIPATED BENEFITS—Where a levee district is dismembered, or some lands excluded therefrom, the whole district is liable for expenses incurred in the formation of the district for the common benefit of all the property in the district as it originally existed, and all of said property is liable for such expenses in proportion to, and not in excess of, such anticipated benefits. (Page 290.)

3. LEVEE DISTRICT—EXCLUDED TERRITORY—BENEFITS—DISCRETION OF LEGISLATURE.—It is within the discretion of the Legislature to determine that lands excluded from a levee district would be benefitted by the improvement, and charge said excluded territory with its pro rata share of the initial expenses incurred in forming the district. (Page 291.)

4. LEVEE DISTRICT—EXCLUDED LANDS—BENEFITS—INCURRED EXPENSES.—A levee district was created by the General Assembly, and later plaintiff's lands were excluded therefrom, but by the excluding act the land excluded was charged with its *pro rata* share of the expenses of the formation of the district. *Held*, the provision of the Legislature for assessments on the excluded lands for incurred expenses, implied that some benefits would accrue to the excluded lands, from the improvement, commensurate with the expense incurred, and a statute is valid authorizing the assessment on the lands excluded from the district. (Page 291.)

Appeal from Crawford Chancery Court; *J. V. Bourland,* Chancellor; reversed.

E. S. Matlock, for appellant.

1. The court erred in sustaining the demurrer. It is within the power of the Legislature to tax all lands in the original district to pay the initiatory expenses of said original district. 97 Ark. 322; 72 *Id.* 119; 81 *Id.* 562; 83 *Id.* 54; *Ib.* 344; 98 *Id.* 113.

2. No issue can be raised in the courts as to notice of special legislation. 48 Ark. 570; 72 *Id.* 119; 75 *Id.* 120.

3. The contention of appellee that it was the intention of the Legislature to let his lands out of the district because they would not be benefitted is not well taken. 76 Ark. 113.

P. C. Barksdale and *J. E. London,* for appellee.

1. It is the province of the court to declare a tax void when the Legislature exceeds the Constitutional limits of its powers. 101 U. S. 153; 43 Cal. 335; 13 Am. Rep. 143; 19 Kan. 584; 59 Mo. 415; 20 Wall. 655; 22 Fed. 54. Whether a particular object of taxation is public or private is a judicial and not a legislative function. 107 Fed. 827; 111 Mass. 454; 15 Am. Rep. 39; 32 Conn. 118; 86 Minn. 111; 20 Wall. 655.

2. Local burdens require local benefits. 57 Ark. 554; 45 Ala. 370; 105 U. S. 275; 103 *Id.* 562; 97 *Id.* 284; 57 Ark. 554. One locality can not be taxed for the benefit of another. 57 Ark. 554.

3. Only those who are benefitted can be taxed. Taxation must be equal and uniform. 41 Am. Dec. 333; Cooley on Torts, 344; 22 Ark. 526; 11 Allen (Mass.) 258; 25 Ark. 289; 30 *Id.* 31; 117 Ala. 303; 34 Cal. 433; 43 Mo. 479; 28 Oh. 311; 43 Tex. 508; 57 Ark. 554; 105 U. S. 275.

McCULLOCH, C. J. The General Assembly of 1909 enacted a special statute creating the Crawford County Levee District for the purpose of constructing a levee along the Arkansas river between given points. The boundaries of the district were prescribed in the statute. The validity of said statute was sustained by this court in the case of *Alexander* v. *Levee District,* 97 Ark. 322.

A stream known as Frog Bayou runs through the district from the north and flows into the Arkansas river.

At the session of 1911 the Legislature passed an act amending the act creating said district, by excluding therefrom all of the lands lying east of Frog bayou and by providing that the lands so excluded should be assessed to pay its proportionate part of the initial expense incurred in proceeding under the original act. The act contained the following provision with regard to such assessments:

"The total expense already incurred by and on account of said levee district for making the survey of same, maintaining offices and clerical force, and attorneys' fees, shall be bourne by the whole district as it

existed prior to the passage of this Act; that the territory hereby excluded from said district shall be liable for its *pro rata* part of said total expense, to be based on the direct proportion which the total property value of said excluded territory bears to the total property value of the whole district as it existed prior to the passage of this Act; same to be determined from the valuations as they appear upon the real estate assessment book of Crawford County for the year 1909; and that the amount for which said excluded territory shall be liable, as determined from said assessment book in accordance with the terms of this Act, shall be collected as provided by said Act amended hereby."

Another section, concerning the levying of assessments for the purpose aforesaid, reads as follows:

"That for the purpose of raising money to pay for the survey and other initial expenses of the organization of the district heretofore mentioned, there be levied for the year 1910, upon all the lands in said district, as originally constituted, including these lands which are now taken out of said district, the sum of five per cent upon the value of said lands, as the same appears upon the assessment books of Crawford County for the year 1910, leaving all future levies to be made by the board of directors of the levee district, as provided in the Act creating the same. Said tax shall be certified by the county clerk of Crawford County, to the collector of the county, and the collector shall proceed to collect the same, whether the parties owning the same have paid their other taxes or not, and if said taxes for levee purposes aforesaid are not paid on or before the tenth day of April, 1911, the collection thereof shall be enforced as provided in the terms of said Act creating the said district."

Appellee owned lands in the excluded territory and instituted this action in the chancery court of Crawford County attacking the validity of said amendatory statute and seeking to restrain the collection of assessments on his lands.

The court overruled a demurrer to the complaint and

sustained a demurrer to the answer. Appellant failing to plead further, the court rendered a final decree in appellee's favor, making the injunction perpetual.

If the amendatory statute is valid no cause of action is stated in the complaint, therefore the grounds of demurrer were not waived by pleading over. *Martin* v. *Royster,* 8 Ark. 74; *Frank* v. *Hedrick,* 18 Ark. 304. The demurrer to the answer reached back to the defective complaint. *Logan* v. *Moulder,* 1 Ark. 320; *Hynson* v. *Burton,* 5 Ark. 492; *Carlock* v. *Spencer,* 7 Ark. 12; *State* v. *Allis,* 18 Ark. 269; *Yell* v. *Snow,* 24 Ark. 554; *Smith* v. *Thornton,* 74 Ark. 572.

The ground for attack on the validity of the statute is that it is beyond the power of the Legislature to impose on lands excluded from the district the burden of taxation to pay the initial expense incurred by the district as originally organized.

It is not alleged in the complaint that the lands of appellee would not have received benefit from the construction of the levee as originally projected when the expense was incurred, before the statute was amended. The case does not come within the principles announced by this court in *Coffman* v. *St. Francis Levee District,* 83 Ark. 54. All that is alleged is that those lands will derive no benefit from construction of the levee under the statute as amended.

The question presented is very important and its solution may be far-reaching in effect.

It may be well, in the beginning, to express our approval of some of the sound principles advanced by counsel for appellee.

"Whether a particular object of taxation is public or private is a judicial and not a legislative function." *Dodge* v. *Mission Township,* 107 Fed. 827.

"If the expenditure is in its nature such as will justify taxation under any state of circumstances, it belongs to the Legislature exclusively to determine whether it shall be authorized in the particular case; * * * on the other hand, if its nature is such as not to justify

taxation in any and all cases in which the Legislature might see fit to give authority therefor, no stress of circumstances affecting expediency, importance or general desirableness of the measure * * * will supply the elements necessary to bring it within the scope of legislative power." *Lowell* v. *Boston,* 111 Mass. 454.

It must also be conceded that "special assessments for local improvements find their only justification in the peculiar and special benefits which such improvements bestow upon the particular property assessed. Any exaction in excess of the special benefit is, to the extent of such excess, a taking of property without compensation," and without due process of law. *Kirst* v. *Street Imp. Dist.,* 86 Ark. 1; *Alexander* v. *Levee District, supra.*

But it is not essential that the benefits be actually realized. Expenses must be incurred in advance of the enjoyment of benefits and assessments must necessarily be levied upon the basis of anticipated benefits. *Salmon* v. *Levee District,* 100 Ark. 366, 140 S. W. 585; *Ross* v. *Bd. of Supervisors,* 123 Iowa 427, 1 L. R. A. (N. S.) 431.

This being true, if the district be dissolved or dismembered, the Legislature may, in order to provide for payment of expenses incurred in initiating or forwarding the improvement, authorize assessments based on the benefits which were anticipated.

The case of *Ry.* v. *Pierce Co.,* 51 Wash, 12, 23 L. R. A. (N. S.) 286 supports that rule, though the decision goes further in some respects than we are willing to approve.

In case of dismemberment of the district or of exclusion of territory therefrom, the assessments must be limited so as to cover only expenses incurred for the common benefit of property in the territory originally embraced and must be in proportion to and not in excess of such anticipated benefits.

Whether authority to levy assessments may be separately conferred after the dissolution or dismemberment occurs, we need not decide, for that question does not arise in this case.

The Legislature, when it narrowed the bounds of the district so as to exclude part of the territory, determined that certain initial expenses had been incurred for the common benefit of all lands in the territory originally embraced and authorized assessments upon estimated benefits to pay those expenses. Those were matters within the legislative province. *Sudberry* v. *Graves,* 83 Ark. 344; *St. L. S. W. Ry. Co.* v. *Red River Levee District,* 81 Ark. 562; *Alexander* v. *Levee District, supra; Moore* v. *Levee District,* 98 Ark. 113; 135 S. W. 819.

In *Salmon* v. *Levee District, supra,* we said:

"The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof and in determining, or in providing means for determining, the amount of assessments based on benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assessments, in fixing the amount or rate of assessment will not be reviewed and corrected by the courts."

It is said that the exclusion of territory from the district implies a determination that there were no anticipated benefits to the excluded lands. This is not correct, in the face of the provision made by the Legislature for assessments on those lands to pay incurred expenses, which necessarily implies a determination that benefits would have accrued to the excluded lands commensurate with the expenses incurred.

The function of the General Assembly is legislative and it is presumed to act for the common good and in response to popular demand. The mere fact that it excludes territory from the district raises no presumption of a determination that no benefits were anticipated to accrue. Such presumption might be indulged if no provision had been made for assessments to pay the incurred expenses, but not so in the face of such a provision.

In the recent case of *Burton* v. *Chicago Mill & Lumber Co.*, 106 Ark. 296; S. W. 114, it was said there could be no assessment to cover costs not provided for by the Act of the Legislature under which the parties to that case had proceeded, where the district was not established. But that decision must be read in the light of the facts there recited. We said there had been no finding that it would be to the best interest of the landowners to establish the drainage district there petitioned for under the provisions of the Acts of 1909, page 829, as amended by Acts of 1911, page 193, and consequently there could have been no benefits which would authorize its establishment. Moreover, it was there said that the law under which the petitioners for the drainage district had proceeded made no provision for the payment of costs where the district was not established, except the costs of survey and of publication.

Here there was a legislative ascertainment that the lands would be benefitted by the proposed improvement and when the project was abandoned, so far as these lands were concerned, the Legislature fixed what it declared to be the proper proportion of the costs for the excluded lands to bear.

We are of the opinion that the statute in question, authorizing assessments on lands excluded from the district, is valid and that the complaint in this case states no cause of action.

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

KIRBY, J., dissents.

VAN HOOK v. MCNEIL MONUMENT COMPANY.

Opinion delivered March 10, 1913.

1. COUNTY COURT—ALLOWANCE OF CLAIM.—The allowance by the county court of a claim out of the appropriation for "public buildings and grounds," for the erection of a monument and drinking

fountain to be erected in the county court yard, does not violate any provision of the Constitution. (Page 295.)

2. STATUTES—VALIDATING ACT—EFFECT ON PENDING LITIGATION.—When a county court allowed a claim of appellee based upon the performance of a contract, without the filing by appellee of the statutory affidavit verifying the claim, the Legislature may pass an act which will validate the order of the county court. (Page 297.)

3. STATUTES—VALIDATING ACT—CONSTITUTIONALITY.—An Act of the General Assembly validating an act of the county court in dispensing with a statutory requirement in the letting of a contract and the allowance of a claim based upon the performance of the contract, does not violate the provisions of Sec. 24, Art. V of the Constitution, which provides: "In all cases when a general law can be made applicable, no special law shall be enacted; nor shall the operation of any general law be suspended by the Legislature for the benefit of any particular individual, corporation or association." (Page 297.)

4. APPEAL—VALIDATING ACT—COSTS.—Where the appellee secures an affirmance of a judgment appealed from, by virtue of an Act of the Legislature validating the action of the county court, passed during the pendency of the appeal, the costs of the appeal will be adjudged against the appellee. (Page 297.)

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

Patterson & Green and *J. Y. Stevens,* for appellant.

1. The county court was without authority to make the allowance without an appropriation. There was no contract or purchase by, or consideration to, the county. 66 Ark. 82; Kirby's Dig., §§ 1494, 1500, 1503; 61 Ark. 74; 85 *Id.* 611.

2. The contract should have been let to the lowest bidder. 54 Ark. 645.

3. No claim or demand, verified as required by law, was ever filed in the county court. Kirby's Dig., §§ 1453, 3517, 114; 66 Ark. 327; 69 *Id.* 62; 97 *Id.* 296; 32 Ark. L. Rep. 336.

4. The allowance was not within the discretion of the county court. 47 Ark. 239; 49 *Id.* 145; 56 *Id.* 443; 11 Cyc. 772, 594.

Gaughan & Sifford, for appellee.

1. The allowance was properly made out of the ap-

propriation for public grounds and buildings. Kirby's Dig. §§ 1375, 1499; 54 Miss. 666.

2. Want of verification of a claim is not jurisdictional. 84 Ark. 329.

3. The Legislature has validated the allowance by Act 4.

McCULLOCH, C. J. An association of ladies at El Dorado, Union County, Arkansas, inaugurated a movement to erect at that place a monument to the soldiers of the Confederacy, and a verbal agreement was entered into between that association and the county judge of Union County, acting for the county, whereby a monument, in the form of a drinking fountain, should be erected on the courthouse grounds at a cost of $3,500, and the county would pay half of said cost in consideration of the fact that the exclusive control of it should be relinquished to the county.

The ladies entered into a contract with the appellee, McNeil Monument Company, for the construction and erection of the monument, and the work was done in accordance with said contract. The ladies association then presented a written request to the county court to issue a warrant to appellee for $1,700, but the court declined to issue a warrant for that amount, giving as its reason therefor the fact that the monument cost only $2,700; but the court allowed the claim in the sum of $1,000 and directed the issuance of a warrant to appellee for that amount. Appellee did not present any claim to the county court, but the court treated the petition of the ladies as a claim and made the allowance to appellee accordingly. Appellant, Van Hook, who was a citizen and taxpayer of the county, within the time prescribed by statute, filed his prayer and affidavit for appeal and prosecuted an appeal to the circuit court. The circuit court held that the appeal was improperly taken and dismissed it; but this court reversed the judgment of the circuit court and remanded the cause for trial. 101 Ark. 246.

On remand the appellee was permitted to file in the circuit court an affidavit, in conformity with the statute,

verifying the claim against the county. The case was tried before the court, and the court made a finding in favor of appellee and rendered judgment accordingly, from which judgment an appeal has again been prosecuted.

Appellant urged below, and contends here, that the allowance of the claim was improper for several reasons.

One of the grounds given is that there was no appropriation. The county court allowed the claim out of the appropriation made for "public buildings and grounds," and it does not appear in the record here that no appropriation had been made for those purposes. Whether or not the erection of the monument and drinking fountain on the public grounds of the county in order to beautify and adorn them, came within the appropriation made by the levying court, we need not decide, but if there was in fact an appropriation the Legislature had the power to classify the appropriation.

The allowance of the claim was not violative of any provision of our Constitution; but two other grounds of objection to the allowance are, that the alleged contract upon which the liability of the county rests was not let at public outcry, and that the affidavit required by the statute verifying claims against the county was not filed.

It has been held by this court that the failure to properly verify a claim is not jurisdictional. *Saline County* v. *Kinkead*, 84 Ark. 329.

Whether the circuit court could properly permit the filing of an affidavit where none at all had been filed in the county court, is a question we need not decide.

Since the appeal was taken to this court and the transcript lodged here the General Assembly, now in session, has enacted a special statute reciting the facts upon which this allowance was made and providing "that the action of the county court of said County of Union, in allowing and issuing warrants aggregating the sum of $1,000 for part payment of the fountain erected on the courthouse yard in such county, be and the same hereby is in all things validated." Therefore, the ques-

tion arises as to the validity of that statute, and learned counsel for appellant earnestly contend that it is not valid.

We have approved the rule stated by Judge Cooley in his work on Constitutional Limitations (7 ed.) p. 431, as follows:

"If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." *Green* v. *Abraham,* 43 Ark. 420; *Sidway* v. *Lawson,* 58 Ark. 117; *Sudberrry* v. *Graves,* 83 Ark. 344; *Pelt* v. *Payne,* 90 Ark. 600.

Numerous authorities bearing upon this question are collated in a note to Cooley on Constitutional Limitations on the page cited above.

The Supreme Court of the United States has repeatedly held that such statutes are valid. In the case of *Utter* v. *Franklin,* 172 U. S. 416, that court upheld an Act of Congress validating bonds which were theretofore invalid on account of having been issued not in compliance with authority of law. The other decisions of that court are cited in the opinion.

The Supreme Court of Connecticut in a case decided many years ago said this:

"When a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of parties, or promote justice, then both as a matter of right and of public policy affecting the happiness and welfare of the community, the law should be sustained." *Savings Bank* v. *Allen,* 28 Conn. 97.

Testing the question by the principles announced above, we are of the opinion that it was within the power

of the Legislature to pass the statute, and it rendered the allowance valid.

It is also urged that the enactment is violative of Section 24, Article V, of the Constitution, which provides that:

"In all cases where a general law can be made applicable no special law shall be enacted; nor shall the operation of any general law be suspended by the Legislature for the benefit of any particular individual, corporation or association."

It has been repeatedly held by this court that the first clause of the above quoted section is merely cautionary to the Legislature and that it is exclusively within the province of that body to determine when a general law is applicable. *Hendricks* v. *Block,* 80 Ark. 333, and cases cited.

The statute does not violate the provisions of the second clause of that section, for it is not a suspension of a general law in favor of an individual, corporation or association, and it merely operates as a ratification of the act of the county court in dispensing with statutory requirements in the letting of contracts and the allowance of claims based upon the performance of the contract.

We are, therefore, of the opinion that, in order to give proper force to this legislative enactment, it is our duty to affirm the judgment insofar as it allows the claim against the county. The fact that the statute was enacted during the pendency of the appeal does not prevent us from observing its force upon our decision of the case. But inasmuch as the statute was passed since the appeal in this case was taken and the transcript lodged here, the costs of appeal should be adjudged against the appellee, and not against the appellant. *Sudberry* v. *Graves, supra.* It is true that the case just cited was an appeal from the chancery court and as to appeals of that kind this court may exercise discretion in the matter of awarding costs. But our decision in that case awarding costs against the appellee, notwithstanding the affirmance of

the decree, was not based upon an exercise of our discretion but upon the broad principle of law that, where a decree as originally rendered was erroneous and the appellant was within his rights in prosecuting an appeal, the subsequent passage of a statute calling for an affirmance would not impose the burden of the costs upon him. Any other view would render the statute invalid, because it would be placing upon appellant the burden of costs already accrued, and to that extent the statute could not be made retroactive. The judgment of the circuit court will, therefore, be affirmed, and the costs of this appeal awarded against appellee.

CRAIG v. GRIFFIN.

Opinion delivered March 10, 1913.

COUNTIES—COUNTY COURT—COURT HOUSE—SETTING ASIDE ORDER.—A county court at one term appointed commissioners to construct a court house, ordered its construction and appropriated funds for the same. *Held*, at a subsequent special term, the county court may revoke such order, subject, however, to any contractual liabilities incurred under its former order. Under Kirby's Digest, § 1375 and § § 1009-1024, the court has a continuing control over such matters beyond the close of the term.

Appeal from Pope Circuit Court; *Hugh Basham*, Judge; affirmed.

Hill, Brizzolara & Fitzhugh, for appellant.

The orders of a county court under §§ 1009 to 1024, Kirby's Digest, pass beyond the control of the court at the close of the term. 10 Ark. 241; 38 *Id.* 150; 53 *Id.* 287; 73 *Id.* 523; 93 *Id.* 11; 68 *Id.* 340; 73 *Id.* 66; 89 *Id.* 160; 97 *Id.* 314; 96 *Id.* 427; 1 S. W. 468; 88 Ky. 485; 68 *Id.* 240; 84 *Id.* 547; 6 B. Mon. 214. The attempt to set aside the judgment at a subsequent term was void and should be quashed on *certiorari*.

J. F. Sellers, for appellees.

1. County courts, in many instances, act in a purely administrative capacity, in dealing with public concerns,

and have power to revoke, at a subsequent term, their former proceedings. 11 S. W. 468; 17 Am. St. 118; 61 Pac. 241; 45 S. W. 853; 28 Cyc. 384; 3 Am. Dec. 131; 103 Ind. 360; 118 *Id.* 54; 125 *Id.* 247; 2 Dillon on Mun. Corp., § 539; 16 L. R. A. 260; 55 Am. St. 192; 8 S. W. 434; 40 S. E. 238. But our court has settled this question. 114 S. W. 214; 73 Ark. 523.

2. There are no vested rights intervening. 105 Fed. 293; 58 L. R. A. 904; 161 U. S. 40; 151 Fed. 399; 67 S. W. 369.

3. Non-judicial proceedings are not subject to review by *certiorari.* 100 Am. Dec. 337; 45 Pac. 529; 62 Ark. 196; 70 *Id.* 588.

4. *Certiorari* is not a writ of right. 6 Cyc. 748; 113 Am. St. 432; 69 Ark. 518; *Ib.* 344.

SMITH, J. On the 12th day of November, 1912, the appellants filed in the Pope circuit court, a petition for *certiorari,* in which they alleged: That they were citizens and taxpayers of that county and that on May 20, 1912, they were appointed commissioners of public buildings by the county court of Pope County, and qualified and entered upon the discharge of their duties as such. That in pursuance of their duties, they purchased grounds for the erection of a court house, and prepared and submitted plans and an estimate of cost, and all their proceedings were approved by the county court, and the court appropriated, at its March 1912 term, the sum of $60,000 for the erection of a courthouse and directed them to use as far as possible the material in the present court house. That said March term adjourned without day. That on the 12th day of November, 1912, pursuant to a notice given for ten days, the county court of Pope County attempted to hold a special term, and at this term the following proceedings as shown by the court's order, were had.

"Whereas, heretofore and on or about the 20th day of May, 1912, this court made and entered of record an order and judgment among other things reciting that it was found expedient and necessary that the court house

of said county be repaired and enlarged, and appropriated $30,000 therefor and appointed S. J. Rye, M. R. Craig and W. P. Lewellen commissioners of public buildings for the purpose of erecting and carrying out said order. And whereas, said commissioners of public buildings having filed their report recommending the destruction or tearing down of the present court house of said county and the building of a new one. This court on or about the 10th day of June, 1912, did by a *nunc pro tunc* order made and entered of record among other things approve the report of said commissioners of public buildings, and order a new court house built and appropriated $60,000 for that purpose, said order and judgment ordering and directing that said order and judgment should take effect as of the date of the one of the same term and effect previously made but not entered of record.

"And whereas, this court on or about the 13th day of June, 1912, made and entered of record an order and judgment, which, among other things, recited the prior order and judgment ordering a new court house to be built and directed said commissioners to advertise for bids and let the contract for the building of said court house. And it now appearing to the court that the present court house of Pope County is sufficient for the needs of said county, that it is now and was at the time of making and entering of record said above mentioned orders and judgments inexpedient, unwise and unnecessary to build a new court house.

"It is therefore by the court considered, ordered and adjudged that each one and all of the above mentioned orders and judgment heretofore made and entered of record by this court directly or indirectly directing or authorizing the destruction or removal of the present court house of said county or building of a new one be and they are each and all of them repealed, revoked, cancelled, set aside and held for naught.

"It is further ordered and adjudged that all authority of said commissioners of public buildings to tear

down or remove the present court house or to make contracts therefor or for the building of a new court house or to otherwise act as commissioners of public buildings except as to the duties and powers conferred upon them pertaining to the building of a county jail be and the same and they are hereby revoked and annulled.

"Ordered, that this court be adjourned until the next regular term, which meets the first monday in January, 1913.

"Ira Griffin, County Judge."

Petitioners alleged that the proceedings of said special term were void and they prayed that the writ of *certiorari* issue, bringing up the record as aforesaid, and that on the hearing the same be quashed.

Appellees filed a demurrer to this petition upon the ground, among others, that the petition did not state a cause of action, and from the order of the court sustaining this demurrer, this appeal is prosecuted.

The facts sufficiently appear from the recitals of the petition and the order of the court, above set out, to present the question here involved and the following statement of the issues is copied from one of the excellent briefs filed in the cause.

"No point was made in the circuit court or is made here as to the regularity of the special term, and no contention is made that the special term held by a succeeding judge did not have all the power that a general term held by the same judge would have had.

"The vital question, and the one going to the merits of the controversy, is whether the orders of a county court in the exercise of its powers and the duties under sections 1009 to 1024 inclusive of Kirby's Digest, pass beyond the control of the court at the close of the term, as do judgments in adversary proceedings, or is the action of the court, the exercise of administrative authority as an agency of the public affairs of the county and of which the court has a continuing jurisdiction."

Under our laws, the management of the internal affairs of the counties is vested in the county courts of the

respective counties, the power and jurisdiction of such courts being set out in general terms in section 1375 of Kirby's Digest, and there are many matters in which this court acts in a purely administrative capacity and over which, in the very nature of things, it must have a continuing control. It may adopt some policy of internal improvement by its order, which it may be necessary later to change, and this it may do when it becomes necessary so to do, subject only to the obligation of protecting such contractual rights as have become vested under its prior orders and judgments. In its administrative capacity, the county court acts for the county as does the council for a city or a town, or the Legislature for the State, and within the sphere of the operations of each, an obligation exists to be aware of and to consider the conditions which require the exercise of their respective functions, and a discretion abides for that purpose. But this discretion is subject always to the obligation of regarding any contractual rights or obligations which these agencies of government have made or incurrerd.

Our attention is called to a case very similar to this in principle. The county court of Crittenden County, Kentucky, had made an order and appropriation for the construction of certain bridges and had appointed a commissioner to superintend the work, but at a subsequent term of the court, the court being then of the opinion that the location of the bridges as fixed by its prior order made them subject to overflow and destruction, made an order setting aside its former order and changed the location of these bridges. Citizens of the county, who favored the original location, filed a petition for mandamus in the circuit court to compel the court's commissioners to build the bridges, as provided for in the original order, the contention there being that the court could not at a subsequent term revoke its prior order. The circuit court granted the petition and ordered the issuance of the writ as prayed, but upon appeal, the Court of Ap-

peals of the State reversed the judgment and dismissed the petition and in doing so said:

"No contract had been entered into with anyone to perform this work, but the county court, as the representative of the corporation or county, had only exercised its discretion in making an appropriation that at one time they thought advisable, but upon further consideration deemed unwise. They had contracted with no one, and in their legislative capacity undertook to make the appropriation, but, whether legislative or judicial, it was the only party to the proceeding, and had the right at any time to revoke the order making the appropriation until the rights of others became involved. In *Turnpike Road Co.* v. *McMurtry,* reported in 6 B. Mon. 215, this court held that a judicial act by the county court, determining the rights of individuals was final, and could not at a subsequent term of the court be set aside at the mere will of the court. This doctrine is well understood, but has no application to a case like this, where the magistrates are assembled as a court of claims, to make ordinary appropriations for public improvements, in which one citizen has as much interest as another. In fact such an appropriation is non-judicial, and may be disregarded at its discretion, unless individual rights have become involved. A municipal corporation, through its council, might make an appropriation for the improvement of its streets, and before any contract right had accrued deem it expedient to withdraw or annul the order making the appropriation, and the right to do so can not be questioned. The discretion confided to a county court in regard to the finances of the county, and the appropriation of money for public or county purposes, can not well be controlled by the action of a higher tribunal * * * It results, therefore, that the county court, in the exercise of its discretion, has said that the bridges should be dispensed with, and, having complete power over the subject, the writ of mandamus should have been refused." *Crittenden County Court* v. *Shanks,* 11 S. W. 468.

"In *Platter* v. *Board of Commissioners of Elkhart County,* 103 Ind. 360, the Supreme Court of that State, referring to the power of the county commissioners (county court) said in the first paragraph of the syllabus:

" 'The Board of County Commissioners has power to change the location of county institutions and to do all acts necessary to effect the change, and such power is a continuous one, not exhausted by a single exercise.' "

In *Cox* v. *Mt. Tabor,* 41 Vt. 28, it was said: "A town, like an individual, may change its purposes, and a town may express this change by a vote, and, unless some right of another has been acquired or has vested under its action, no one may complain of the change."

We are cited to many cases which are substantially to the same effect, but our own court has announced the principle which here controls and it will be unnecessary to collect or cite other authorities. In the case of *Graham* v. *Nix,* 144 S. W. 214, an election had been held upon the removal of the county seat of Dallas County. But before the election for removal of the county seat was ordered, an abstract of title to a lot in the town of Fordyce, proposed to be donated as a site for the new court house, was filed and presented with the petition of the citizens, who asked for the removal. After the commissioners had adopted and reported plans for the building and they had been approved by the county court, and after several terms of the court had intervened since the making of the court's order for the erection of the building, the commissioners reported that the original site was not a proper one, whereupon the court made an order changing the site of the building. It was there said:

"It is contended that the order of the court entered October 6, 1908, declaring the result of the election and ordering the removal of the county seat, and the subsequent orders of that court directing the commissioners to proceed to the construction of the court house on the school district lot, could not be set aside at a later term, and that the order of the county court in May, 1911,

changing that order, was void. The power of the county court over the location of public buildings is a continuing one. It is the same as if the building had been constructed on the school district lot, and afterwards the county court saw fit to dispose of that site and change to a new location in the town which constituted the county seat. If the county court had the power at all to order a change of the location of the court house, it had the power to make this change before the building was actually constructed as well as to wait until its order was carried out by the construction of the new building and then order the change. There is nothing in the decision in *Walsh* v. *Hampton, supra,* which limits the power of the county court to make a new order with respect to the change of location. In that case we merely held that the order of the court, declaring the result of the election and ordering the removal, was final and could not be vacated at a subsequent term; but that was a matter over which the county court had no continuing power. After it declared the result of the election and ordered the removal pursuant thereto, its power was exhausted. The difference between the two kinds of judgments lies in the continuing power of the county court over the subject of county buildings, as distinguished from the power to declare the result of an election by the people."

We conclude, therefore, that the judgment of the court below is correct and it is accordingly affirmed.

MARR v. SCHOOL DISTRICT NO. 27.

Opinion delivered March 10, 1913.

1. SCHOOL DIRECTORS—AUTHORITY TO BIND SCHOOL DISTRICT.—When there are only two school directors in a school district qualified to act, they may bind the district by their acts. (Page 308.)
2. SCHOOL DISTRICTS—LEGALITY OF ACTS OF DIRECTORS.—When the evidence tends to show that there are only two directors in a school district and that the third has moved out of the district and abandoned his office, it is error for the trial court to hold as a

matter of law that the acts of the two remaining directors are not binding on the district. (Page 308.)

3. SCHOOL DISTRICTS—CONTRACT TO TEACH—PAROLE EVIDENCE.—Only written contracts to teach school may be made by school directors and parol evidence to vary the terms of a contract is inadmissible. (Page 308.)

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

Troy Pace, for appellant.

1. The undisputed evidence shows that Gentry, the third director, had moved out of the district, and was living in another district at the time the contract was entered into; that one Sam Woods was elected to succeed Gentry, but had refused to serve, and that no one had ever been elected or appointed to serve in his stead. Under such circumstances the remaining directors not only had the power but it was their duty to act for the district, and it is bound by their act.

2. If the statute, Kirby's Digest, § 7615, is mandatory, it is nevertheless immaterial to the validity of the contract that the directors failed to subscribe their names to the original which they retained. The material point is that they and Marr *entered into the contract,* and that they and he signed the contract which Marr retained. They could have signed the original signed by Marr, which they kept, and their failure to do so does not affect the validity of the real contract entered into. 130 S. W. (Ark.) 541; 72 Ark. 359; 51 So. (Ala.) 969; 117 Mass. 96; 125 N. Y. S. 952; 83 Ark. 152, 153; 121 N. W. 1076; 88 N. E. 973.

3. But the statute, Kirby's Dig. § 7615, is directory merely, and a substantial compliance therewith is sufficient. Kirby's Dig. § § 7818, 7821; 36 Ark. 446; 34 Ark. 491, 493; 42 Ark. 46, 51; 95 Ark. 28, 29, 30.

J. H. Harrod, for appellee.

It is not necessary that the teacher should sign the duplicate furnished to him by the directors in order to make the original contract binding, but it is indispensably necessary to its validity that the directors and the

teacher sign the original contract which is to be kept by the directors. Kirby's Dig. § 7615; 87 Ark. 93. The effect of the failure of the directors to sign the original is that there was no valid contract made of which they could give a duplicate to appellant until they did sign the original contract. 35 Cyc. 1081, 1082.

SMITH, J. Appellant instituted this action in the Cleburne Circuit Court to recover damages for the alleged breach of a contract entered into by and between himself and the directors of School District No. 27 of that county, whereby he was to teach a common school in said district. Upon the trial before a jury, the court directed a verdict in favor of the appellee, upon which verdict judgment was rendered, and from which judgment this appeal is prosecuted. The contract to teach the school was in writing and conformed to the requirements of section 7615 of Kirby's Digest and its recitals, so far as they are necessary to be considered here, are as follows:

"TEACHER'S CONTRACT.

State of Arkansas, County of Cleburne.

This agreement, between C. B. Stark and J. W. Freeman, as directors of the School District No. 27, in the county of Cleburne, State of Arkansas, and Alex Marr, a teacher, who holds a license of the second grade, and who agrees to teach a common school in said district, is as follows:

The said directors agree, upon their part, in consideration of the covenants of said teacher, hereinafter contained, to employ the said Alex Marr, to teach a common school in said district, for the term of five months, commencing on the 6th day of November, A. D. 1911, to pay therefor in the manner, and out of the funds provided by law, the sum of sixty ($60) dollars for each school month.

(Signature) J. W. Freeman,
C. B. Stark, Directors.
Alex Marr, Teacher.

Date, July 8, 1911. Place, Schoolhouse."

The complaint, after setting out the contract, alleged that the two directors, who signed the contract, were the only acting directors, that the third had permanently removed from said district and had abandoned his office; and that no successor had qualified to succeed him. That thereafter on November 6 he presented himself at the schoolhouse for the purpose of performing his contract, but that the directors refused to permit him to teach said school; and that during the entire period covered by said contract he was unable to secure other employment, and judgment was prayed for $300.

The school district answered and admitted that the contract sued on had been executed by C. B. Stark and J. W. Freeman as directors of said district, but denied that they were the only directors of said district and denied that the third director had removed from said district and had abandoned his office, and denied the contract had been executed in conformity to and in compliance with the law appertaining thereto and denied that the plaintiff was furnished with a duplicate of said contract. The answer also denied plaintiff's offer to comply with the contract or his inability to secure other employment.

The execution of the contract sued upon is admitted except that the original copy kept by the directors read six dollars for each school month instead of sixty dollars and this original copy had not been signed by either of the directors, although it had been continuously in their possession since its execution and was signed by the plaintiff. The question involved is the validity of this contract.

The law does not authorize school directors to make any but a written contract to teach school. *Griggs* v. *School Dist. No.* 70, 87 Ark. 95; and the same case holds that parol evidence is not admissible to vary the terms of the contract thus reduced to writing. One of the purposes of this law is to prevent controversy as to the execution of the contract or as to its terms, if executed.

The law was sufficiently complied with in this case.

The proof is that the teacher wrote both copies and signed them both and the directors signed the copy which they gave him, but did not sign the copy which they retained.

The point is made that the original contract recited the compensation to be six dollars per month while the copy sued on read sixty dollars per month. This question was never raised until the trial, and no one contended the compensation should be or was intended to be six dollars per month instead of sixty.

One of the points at issue in the trial below was the fact that only two directors had signed the contract. Two directors may bind their district only where there was a meeting at which all of the directors were present or of which all had notice. *School District* v. *Bennett*, 52 Ark. 511. But if there are only two directors qualified to act, they may act, and may bind their district when they have done so. The proof here tended to show there were only two directors for this district at the time of the execution of the contract in question; that Horace Gentry, the third director, had moved out of the district and had abandoned his office. If such was the case, the remaining two directors had the authority to employ a teacher and to enter into a valid contract for that purpose.

In the case of *School District No.* 54 v. *Garrison*, 90 Ark. 335, it was contended that, under the facts there stated the office of director had been abandoned by one of the directors, who had removed from the district, and in an opinion by Justice FRAUENTHAL, the principle which controls the decision of such questions was announced as follows:

"The authorities seem to be in accord in holding that an office can not be abandoned without the actual intention on the part of the officer to abandon and relinquish the office. The relinquishment of the office must be well defined, and it is not produced merely by nonuser or neglect of duty. The officer must clearly intend an absolute relinquishment of the office; and a removal from

the district, if only temporary, would not evince such intention. The nonuser, or neglect of duty, or removal from the district, in order to amount to a vacation of the office, must be not only total and complete, but of such a continuance as to make it permanent, and under such circumstances so clearly indicating absolute relinquishment as to preclude all future question of fact. Otherwise, there must be a judicial determination of the vacancy of the office before it can be so declared."

We, therefore, conclude that the court erred in directing a verdict for defendant and the judgment of the court below is reversed and the cause remanded for a new trial.

WATERS-PIERCE OIL COMPANY *v.* BRIDWELL.

Opinion delivered March 10, 1913.

1. LIBEL AND SLANDER—TRUTH AS DEFENSE.—In an action for slander, the truth of the alleged slanderous charge may be given in evidence or justification thereof and is a complete defense, and it need be shown only that the statement is substantially true. (Page 313.)
2. LIBEL AND SLANDER—LIABILITY OF CORPORATION—TRUTH OF AGENT'S STATEMENTS.—In an action for slander where the evidence shows that the statements of defendant's agents that plaintiff's oils had failed to come up to statutory requirements, and the undisputed evidence shows said statements to be substantially true, there is no question for the jury, as a complete defense is made out. (Page 313.)

Appeal from Boone Circuit Court; *George W. Reed,* Judge; reversed and dismissed.

Mehaffy, Reid & Mehaffy, for appellant.

1. A joint action against two or more for slander can not be maintained. 48 Am. Dec. 423; 121 S. W. 1026; Hale on Torts, 122; 25 Pa. 550; 22 Atl. 970; 35 Pac. 1011; 25 Cyc. 1011; 13 Enc. Pl. & Pr. 30; 34 Atl. 995; Cooley on Torts, 91; 32 Cent. Dig. § 171.

2. If defendants had made the statements alleged, and if they had been untrue, there would be no liability.

Bishop on Contracts, § 664; 31 Ark. 72; 105 Fed. 163. The peremptory instruction asked by defendant should have been given.

3. The law of this case is settled in 147 S. W. 64; 108 Fed. 721; 57 N. Y. Supp. 475. The truth is a perfect defense. 36 S. W. 171; 14 Atl. 51; 57 *Id.* 157.

4. Estimated profits are too vague and indefinite to form a criterion of damages. 33 Ind. 54; 23 N. C. 607; 42 Am. Dec. 38.

J. M. Shinn, E. G. Mitchell and *Troy Pace,* for appellee.

The law of this case was finally settled on the former appeal. 147 S. W. 64. The testimony is the same. 92 Ark. 554. The court properly instructed the jury and it has again found for plaintiff and the judgment should be affirmed.

KIRBY, J. This is the second appeal of this case, a statement of which and the opinion on the first appeal will be found in *Waters-Pierce Oil Company* v. *Bridwell,* 147 S. W. 64. The cause was reversed for error committed in the giving as amended of two instructions numbered 7 and 8, this court having held that the instructions as requested were correct and should have been given without modification, as follows:

"No. 7. If you find from the evidence in this case that the inspectors authorized by law in Arkansas made inspection of the oils of plaintiff and stated that they did not come up to the required test, then the defendants and everybody would have a right to say that they understood or that this was the decision of the inspector, and that it was violative of the law to sell these oils and whoever sold them was subject to prosecution; and if defendants, or any of them, made these statements, this would not make them liable to the plaintiff, and your verdict would be for the defendants.

"No. 8. You are instructed that it makes no difference whether the inspection made by the authorized inspectors in Arkansas was correct or incorrect, if they made a test and stated that it was below the require-

ments of the law, then the defendant had a right to make the statement that whoever made the sale would be prosecuted; and they are not liable to the plaintiff for making such statements, even if they resulted in damage to him."

Sections 4063-4071 of Kirby's Digest of the Statutes provide for the inspection of oils that may or can be used for illuminating purposes, prescribe the fire test, how the oils shall be branded upon inspection and penalties for violation of the law.

Upon the trial anew A. W. Cripps testified that he was oil inspector for Boone County in May, 1911, and inspected some oil for Mr. Bridwell but did not remember the exact date nor the exact figures that the inspection showed but that it did not come up to the legal requirement and that he made a statement that it did not. "I know that it did not come up to 150 degrees, it did not come up to the test. I got the statute or the rule from the statute and followed that, inspected it according to the provisions of the law at the time."

V. C. Mabrey testified: "I was oil inspector for Searcy County in April and May, 1911, and lived at Leslie, and inspected some oil that Mr. Bridwell had there. None of it went as high as 150 degrees before it burned. I made the inspection according to law and branded the oil 'Condemned unsafe for illuminating purposes.' I did not notify Mr. Bridwell that I was going to inspect it; nobody requested me to inspect it. I found the oil was there and had been stamped and only stamped 'test 124' and I went and tested it." Some time after this the witness tested some other oil shipped into that county by the Indian Refining Company and found it up to the legal requirements and made a certificate to that effect, dated May 25, 1911.

The testimony of these witnesses is undisputed and according to the statements of the different witnesses the agents of the Waters-Pierce Oil Company in the furtherance of its business in the sale of its oils told the prospective customer that they understood that the

Bridwell oils had been tested and did not stand the test required by law and that it was unlawful to sell oils that did not stand the inspection test. Some of the witnesses said that appellant's agents either made the statement that the oils sold by Bridwell did not stand the inspection test required by law or that they would not stand such test and that it was against the law to sell oils that burned at a lower temperature than that designated in the statute. The agents themselves testified that they had heard that the oil had been tested by the inspectors, that it failed to stand the test required by law and had been condemned. They also stated that they told prospective customers that it was against the law to sell oils that did not stand the inspection test required by the statute and that any one so doing could be prosecuted and might get into trouble. The law as declared on the former appeal is necessarily the law of this case and the court there said that if the inspectors authorized by law of this State made inspection of the oils sold by Bridwell and stated that they did not come up to the required test, the defendant and everybody else would have the right to say that they understood, they did not, or that this was the decision of the inspectors and it was violative of the law to sell these oils and whoever sold them was subject to prosecution, and if defendants or any of them made these statements it would not make them liable to the plaintiff and the verdict should be for the defendants, and this without regard to whether the inspection made by the authorized inspectors in Arkansas was correct or incorrect; that if they made the test and stated that it was below the requirements of the law, the defendants had the right to make the statement that whoever made the sale could be prosecuted and were not liable to the plaintiff for making such statements even if it resulted in damage to him.

The truth of the alleged slanderous charge may be given in evidence or justification thereof and is a complete defense, and in order that it may be so it need only be shown that the statement is substantially true. It is

only required to be substantially proved. 25 Cyc. 526, and cases cited; *Ratcliffe* v. *Louisville Courier Journal,* 36 S. W. 177; *Press Company* v. *Stewart,* 14 Atl. 51; *Jaeger* v. *Berledick,* 57 Atl. 157.

The undisputed testimony shows not only that the statements charged to have been made by the appellant company through its agents were made but also that the oils of the Indian Refining Company sold by Bridwell about which they were made were inspected by the authorized inspectors of the State of Arkansas who declared that they failed to come up to the test required by law and consequently the statements made by the agents relative thereto were shown by the undisputed evidence to be substantially true, and, such being the case, there was no question for the jury to decide.

The court erred in not directing a verdict for appellant as requested. *Bingham* v. *Ry.,* 149 S. W. (Ark.) 90; *Williams* v. *St. Louis & S. F. Rd. Co.,* 103 Ark. 401, 147 S. W. (Ark.) 93.

The judgment is reversed and the case dismissed.

RUBEL v. PARKER.

Opinion delivered March 10, 1913.

1. ADVERSE POSSESSION—POSSESSION AS NOTICE.—Although actual possession is evidence of some title in the possessor, and puts a purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property, still, the mere residence of a little girl, in the family of her uncle, will not put a mortgagee on notice of any equities she may have in the lands on which she and her uncle are living, the lands being mortgaged by the uncle. (Page 320.)

2. ADVERSE POSSESSION—POSSESSION AS NOTICE TO MORTGAGEE.—A child living with her uncle and his family, the uncle being in the open, actual and visible possession of the lands claiming to be the owner under a recorded deed, is not in such actual, visible and exclusive possession of such premises under a claim of right as to compel a mortgagee to take notice of the equities or claims of the person in possession. (Page 320.)

3. MORTGAGES—INNOCENT PURCHASER FOR VALUE.—Where an infant is defrauded by her uncle, who secures for himself a record title to

lands properly belonging to her, the lands will be charged as against her claim, with a mortgage taken on the land by a mortgagee who loans money on the same to the uncle, for value, without notice of the equitable rights of the infant. (Page 320.)

4. MORTGAGES—INNOCENT PURCHASER FOR VALUE.—No one can occupy in a court of equity higher ground than an innocent purchaser for value without notice. So, a mortgagee who occupies the position of an innocent purchaser for value without notice, is entitled to the amount of his loan out of the property securing the same, as against the actual owner, who has been defrauded out of the property by the mortgagor. (Page 321.)

Appeal from Lonoke Chancery Court; *J. E. Martineau,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellee brought suit by her next friend, alleging that she was the only child of Joseph Parker, deceased. That prior to his death he purchased the quarter section of land in controversy, describing it, executed eight promissory notes for the sum of fifty dollars each, in payment therefor, and received a bond for title from the owner, Ed Bell, and was delivered possession of the land. That he moved on to the premises and occupied same as his homestead until his death, during which time he paid off all the notes, except one and a half, owing at the time of his death seventy-five dollars. the balance of the purchase money. That John J. Parker, her uncle, immediately took possession of the premises and all the personal property of her father, converted same to his own use and told her grandfather, when he protested against his doing so that he had been appointed guardian by the probate court and had the right to the custody of the child and the decedent's estate. That he sold and converted all of the property to his own use, except the $75 which he paid to Ed. Bell; that he falsely represented to Ed. Bell, the maker of the title bond, that he was the sole heir of Joseph Parker and entitled to his property, and upon the payment of the balance of the purchase money due, Ed. Bell conveyed the lands to the said John J. Parker, by his warranty deed. Alleged further that on the 8th day of July, 1905,

Parker and his wife executed a trust deed upon the land to Ike May, as trustee, to secure an indebtedness of $200 to A. Rubel; that Parker continued to occupy the premises until his death, leaving surviving him a widow and children and heirs, naming them. Prayer was that the deed executed by Bell to J. J. Parker, conveying the lands, be cancelled, and the trust deed from Parker and wife to Ike May, trustee, also, and the title be divested out of defendants and invested in her.

Rubel answered, denying the allegations of the complaint, admitting the execution of the trust deed from Parker and his wife to Ike May, as trustee, to secure the payment of the $200 loaned by him, and alleged that in January, 1903, the said Ed. Bell conveyed the lands by warranty deed to J. J. Parker, which deed was duly recorded; that Parker was seized in fee and in possession of the land, claiming to be the owner thereof under said deed of July 8, 1903, when the money was loaned by him and the deed of trust to secure the payment thereof made. That he had no notice of any claim or interest in the land, or that the same had ever been conveyed by Ed. Bell by bond for title to Joseph Parker, and that there was nothing of record to indicate that any one other than John Parker had any interest in the land. That he in good faith loaned the money to him for the security for which the trust deed was taken and claimed to be an innocent purchaser and entitled to protection as such purchaser. Prayed that the land be charged with the payment of the $200 and interest and waived any further claim or right under the trust deed.

The testimony shows that Ed. Bell sold the land to Joseph Parker, and made him a contract for the conveyance thereof, or a bond for title and delivered possession to him and took his notes for the purchase money. That he had paid all of the purchase money, except $75 during his life. After his death John Parker moved on the place and claimed to be holding it as the only heir of Joseph Parker, under the agreement or contract of sale, and paid the balance of the purchase money due

after his brother's death, and Bell executed a warranty deed, conveying the title to him. It was also shown that Joseph Parker bought the lands and went into possession of same under bond for title. That he lived there with his sister and appellee, after his wife's death, until January 31, 1903, the time of his death, at which time there was a balance of $75 due on the land. John Parker moved on the place with his family, took charge of it and the personal property of his brother and the little girl and paid the balance of the purchase money to Ed. Bell and procured conveyance of the lands to himself by warranty deed from Ed. Bell, upon the representation that he was the only heir of his deceased brother, telling the child's grandfather at the time that he had papers from the probate court to take charge of that and that he was going to pay the land out and keep it for Joe's daughter. The bond for title to Joseph Parker was never placed of record, and the deed from Bell to John Parker was recorded after the execution thereof.

Rubel testified that he loaned the money to John Parker on July 5, 1905, and that the deed of trust was given to secure the payment thereof; that he had no information whatever, that John Parker was not the owner of the land as he claimed to be and as the records showed him to be, until a year or two after the loan was made and the trust deed executed. That he then heard that Joseph Parker had purchased the land and left at his death surviving him the appellee herein. That he went to John Parker about this report and was told by Parker that it was true his brother had purchased the land, but that he had not paid anything on it and had no papers to show for it, and that he had paid for the lands and that they had been conveyed to him by the deed which was recorded. He also said he had not seen the deed of conveyance at the time he loaned the money in 1905, but that it was recorded in 1904, but he had no intimation at the time that John Parker did not own the lands, as he claimed to, and that later when he heard that Joe had purchased the lands and died, leaving this

little girl, that he examined the records and found that there was nothing of record to show that Joe Parker had ever owned the lands, or had any claim whatever against them. He later loaned John Parker another $150 and took a mortgage upon some personal property to secure it. Thereafter, he was paid the sum of $50 rent for the lands in controversy, for one year and ten and fifteen dollars in money, which he applied upon the note secured by the personal property, not being directed by Parker to place the credit otherwise. He did not attempt to foreclose the deed of trust until after John Parker died, claiming that all the time Parker was agreeing to pay it and he thought he would do so.

The court decreed the cancellation of both the deed from Ed. Bell to John Parker, and his deed of trust to Ike May, securing the loan to Rubel, vested the title to the lands in appellee and adjudged costs against Rubel, from which decree he appealed.

Geo. M. Chapline, for appellant.

An innocent purchaser is always protected. 4 Ark. 301. A mortgagee who takes his mortgage without notice of prior equities occupies the position of a *bona fide* purchaser and is entitled to the protection afforded such a purchaser by a court of equity. 14 Am. & Eng. Enc. of L. (2 ed.) 288; 23 *Id.* 476, and cases cited.

As between appellant and the infant appellee, the equities being at least equal, the law should prevail. 23 Am. & Eng. Enc. of L. (2 ed.) 475.

Trimble & Trimble, for appellee.

Actual possession of land by a vendee under bond for title is sufficient notice of his title, relieving him of the necessity of filing his bond for record as protection against subsequent purchasers. 66 Ark. 167. See also 58 Ark. 85; 2 Pomeroy, Eq., 539.

Where there are equal equities the first in time prevails. Snell, Principles of Equity, 20.

KIRBY, J., (after stating the facts). It is insisted for appellee that she was a minor and in the actual posses-

sion of the lands at the time of the execution of the deed of trust thereon to secure the payment of the loan to A. Rubel, and that he could not be an innocent purchaser thereof, since the law requires him to take notice of her equities therein.

It is not disputed that her father purchased the lands and went into possession thereof under bond for title from Bell; that he died in such possession, leaving appellee surviving him, still occupying the lands; neither is it disputed that John J. Parker, her uncle, immediately thereafter with his family took possession of the premises, and that the infant, appellee, continued to live in the house with him and that Parker procured the conveyance of the lands from Ed. Bell to himself by warranty deed, upon the payment of the balance of the purchase money under the contract of sale made to appellee's father, Joseph Parker. This deed was placed of record and thereafter appellant made the loan to John Parker, taking as security therefor the deed of trust upon the lands. There was no testimony indicating that he had any knowledge or information whatever, that appellee had any equity in the land conveyed in the deed of trust. Under such circumstances, does the law make him take notice of her rights and equities?

In American Building & Loan Association v. Warren, 101 Ark. 169, this court said:

"Ordinarily, possession by a person under a contract of purchase, although unrecorded, is notice of his equitable rights and interests in the property. Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice, as to the title which the occupant holds or claims in the property.

"Generally actual, visible, exclusive possession is notice to the world of the title and interest of the possessor in the property and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor, and if he does not do so, notice thereof will be

imputed to him. *Hamilton* v. *Fowlkes,* 16 Ark. 340; *Shinn* v. *Taylor,* 28 Ark. 523; *Rockafellow* v. *Oliver,* 41 Ark. 169; *Atkinson* v. *Ward,* 47 Ark. 537; *Strauss* v. *White,* 66 Ark. 167; *Talheimer* v. *Lockhert,* 76 Ark. 26; *Sproull* v. *Miles,* 82 Ark. 455; *Hugh Bros.* v. *Redus,* 90 Ark. 149; 1 Jones on Mortgages (6 ed.), § 589."

It is true appellee lived in the house with her uncle, John J. Parker, at the time of the execution of this deed of trust and that she had succeeded to the rights of her father, who died in possession of the premises under the title bond executed by Ed. Bell, but such occupancy can not be regarded as possession, which, under the law, would require the purchaser or mortgagee to take notice of any equities she might have in the land. 39 Cyc. 1766cc;*L endley* v. *Martindale,* 78 Iowa 379, 43 N. W. 233; *Rankin* v. *Coar,* 46 N. J. Eq. 566; 22 Atl. 177; 11 L. R. A. 661. She was but a small girl, living in the house with her uncle and his family, who was in the actual, open, visible possession of the lands, claiming to be the owner thereof under a deed of conveyance of record, showing him to be such owner. It can not be said that she was in the actual visible and exclusive possession of such premises under a claim of right which compels the purchaser or mortgagee to take notice of the equities or claims of the person in possession. If appellant had even been upon the premises and seen the family of John Parker, it would not have occurred to him as a prudent person to inquire if the infant girl was his own or the child of his brother living with the family, and certainly it could not have occurred to him that she was in the possession of the premises under the circumstances.

Appellee was an infant and was imposed upon and defrauded by her uncle, who fraudulently acquired the deed conveying the title to the lands which should have passed to her upon payment of the remainder of the purchase money, but appellant occupies the position of an innocent purchaser in the transaction. for value, and without notice of any equitable claims or rights of appellee, affecting the title to the lands and is equally entitled

to the protection of a court of equity, and "where the equities are equal the law will prevail." It has been said, "No one can occupy in a court of equity higher ground than the purchaser for value without notice, for if he can maintain that position his title is established and his position impregnable." 23 A. & E. Enc. of Law, pp. 475-6; *Sorrell* v. *Sorrell*, 4 Ark. 301.

Appellee was entitled to the lands as against the heirs of John Parker, but could have been charged with the balance due upon the lands paid by him which was more than extinguished by the personal property of appellee's father converted to his own use and as between them would have the right to the lands free of any lien for the payment of the balance of the purchase money.

As against the *cestui qui trust*, A. Rubel, who occupies the position of an innocent purchaser, for value without notice, she is entitled to the lands after payment of the amount due him under the mortgage, with interest. The testimony shows, however, that he collected in different amounts from John Parker after he learned of the rights and equities of appellee in the land, $50, which was for rent of this land, $75, in all, which he applied upon another indebtedness of John Parker, due him secured by mortgage on personalty. Under these circumstances, we think equity requires that he shall be charged with such sums in the settlement of his debt against the land, and is entitled to recover only the difference between the said sum of $75 and the amount of the $200 loan, and interest, secured by the trust deed. Upon the payment of this amount the deed of trust should be cancelled, and the title to the property vested in appellee. The conveyance to John Parker should not be cancelled, but he should be declared a trustee, holding the title thereto for her benefit, and the decree will vest the whole legal title in appellee subject only to the payment of the balance due on the indebtedness secured by the deed of trust as indicated herein. The judgment is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

S. R. H. ROBINSON & SON CONTRACTING COMPANY v. GEYER & ADAMS.

Opinion delivered March 17, 1913.

CONTRACTS—CONTRACT FOR SUPPLIES—LIABILITY FOR.—When appellant orders supplies from appellee from time to time, but does not notify appellee to discontinue furnishing said supplies, the appellee may assume that the persons ordering the supplies are authorized to continue to do so, and having delivered supplies in the usual way at the usual place, the appellant is liable therefor.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

J. A. Comer, for appellant.

L. E. Hinton and *R. W. Irvine,* for appellee.

KIRBY, J. Appellee brought this suit in justice court for a balance claimed to be due upon an account for supplies furnished to appellant company, while it was engaged in the construction of a drainage ditch, and from a judgment in its favor the Robinson Company took an appeal to the circuit court, where appellee again recovered judgment, from which this appeal comes.

Appellant corporation, with its principal offices in St. Louis, took a contract for the construction of a large ditch near Argenta, with Pulaski Drainage District No. 1. Mr. Robinson, representing the company, told appellees that they were running a camp at the works and wanted to be supplied with goods. Arrangements were made and the first order of supplies was sent to the camp by appellee, Robinson, himself, giving the directions for finding the place of delivery. All the goods and supplies were sent in this manner to the camp, the driver of the delivery wagon taking duplicate bills therefor, one of which was left with the person receiving the goods at the cook tent, or office, and the other signed by the person receiving the goods and returned to the shipping clerk of appellee. All supplies were delivered in this manner for several months and all the bills paid, except for the last three deliveries on June 13, July 13 and

August 19, 1910, which were made in the same manner as all the other goods had been delivered. The same person did not sign all of the delivery tickets, in fact, nearly all of them were signed by different persons. Mrs. Watson signed the tickets for the last two bills of goods delivered. The driver of the wagon said he delivered August bills and a lady signed the tickets, which was the first time a lady had signed the tickets when he delivered the goods. She was the only one around the kitchen or tent and there was no change in the appearance of the place.

R. A. Denser, secretary and treasurer of appellant company, examined the account and stated that appellant had received one bill of goods, amounting to $42.02 that had been used by its men on the dredge, but that the other items and bills of goods were bought by W. A. Watson, an employee of T. A. Stoddard, a subcontractor, who had the contract for the concrete work. The witnesses stated that they broke camp on March 15, 1910, moved all the tents except the cook tent, and had no men at the camp after March 15, 1910. That there was still a little dredge work to be done and they were tied up by an injunction and left an engineer and foreman on the dredge, which was two or three miles from the camp; that he knew nothing about these goods having been purchased until nearly a year afterwards, on April 1, 1911, and that he received a letter from appellees on March 1, 1911, in regard to the account. He stated his company did not receive any benefits whatever from any of the goods sued for and did not authorize any one to order them and that they were not delivered to his company nor any of its employees. Stated further that he stayed in St. Louis most of the time, came down to the works every month, sometimes oftener, and that the company did not know there was any camp there after March 15, 1910, when they had moved the camp, and "when they got the goods, we never asked any questions about the placing of the order; didn't look up to see who checked the order, just paid for the goods when we re-

ceived them. I didn't follow up each individual invoice. I would have had no occasion to do so after March 15, 1910, the date the camp was moved, and didn't tell Geyer & Adams not to send any more goods to the camp because I didn't regard it necessary when we had broken camp, there being no further necessity for sending the goods." He admitted receiving certain of the goods, the $42.02 worth that were used by the men on the dredge, and said: "We took the goods from the camp to the dredge. The men on the dredge left on July 1, and went to work for us in East St. Louis. No one was left in our employ on the grounds after that time." Stated positively that they did not receive the goods on August 19, ticket for which was signed by Mrs. Watson, and for the one on July 13, signed likewise; that Mrs. Watson was never in the employ of the company and that they did not maintain a camp at those dates and had no one there. That the dredge was three miles from the camp.

The testimony shows that the goods were regularly delivered to the Robinson camp, in response to different orders over the telephone and otherwise and receipted for at the camp by different persons signing the tickets and that no directions, whatever, had been given to appellee company to deliver the goods to any particular individual, or require the receipt of any particular person, or agent, upon the ticket at the time of delivery.

It was not disputed that all the goods claimed to have been delivered were delivered at the camp in the usual way, but only that appellant company had broken camp on March 15, 1910, and thereafter had no need or use for supplies there, and that none were delivered to it. It admits, however, that one of the bills of goods sued for, although delivered at this camp where the old cook tents still remained and the office, as before the breaking up of the camp, had been received and used by the foreman on its dredge about three miles distant and that some little bit of the equipment still remained at the camp, or cook tent, which was not moved, until some months after the camp was abandoned.

Under all the circumstances, appellee had the right to assume that the persons ordering the last supplies were authorized to do so, and, having delivered them in the usual way, appellant became liable to pay therefor. The testimony is amply sufficient to sustain the finding of the circuit court and the judgment is affirmed.

WULFF v. CLAIBOURNE.

Opinion delivered March 17, 1913.

1. APPEAL—JUDGMENT OF COUNTY COURT.—When a judgment is rendered by the county court, and an appeal taken and granted on the same day, but the order granting the appeal was not entered. *Held*, the omission to enter the order did not affect the validity of the appeal. (Page 329.)
2. APPEAL—DISCRETION OF CIRCUIT JUDGE.—Under Act No. 279, of the Acts of 1909, a land owner is granted the right of appeal from an order of the county court, assessing his land for taxes within twenty days after judgment, and when the land owner prays and is granted an appeal, but does not lodge the transcript in the circuit court for one year after the allowance of the appeal, it is within the discretion of the court to determine whether it will permit appellant to prosecute its appeal. (Page 329.)
3. APPEAL AND ERROR—DRAINAGE DISTRICTS—ASSESSED BENEFITS—FINDING OF COURT.—The finding of the circuit court as to the amount of benefit that should be assessed against appellee's land, if supported by a preponderance of the testimony, will not be disturbed on appeal. (Page 329.)
4. APPEAL AND ERROR—JUDGMENTS—AMENDMENTS.—Where the county court, by an order *nunc pro tunc*, grants an appeal, and the question that notice was not given to the party against whom it was sought was not raised in the circuit court, it is too late to raise the question on appeal to the Supreme Court. (Page 329.)

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

STATEMENT BY THE COURT.

Appellee filed in the county court of Arkansas county, his petition excepting to the assessment of benefits made by the commissioners of appellant drainage district, upon certain of his lands situated within the

district, describing them, and setting out the amount of the assessments, all of which he alleged were excessive, illegal and entirely without authority of law; that the lands could receive no benefit whatever from the proposed drain and should not be assessed in any amount. He alleged that the drain, if constructed, would damage him to the amount of $2,000; prayed that the assessment be vacated and for damages. Upon a hearing in the county court on July 20, 1911, it confirmed the assessments, as made by the commissioners and rendered judgment thereon. On the same day, Claibourne filed a motion and affidavit and prayer for appeal from the judgment of the court rendered on the hearing of his petition in the cause, alleging that the appeal was not taken for vexation, or delay, but because he verily believed himself to be injured by the judgment rendered herein and that justice may be done. No order granting the appeal was entered of record, but on an adjourned day of the January term, 1912, of the county court, the court entered a *nunc pro tunc* order, granting the appeal as of that date, July 20, 1911. The transcript was lodged in the circuit court on the 3rd day of April, 1912, the third day of the term. On the 20th day of May, an adjourned day of the April term, 1912, appellant filed its motion to dismiss the appeal, alleging numerous grounds therefor, among the number that the affidavit and motion were insufficient, that the order granting the appeal was not made on July 20, 1911, nor until March 30, 1912, when it was entered *nunc pro tunc* and that the appeal was not perfected within the time required by law, the transcript not being lodged in the circuit court until the 3rd day of April, 1912, and that a regular term of the circuit court held in November, 1911, had intervened between the time of the praying for the appeal and the lodging of the transcript of the record in the circuit court, which was done more than six months after the rendition of the judgment in the county court. The court heard the testimony of W. N. Carpenter, attorney for appellee, relative to the cause of the delay of the prosecution of the appeal and

overruled the motion to dismiss. Appellants thereupon demurred to the petition of Neil Claibourne, alleging that there was a misjoinder of causes of action and that no bond had been taken nor offered upon the taking of the appeal, which was also overruled.

The court heard the testimony of the witnesses and set aside the assessment made by the county court and fixed assessments against and taxed the lands of appellee at different amounts, specifying them in the judgment and divided the costs between appellee and the drainage district and from this judgment, this appeal comes.

J. M. Brice, for appellant.

1. Being a special act, the statute must be fully complied with, and nothing will be taken by intendment. In order to give the county court jurisdiction to grant an appeal, and the circuit court jurisdiction to entertain it, the affidavit must show that the party praying the appeal is a property owner in the district. Act 279, Acts 1909, § 7; 104 Ark. 113.

The affidavit must also state the grounds or matters wherein he is aggrieved. Section 9 of the Act is not in conflict with section 1428, Kirby's Digest, except as to the time for appealing, and the remaining portion of the last named statute must be complied with in order to confer jurisdiction upon the circuit court. *Id.;* 116 S. W. (Mo.) 549.

2. The *nunc pro tunc* order by the county court granting an appeal is void. Such an order can be granted only after notice of the intended application therefor, and for the purpose of entering an order that was actually made and not entered. Kirby's Dig. §§ 4432, 4423; 84 Ark. 100-6; 87 Ark. 438; 92 Ark. 299; 93 Ark. 234. It will not be made where the delay was not occasioned by the court but by the neglect or mistake of the party seeking the order. 1 Wall. (U. S.) 627; I Demarest (N. Y.) 63.

3. In order to invest the circuit court with jurisdiction, the order granting the appeal must be made or

entered of record either by the court or the circuit clerk and the transcript lodged in the office of the circuit clerk within six months from the rendition of the judgment by the county court. Kirby's Dig. §§ 1489, 1490; 95 Ark. 148; 92 Ark. 148; 65 Ark. 419; 45 Ark. 397; 6 Am. & Eng. Ann. Cases, 946.

4. The case should be reversed on the testimony. Where there is substantial testimony that the property receives benefits from the improvement, the assessment will stand. 98 Ark. 543; 78 Ark. 580; 99 Ark. 100; 82 Ark. 75; 81 Ark. 80. Neither the fact that the lands are overflowed from the back water at certain seasons, nor that lands are high and above overflow, exempt them from such assessments. 78 Ark. 580; 99 Ark. 100.

W. N. Carpenter for appellee.

The Act of 1909 does not contemplate that the appeal shall be *perfected* within twenty days, but that it be prayed for and granted within that time, and then perfected with reasonable diligence. Since the special statute did not prescribe the remaining steps to be taken in perfecting the appeal, the general statute governs. Kirby's Dig. § 1489. Appellee will not be held responsible for the omission of the clerk to comply with this statute. The proceeding by *nunc por tunc* order was the correct practice. 43 Ark. 33. Appellants will not be heard to raise in this court for the first time the question of notice.

KIRBY, J. (after stating the facts). It is insisted that the court erred in not dismissing the appeal from the county court and that the *nunc pro tunc* order made by that court granting the appeal was void, and conferred no jurisdiction upon the circuit court.

An order *nunc pro tunc* was entered March 30, 1912, granting the appeal as of the date the judgment was rendered, from which the appeal was taken and the affidavit and prayer therefor filed, and no question was made below that notice of the application therefor, was not given to the party against whom it was sought, and it is too late to raise it here for the first time. The

law under which the district was organized, Act 279 of the Acts of the Assembly, 1909, and amendatory acts, allows an owner of real property within the district, who conceives himself to be aggrieved by the assessments of benefits against his land to present his complaint to the coutny court at its first regular, adjourned or special session thereafter, which shall consider the same and enter its finding thereon, confirming the assessment, or increasing or diminishing the same, which finding shall have the force and effect of a judgment, from which an appeal may be taken within twenty days by either the property owner or the commissioners of the disstrict. Sec. 7, Act 1909.

Section 9 of the act provides: That the remedy against such assessments of taxes shall be by appeal and that such appeal shall be taken within twenty days from the time that said assessment has been made by the county court and on such appeal the presumption shall be in favor of the legality of the tax.

The affidavit and prayer for appeal was filed on the day the county court rendered its judgment confirming the assessment against appellee's land and an order granting the appeal was, in fact, made, although the clerk omitted to enter it of record, and it was entered *nunc pro tunc* on March 30, 1912, thereafter. The appeal, however, was taken and granted on the same day the judgment was rendered, and the omission to enter the judgment on that day did not affect its validity. *Ex Parte Morton,* 69 Ark. 48. Although this is a special act the terms of which must be fully complied with in proceedings under it, it is neither cumulative nor amendatory of the other drainage laws in force at the time of its passage but is expressly declared to be an alternative system and its provisions relative to procedure on appeal from judgments of the county court are different from those of section 1428 of Kirby's Digest which are not required to be complied with in taking an appeal under the provisions of the act.

Under the general law, relating to appeals from the

county court, six months after the determination of the judgment or order appealed from is given in which to appeal, and the clerk is required to transmit all the original papers and the transcript of the record entries in the cause or matter to the clerk of the circuit court and all appeals granted ten days before the commencement of the term of the circuit court next after they are allowed, shall be tried and determined at such term, unless continued for cause. The transcript in the instant case was not lodged in the circuit court until a year after the allowance of the appeal and it was within the discretion of that court to determine whether it would permit appellant to prosecute its appeal on account of the lack of diligence and the court determined the question in favor of appellee and refused to dismiss the appeal on that account, and we find no abuse of discretion in its having done so.

A good deal of testimony was heard, relative to the situation of the lands, and the location of the drain or ditch and the benefits to the land, by reason of its construction, which was to some extent conflicting, and the court determined from it what amount of benefit should be assessed and entered judgment accordingly and we think its findings are supported by the preponderance of the testimony.

Finding no prejudicial error in the record, the judgment is affirmed.

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

Opinion delivered March 10, 1913.

1. LIMITATION OF ACTIONS—OBSTRUCTION OF DRAINAGE.—When a railway company constructs a culvert so that damage to adjoining property by overflow must necessarily result, and the certainty, nature and extent of the damage may be reasonably ascertained and estimated at the time of the construction of the culvert, then the damage is original and there can be but a single recovery and the

statute of limitations against such cause of action is set in motion on the completion of the obstructing culvert. (Page 335.)

2. LIMITATION OF ACTIONS—OBSTRUCTION OF DRAINAGE.—If damage to adjoining property by overflow by reason of the construction of a culvert by a railroad company, is merely probable, or the nature and extent of it can not be known and fairly estimated, and would be only speculative and conjectural, the statute of limitations is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries. (Page 336.)

3. LIMITATION OF ACTIONS—RAILROADS—DAMAGE TO LAND BY OVERFLOW—WHO MAY RECOVER.—When a railroad company, by the construction of a culvert causes a permanent injury to land by causing it to overflow, the injury was caused at the time the culvert was constructed, and if the right of the owner against the railroad for damages, is barred by limitations, the right of a tenant of the owner is also barred. (Page 336.)

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

STATEMENT OF FACTS.

On the 22nd day of February, 1912, appellees, Ella Humphreys and her husband, James Humphreys, instituted separate actions in the Saline Circuit Court against the appellant railway company for damages alleged to have resulted from exposure of appellee, Ella Humphreys, to an overflow of water from Rose Creek in the western part of the city of Little Rock. The wife alleged that as a result of her exposure, she caught a cold which terminated in inflammation of the bladder, technically called cystitis, and the husband's suit was for the loss of his wife's services and for the expense of her treatment. The cases were consolidated and from a judgment in favor of each plaintiff, this appeal was taken. The complaint in each case alleged that on or about March 20, 1909, Mrs. Humphreys resided in a dwelling house at 401 Summit avenue in the city of Little Rock, the same being the property of R. D. and B. T. Plunkett, and that there was a natural water course, commonly called Rose creek, which ran across the lots on which said house was situated. That in 1899 the appellant built its railroad across said creek near said house and built a culvert over said creek which left

an opening for the flow of water of about eight feet by thirteen. That said house was never overflowed prior to the construction of said culvert, but has frequently overflowed since. That after the house had overflowed, Plunkett built a stone wall six or seven feet high along the bank of the creek opposite the brick house, and had the floor in the house raised. That in 1908 appellees negotiated for renting the house and were informed that it had overflowed, but since the stone wall had been erected and the floor raised, that the house was now protected from further danger of overflow. They rented the house and moved into it in February, 1908, and there was no overflow in the house until March, 1909, at which time the water came in the house at about 3 o'clock in the morning to a depth of twenty-two inches. That appellee, Ella Humphreys, in attempting to save her property and in ministering to her children was exposed to the water and contracted the cold, from which the injuries resulted for which she sues. It was further alleged in the complaint that the appellant had negligently constructed the culvert by not making it large enough for the natural flow of the water down the creek and that as a result, the water backed over the land and into the house as above stated. Appellant answered and denied the injury and the insufficiency of the opening and alleged that the culvert was sufficient to carry all water that passed down the channel of said creek. But alleged that any cause of action which might have arisen out of the negligent failure to leave a sufficient opening was barred by the three years statute of limitations and also set up appellees' contributory negligence as a defense.

The evidence is undisputed that the culvert was insufficient from the time of its construction.

The plaintiff admitted that he knew that the land had overflowed but did not know to what depth, but he stated that he supposed the stone wall built around the premises and the filling in that had been done would afford protection. Appellees had previously lived in

Lonoke county and were personally unacquainted with the conditions surrounding this house. But the proof on the part of appellant was that appellees were fully advised as to conditions, and the agent of the owner explained that the rent was low because the house overflowed. The owner of the property testified on behalf of appellees and stated that it overflowed into the house the first big rain after appellant's road was built and that every big rain after that would overflow the premises about like it did when appellee lived there. That everybody in the neighborhood knew the water came up in the house and there were water marks on the outside and one on the inside of the house which showed where the water had come, and the proof of these facts is undisputed. He stated also that he had been compelled to reduce his rent on account of these overflows and that an additional reduction had been made necessary by the experience which appellees had had in the house. A civil engineer testified on behalf of appellees that the construction of this culvert across this creek was a very stupid piece of work and that its insufficiency was apparent from the first. The railroad undertook to show that the culvert would admit the passage of all the water that would flow down the channel of the creek, but the proof is undisputed that when the big rains came the channel itself was insufficient to carry the water and the overflows regularly occurred. If it appears that either party has changed his theory about the case, it is still true that the above facts are undisputed. The appellant asked and the court refused to give the following instructions:

"A. You are instructed that under the law and testimony in this case neither of the plaintiffs is entitled to recover in this case, and you will therefore find for the defendant."

"K. You are instructed that one of the issues in this case is the statute of limitations, and although you may find from the testimony that the culvert constructed by the defendant was not sufficient in capacity to permit

the passage of water and prevent the plaintiff's exposure, as alleged in the complaint, nevertheless, your verdict must be for the defendant, unless you find that said culvert was constructed within three years next before the institution of her original action against the defendant."

"L. If you find from the testimony that at the time of the construction of the defendant's culvert in 1899 or about one year thereafter, it became apparent that the opening provided was not sufficient to permit the passage of water and prevent an overflow of the premises occupied by the plaintiffs and that the condition of said culvert continued from that time until the injury complained of in February or March, 1909, a period of more than three years after the insufficiency in the culvert became apparent, you will find for the defendant."

This refusal was assigned as error and these instructions are sufficient to raise the question of limitations which arises under the evidence in this case.

Thos. S. Buzbee and *John T. Hicks,* for appellant.

1. The injury done by the construction of the culvert in 1899 was a permanent injury to the land and not to the person of the plaintiff, Ella Humphreys, who subsequently became a tenant of the premises; and as the plaintiffs did not own the land and had no interest therein at the time the injury was inflicted, no cause of action ever arose in their favor. 92 Ark. 406, 413.

2. Any cause of action that ever existed is barred. Where the obstruction is permanent and necessarily an injury, the damage is original, and the statute begins to run from the placing of the obstruction. *Supra;* 35 Ark. 622; 39 Ark. 463; 52 Ark. 240, Syl. 1; 56 Ark. 612; 62 Ark. 364; 72 Ark. 127; 76 Ark. 542; 80 Ark. 235; 82 Ark. 387; 86 Ark. 406; 92 Ark. 465; 93 Ark. 46.

Manning & Emerson and *I. S. Humbert,* for appellees.

Appellees had a cause of action and the same was not barred. The law imposed upon the appellant the duty of leaving sufficient opening under its road bed to

permit the water to pass through. Having failed to perform that duty, and appellees being thereby damaged, they had a cause of action. Kirby's Dig. § 2991. Where the obstruction complained of is not entire and complete, and an opening is left for the passage of water, as in this case, the damage is not original, but a continuing one, each overflow constitutes a ground for a new action, and the statute of limitation begins to run from the time of the overflow which inflicted the damage. 52 Ark. 240; 56 Ark. 613; 72 Ark. 127; 76 Ark. 545; 78 Ark. 589; 85 Ark. 111; 80 Ark. 235; 82 Ark. 387; 3 Farnham on Water and Water Rights, 2647, 2648; 95 Ark. 297; 57 Ark. 387, 398.

SMITH, J. Without question this culvert was a permanent structure and, equally without question, it became apparent that these lots were made to overflow by the construction of it as a part of appellant's road. But upon consideration of the question as to the application of the statute of limitations to these overflow cases, the permanency of the structure or obstruction impeding the flow of water is not the controlling question. Indeed, the question can not arise unless the obstruction is of a permanent nature, but its permanency does not of itself determine whether the damages, which result from its erection, are original or recurring. If it is of such a construction as that damage must necessarily result, and the certainty, nature and the extent of this damage may be reasonably ascertained and estimated at the time of its construction; then the damage is original and there can be but a single recovery and the statute of limitation against such cause of action is set in motion on the completion of the obstruction. If it is known merely that damage is probable, or, that even though some damage is certain, the nature and the extent of that damage can not be reasonably known and fairly estimated, but would be only speculative and conjectural; then the statute of limitation is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries. There are many cases

in our reports on this subject and their difficulty consists in the application of the law to the facts of each case. *McAlister* v. *St. L., I. M. & S. Ry. Co.,* 107 Ark. 65; *St. L., I. M. & S. Ry. Co.* v. *Mackey,* 95 Ark. 297; *Kelley* v. *K. C. So. Ry. Co.,* 92 Ark. 465; *Levee District* v. *Barton,* 92 Ark. 406; *St. L., I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46; *C., R. I. & P. Ry. Co.* v. *McCutchen,* 80 Ark. 235; *St. L., I. M. & S. Ry. Co.* v. *Hoshall,* 82 Ark. 387; *Turner* v. *Overton,* 86 Ark. 406; *St. L. S. W. Ry. Co.* v. *Morris,* 76 Ark. 542; *St. L., I. M. & S. Ry. Co* v. *Stephens,* 72 Ark. 127; *St. L., I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360; *St. L., I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240; *Ry. Co.* v. *Yarbrough,* 56 Ark. 612; *Ry. Co.* v. *Cook,* 57 Ark. 387; *Bentonville Ry.* v. *Baker,* 45 Ark. 252; *Springfield & Memphis Ry.* v. *Henry,* 44 Ark. 360; *Springfield & Memphis Ry.* v. *Rhea,* 44 Ark. 258; *L. R. & F. S. Ry. Co.* v. *Chapman,* 39 Ark. 463; *St. L., I. M. & S. Ry. Co.* v. *Morris,* 35 Ark. 622.

Under the facts here stated there is no such difficulty in this case. It was known after the first rain that the culvert was insufficient and would cause the land to overflow, the depth of this overflow was indicated by the high water marks and was observed by the residents of that locality. These considerations determined the value of the land and the difference in this value before and after the construction of the culvert measured the damages which the land owner should recover.

If the owner of the land was barred, the appellees as tenants were. This feature of the case is very similar to the case of *Board of Directors, St. Francis Levee District* v. *Barton,* 92 Ark. 406. In that case Barton was a tenant in possession of the land which was overflowed, under a lease for a term of years, including the years 1906 and 1907, when the crops were destroyed by the impounded water. The levee which impounded the water and caused the overflow was constructed in 1899 and in holding that that cause of action was barred, the court there said: "It would perhaps be more accurate, instead of saying that plaintiff's cause of action was barred, to say that

the injury done by the construction of the levee in 1899 was a permanent injury to the land, and not to the crops subsequently planted and grown thereon; and, as the plaintiffs did not own the land, and had no interest therein at the time, the injury was inflicted, no cause of action ever arose in their favor."

So here the railroad was built in 1899 and appellees had no interest in the land damaged at the time the injury was inflicted and consequently they never had a cause of action on account of this obstruction. The judgment is accordingly reversed and the cause dismissed.

HOLLENBERG MUSIC COMPANY *v.* BANKSTON.

Opinion delivered March 17, 1913.

SALE OF CHATTELS—CONDITIONAL SALE—RESERVATION OF TITLE—NEW TERMS.—When a vendor sold a chattel, reserving title in himself until the price was paid, and the purchaser was in default, and the parties made arrangements for different terms of payment from those of the original contract, the vendor will not be held to have waived the reservation of title, if the arrangement was only to extend the time for payment of the original debt, and not in satisfaction or cancellation of it.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk*, Judge; reversed.

STATEMENT BY THE COURT.

The appellant brought suit in replevin before a justice of the peace for a piano, sold by it to the appellee, and a judgment was rendered in its favor, in the alternative for $123.20, with interest and cost, or the return of the piano. The cause was appealed to the circuit court, where there was a directed verdict for the appellee, and the appellant has appealed from the judgment rendered in that cause. There is no serious controversy about the facts, and they appear to be as follows: Appellant sold the piano on the 6th of April, 1906, for the sum of $325, of which $25 was paid in cash and the balance was to be

paid in monthly payments of $10 each; the last payment being due on October 6, 1908, and the title was reserved in the appellant until all of the payments had been made. Appellee made a number of payments, but was largely in default at the time the last one had matured when appellant agreed that appellee might make payments of $4 per month from July 15, 1909, until the following December, when some definite, final arrangement with regard to the balance, which would then be due, should be made. It appears that appellee made these $4 payments, but did not arrange for the payment of the balance in the December following, and after waiting upon appellee for some time, the following correspondence was had:

"Little Rock, Ark., March 17, 1910.

Mrs. Mildred Bankston,
1200 West Twenty-third Street, City.

Dear Madam—On June 9, 1909, you agreed with our Mr. Hollenberg to pay $4 per month from July 15, 1909, until December, and at that time make satisfactory arrangements for the balance of your account. On looking up the account we find that you paid this $4 per month and in January you paid $8, but there has been no further payment since that time, nor any arrangements made for the account. We would like for you to call at once and settle the same.

W.B.P.-M.R.

Yours very truly,
Hollenberg Music Company,
W. B. Parsons, Treasurer."

and the following reply was written:

"March 21, 1910—I arranged with your Mr. Hollenberg for $4 per month till December, 1909. I did not say just what I would do after that. I did not know what I could do. I have made the $4 payment right along till this month, when I did not have the money. I knew it had run over as well as you did, and will come with a

payment at earliest possible moment. So please don't annoy me when I am doing all I can.

Yours very respectfully,

Mrs. Mildred Bankston,

I. B. Bankston."

On June 9, 1909, appellant wrote appellee to have the piano insured. This was done, the insurance being taken out in the name of appellee. Appellee made no payment later than April 8, 1910, on which day they paid $8, but after the institution of the suit, a tender of $8 more was made which was declined.

It is contended by appellee that, under the facts stated, the original debt had been cancelled by the making of a new contract and that as the original debt was cancelled when the new one was made, without any reservation of title to secure this new debt, that the reservation of title was thereby waived. Appellee's contention is that there was never but one contract; that it was evidenced by the original bill of sale which reserved the title, and which was never surrendered or altered, but that a mere indulgence was given appellee in the matter of payments.

Rose, Hemingway, Cantrell & Loughborough and *C. P. Harnwell,* for appellant.

There was no abrogation of the original contract merely by agreeing to an extension of time, and appellant did not thereby lose title to the piano. 74 Atl. 362; 6 Cranch. 253; 117 N. C. 47; 95 Minn. 4; 163 Mass. 28; 17 Mass. 606; 49 Super. 42; 30 N. Y. 164; 57 N. Y. 506; 21 N. Y. 399; 185 Fed. 179; Cent. Dig., "Sales" §§ 1411-1417; Dec. Dig. § 477; 131 Mich. 633; So. Ia. 422; 136 Mass. 340; 118 U. S. 663; 63 Me. 529; 5 Wash. 276; 122 Ia. 280; 53 Cal. 597; 92 Cal. 527; 16 Am. & Eng. Ann. Cases 216. See also 28 Ark. 193; 45 Ark. 313; 46 Ark. 163; *Id.* 552.

W. T. Tucker, for appellee.

In case of a conditional sale of personal property, when the debt falls due and is not paid the vendor may

treat the contract as at an end and reclaim the property, or he may affirm the sale and seek payment in cash or by notes or other property. And after the debt falls due the making of another contract without then reserving the title, waives the condition and makes the sale absolute. 97 Ark. 432; 60 Ark. 133; 67 Ark. 206; 78 Ark. 569; 78 Ark. 501; 35 Cyc. 675; 82 Va. 614; 42 N. W. 875; 50 Ark. 300.

SMITH, J., (after stating the facts). When a debt, secured by a reservation of title, matures, the vendor has the right to retake the property and thus cancel the debt, or he may bring his action to recover the debt, and thus affirm the sale and waive the reservation of title; and as a general rule, the choice of inconsistent remedies abandons and debars the pursuit of any except the one chosen. *Dudley E. Jones* v. *Daniel,* 67 Ark. 208. But this choice of remedies is to be exercised in the event only that the vendor decides to take some affirmative action. He is not required to act simply because the debt has matured. Nor can his right to accept partial payments, or to give an extension of time for payments, be questioned by the vendee so long as there is no cancellation of the original debt or waiver of the reservation of title securing it. The vendor can not take inconsistent positions and he can not treat the title as being in another and yet reserved by him, nor can he say the title still rests in him, if by any arrangement he cancels the debt thus secured, but the vendor does retain the title so long as the purchase money remains unpaid, and the reservation is not in some manner waived, and the mere indulgence of extension of time for payment is not inconsistent with the continued reservation of title. *Thornton* v. *Findley,* 97 Ark. 436; *National Cash Register Co.* v. *Riley,* 74 Atl. 362. And these cases are authority for the statement that the taking of a new note and the arrangement for different terms of payment from those of the original contract will not waive the reservation, if such last note was given only to extend the time for the

payment of the original debt and not in satisfaction and cancellation of it.

The judgment of the circuit court is therefore reversed and this cause remanded for further proceedings not inconsistent with this opinion.

H. D. WILLIAMS COOPERAGE COMPANY v. KITTRELL.

Opinion delivered March 10, 1913.

1. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE.—Where plaintiff undertook to remove an accumulation of dust and shavings from beneath a planer, and in so doing, his hand was cut off by the underknives, and plaintiff claimed defendant was negligent in that the hood was too large and the machine improperly speeded, but his own testimony showed that some accumulations of dust and shavings always had to be removed by hand and would have to be so removed, even if the hood were smaller and the machine properly speeded; *held*, that the facts that the machine was improperly speeded and the hood was too large were not the proximate cause of the accident. (Page 343.)
2. MASTER AND SERVANT—INJURY TO SERVANT—DUTY TO WARN—NEGLIGENCE.—Where the plaintiff is twenty-three years of age, and a man of average intelligence, and had worked about a planer for some time, and while removing an accumulation of dust and shavings from the hood of the planer, had his hand cut off by the underknives, and it appears that he knew there was a lever by the use of which he could have stopped the machine while cleaning it, but he did not do so, defendant will not be liable for failing to warn him of the danger of his position, nor the danger attending his failure to stop the machine while cleaning the hood. (Page 344.)
3. MASTER AND SERVANT—DUTY TO WARN—INJURY TO SERVANT.—When a servant is an adult of normal intelligence and reasonable experience in the work in which he is engaged, the defendant's duty is measured by the duty which a master ordinarily owes to a servant of mature years and average intelligence, and an instruction is erroneous which submits defendant's duty to warn on account of plaintiff's youth and inexperience. (Page 345.)
4. MASTER AND SERVANT—INJURY TO SERVANT—HIDDEN DANGER—DUTY TO WARN.—When plaintiff is an adult of normal intelligence and experience in the work in which he is engaged, and is injured by his hand coming in contact with the revolving knives of a planer, while cleaning the same, and it appears the machine could have

been easily stopped by him by moving a lever, testimony of plaintiff that he thought the knives were guarded, and that he did not know how far the knives were from the outside edge of the hood, will not support a conclusion that the danger was hidden or extraordinary, so as to raise a duty upon the master to warn. (Page 348.)

Appeal from Cleburne Circuit Court; *George W. Reed,* Judge; reversed and dismissed.

J. H. Harrod, Mills & Barr and *T. D. Wynne,* for appellant.

The court erred in the admission of testimony; also in its charge to the jury. 93 Ark. 153. The evidence did not warrant a verdict. 90 Ark. 407. An employer of mature years and experience needs no warning of obvious dangers as they are among the ordinary risks he assumes. Cases *supra.*

E. G. Mitchell, for appellee.

1. A verdict on conflicting evidence will not be disturbed. 23 Ark. 50; 18 S. W. 172; 157 Fed. 656. The verdict is conclusive. 17 Ark. 478; 11 S. W. 518; 19 Ark. 117; 51 *Id.* 495; 55 *Id.* 31; 90 *Id.* 23.

2. There is no error in the court's charge. 81 Ark. 249. Plaintiff was inexperienced and should have been warned. 53 Ark. 117; 71 *Id.* 56; 73 *Id.* 49; 81 *Id.* 249; 99 Ark. 377; 93 *Id.* 153; 90 *Id.* 407; 97 *Id.* 188; 84 *Id.* 382.

MCCULLOCH, C. J. The plaintiff, H. H. Kittrell, received personal injuries while working in the service of the defendant, H. D. Williams Cooperage Company, and this is an action instituted by him to recover damages on account of such injuries.

Defendant was operating a stave and heading mill at Leslie, Arkansas, and plaintiff was working at a double-surface planing machine called a "pin-head planer." There were two sets of revolving knives in the machine, one above and one below, through which heading timber was run in order to be planed on both sides. Plaintiff was working behind the machine for the purpose of taking the planed pieces of timber as they came

from the planer. The upper set of knives was exposed to view, but the lower set was obscured by a metal hood placed there for the purpose of catching the dust and shavings which came from the knives. A pipe ran from this hood and was connected to a fan so as to convey the dust and shavings from the hood through the pipe by suction. There was always some accumulation of dust and shavings in the hood, which had to be taken out of the hood by the hands of the operator. The evidence tends to show that on the occasion in question the hood was too large and on that account, as well as on account of the excessive velocity of the machine, the suction was not strong enough to draw the dust and shavings out of the hood. For that reason it choked up and had to be cleaned out oftener than would have been necessary if the appliances had been in better working order. It was plaintiff's duty to clean out the hood when it became choked up, and he received his injury in attempting to perform that work. While the machine was in motion he inserted his hand, and it came in contact with the lower set of knives, which cut his hand off entirely.

He recovered judgment below for damages in the sum of $2,999.99, and the defendant appealed.

Negligence of the defendant is charged in allowing the machinery to get into defective condition, in that it was improperly speeded and that the hood was too large so that the conveyor pipe would not perform its function of carrying off the dust and shavings; also in failing to give the plaintiff warning of the danger attending the discharge of his duty of cleaning out the pipe.

According to the undisputed evidence in the case there was always some accumulation of dust and shavings which had to be removed by hand. The plaintiff's own testimony establishes that fact, and neither the alleged defect in the hood as to size nor the failure to have the machine properly speeded was the proximate cause of the injury, for, in any event, the plaintiff would have had to perform that service at times, and the fact that the defective condition aforesaid caused a more frequent

accumulation does not make those defects the proximate cause of the injury.

The court erred, therefore, in submitting those questions to the jury as matters of culpable negligence upon which liability of the defendant might be predicated, and for this reason, if for no other, the judgment must be reversed.

Error was also committed in giving the instruction submitting the question of negligence on the part of defendant in failing to establish and enforce regulations for the operation of the mill and protection of employees.

We are of the opinion, moreover, that the evidence does not make a case for submission to the jury of the question of the negligence of the defendant in failing to give plaintiff instruction as to the discharge of his duty and warning as to the danger which attended the same. The plaintiff was, at the time of his injury, twenty-three years of age, and of average intelligence. There is no showing whatever in the record that he lacked anything in intelligence, but, on the contrary, an examination of his testimony shows that he was of average intelligence and fully understood the work in which he was engaged. He had worked at this mill something more than a year, first working there for a period of about ten months something like two years before the injury, and later he returned to the work after being absent for a time and worked about two and one-half months immediately prior to the injury. He had worked at several different kinds of planing machines in the mill, but had only worked at this particular machine for about six days preceding his injury. He had previously worked at a single-surface planer, but not at a double-surface planer. It was a quite common occurrence for a man at this machine to clean out the accumulation of dust and shavings. Plaintiff himself had been doing this several times a day during the six days that he had been working at the machines. He had seen others do the same thing. Within about six feet of the place where he was standing at the machine there was a lever by which a belt

could be shifted so as to stop the machine, and frequently it was stopped in order to clean it out. The testimony of plaintiff establishes the fact that sometimes the man who cleaned it out would stop the machine and sometimes he would clean it out without stopping. The plaintiff knew that the lever was there and what it was for, and it was his option either to stop the machine while he was cleaning it out, or not do so. The failure to do so was his own election, as he received no instructions not to do so, but was left to do it according to his own notion of safety.

The court gave instructions to the jury submitting to them the duty of warning which defendant owed to the plaintiff if the latter was found, on account of youth and inexperience, not to know of or appreciate the danger incident to work about the machine. Those instructions were erroneous, for, as we have already seen, the plaintiff was an adult of normal intelligence and reasonable experience in the work in which he was engaged. The duty of the defendant must, therefore, be measured by that which a master ordinarily owes to a servant of mature years and average intelligence, and it constituted prejudicial error to submit the case to the jury on any other theory. *Railway Co.* v. *Torry,* 58 Ark. 217.

In the case of *Louisiana & Arkansas Ry. Co.* v. *Miles*, 82 Ark. 534, after quoting from former cases the rule of law that it is the duty of the master to warn the servant of danger incident to the service where, by reason of youth and inexperience, the servant does not realize or appreciate such danger, we said:

"Herein lies the distinction between the duty of a master towards a servant of immature age and inexperience, and his duty towards a servant of full age and average intelligence. In case of the former it is the duty of the master to instruct as to patent as well as latent defects if, by reason of the youth and inexperience, the servant does not know or appreciate the danger incident to his employment, and if the master knows or ought to know or take notice of his youth and inexperience. But

in the case of a servant of full age and normal intelligence the master does not owe a duty to instruct or warn as to dangers which are open and obvious to the senses of any man of ordinary intelligence * * * Where the danger is one that has not been created by a negligent act of the master, and is one which is an ordinary incident to the service, the servant is presumed capable of taking notice of it without warning or instruction from the master, unless on account of youth and inexperience there is reason to believe that he does not know of and appreciate the danger." See also *Warren Vehicle Co.* v. *Siggs,* 91 Ark. 102; *C. R. I. & P. Ry. Co.* v. *Grubbs,* 97 Ark. 486.

In the present case the danger was not created by any negligent act of the master, and the servant was not an inexperienced youth, and therefore the rule just announced applies. In discussing this subject Mr. Labatt says:

"The master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowledge, experience and judgment as he possesses. The failure to give such instructions, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger, or, as the rule is also expressed, where he had all the means necessary for ascertaining the conditions, and there was no concealed danger which could not be discovered." 1 Labatt on Master & Servant, § 238.

Numerous cases cited in the opinion in the case of *Louisiana & Arkansas Ry. Co.* v. *Miles, supra,* fully sustain this view and illustrate the different applications which have been made of it.

The only question which remains for our determination is, whether or not it should be said as a matter of law that the danger incident to the performance of the work of removing from the machine by hand accumulated dust and shavings was a latent or extraordinary

one of which it was the duty of the master to give warning.

Plaintiff's regular work was to assist in the operation of the machine. He not only took the timbers as they came from the machine, but he had, prior to that time, fed the machine and knew exactly how it was operated. He knew that the revolving knives were there, the lower ones as well as the upper, though the latter were not exposed to view. He knew that the machine could be easily stopped for the purpose of removing the accumulation of dust and shavings, and had frequently seen that done. The only excuse he gives in his testimony for allowing his hand to come in contact with the knives was that he thought the knives were guarded, and also that he did not know how far the knives were from the outside edge of the hood. But this does not, we think, remove the case from the operation of the rule announced by Mr. Labatt that "the master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowledge, experience and judgment as he possesses" and "where he had all the means necessary for ascertaining the conditions, and there was no concealed danger which could not be discovered."

There was no deceptive condition created, nor was there any negligence on the part of the defendant in creating a situation increasing the danger incident to the work to be performed by the plaintiff. There was no reason upon which to found a belief that the knives were guarded inside the hood, and even though plaintiff did not know how far the knives were from the edge of the hood it was his duty to examine and determine for himself the situation of the knives before he inserted his hand. It was not to be reasonably anticipated that a man of full age and normal intelligence would insert his hand into a place of that kind without ascertaining the exact location of the knives. Besides, as we have already seen, the plaintiff knew that the machine could easily be stopped while it was being cleaned and that there was

a lever there for that purpose. This was enough to put him upon guard that there was some necessity for stopping the machine instead of attempting to clean it out while running.

The case of *Gleason* v. *Smith,* 172 Mass. 50, is not only similar on the facts but states the principle which should control in this case. The plaintiff in that case was a person of mature years and experience, he was employed to work upon a molding machine, and was injured by having his hand come in contact with revolving knives on the machine. There was a guard in front of the knives narrower than the one which had previously been used and did not fully cover the knives, and the charge of negligence on the part of the employer was that the servant was set to work upon a dangerous machine without warning him of the danger. The court, in disposing of the case, said:

"Although the plaintiff could not see the knives when the machine was in operation there is nothing of record that an examination of the machine when it was at rest would not have shown that the guard did not fully cover the knives. If the plaintiff had chosen to use them, he evidently had all the means of seeing the relation of the guard to the knives which the workmen had who made the guard. If he put his thumb and fingers against the knife without making an examination, and defendant had no reason to suppose that he needed instruction with regard to this danger and owed him no duty either to change the guard or give him instruction or warning about it."

Our conclusion is, that the defendant did not owe the plaintiff any duty to give him further instructions as to the condition of this machine and the danger of doing this work; that plaintiff's injury was not the result of any negligence on the part of the defendant in failing to give him instructions, but that the injury resulted from a danger which was incident to the work in which he was engaged and the burden of which, under the law, he must himself bear.

The case is fully developed and according to plaintiff's own testimony he is not entitled to recover anything. No useful purpose would be served in remanding the cause, so the judgment is reversed and the cause dismissed.

BLOCH v. TUCKER.

Opinion delivered March 17, 1913.

1. LANDLORD AND TENANT—RENTS—PREMISES DESTROYED BY FIRE.—Where appellee's lease provides for payment of rent monthly in advance with the stipulation that "if said premises are destroyed by fire * * * said lessee shall have the privilege to terminate this lease, or continue the same, at his pleasure," and the building burned and appellee elected to terminate the lease, he can not recover from the lessor the portion of the rent paid in advance, in the absence of a provision in the contract that it shall be paid back. (Page 351.)
2. LANDLORD AND TENANT—LEASE—COVENANT TO REPAIR—WARRANTY.—In the absence of covenants in the lease of warranty and to repair the leased premises, the landlord will not be liable to the tenant for damages due to bad condition of the roof. (Page 352.)

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

Hill, Brizzolara & Fitzhugh, for appellant.

1. The evidence introduced to show that appellant made the statement that the roof did not leak was not admissible, if introduced to show a warranty, its effect would be to add to, contradict or vary a written instrument, and if offered to show fraud, it was not responsive to the allegations of the complaint. 95 Ark. 131; 44 Ark. 496; 92 Ark. 509; 77 Ark. 355. Bloch's promises to repair, being without consideration, were a nullity. Underhill on Landlord and Tenant, § 514; Jones on Landlord and Tenant, § 598; Tiffany on Landlord and Tenant, § 87, p. 583. Appellee, notwithstanding any promises by appellant, can not recover because of his own contributory negligence in allowing his goods to be exposed to the weather, knowing as he did, the condition of the

premises, and having the means at hand with which to protect his goods from the rain and weather changes. 56 N. Y. 420, 423; 38 A. D. (N. Y.) 441; 10 S. E. 934.

2. A portion of rent paid in advance can not be recovered back on the destruction of the leased premises, nor will a stipulation in the contract allowing the lessee to surrender premises in the event of destruction, entitle him to recover a proportionate part of rent so paid. 56 O. St. 39; 24 Cyc. 1159; Jones, L. & T., § 677; Tiffany, L. & T., § 182, p. 1197; *Id.*, p. 1071; 121 Mich. 369; 64 Ill. App. 513; 49 A. D. (N. Y.) 135; 167 N. Y. 611.

H. C. Mechem, for appellee.

1. Where a party about to let premises for use as a storehouse, the roof of which can not be examined by the lessees to ascertain its condition, misrepresents the condition of the roof to the lessee and thereby induces him to lease the premises, he can not escape responsibility for the damages resulting to the lessee by reason of the unsound condition of the roof, and it is immaterial whether the false representations were knowingly or innocently made. 30 Ark. 535; 38 Ark. 340; 60 Ark. 388.

2. Appellee is entitled to recover the unused part of the rent paid in advance, the same being without consideration received by him. 33 Pac. 965.

McCULLOCH, C. J. Appellant owned a building in the city of Fort Smith and by written contract leased the same to appellee for a term of years, a rental price of $125 per month being stated in the contract, payable monthly in advance.

The contract contained a stipulation that "if said premises are destroyed by fire * * * said lessee shall have the privilege to terminate this lease, or continue the same, at his pleasure."

The building was destroyed by fire on January 11, 1911, during the life of the lease.

Appellee elected to terminate the lease and gave notice to that effect. He then instituted this action against appellant to recover $75, the proportionate part

of the rent for the month of February paid in advance. He also alleged that "he was induced to enter into said lease by the defendant representing to him that the roof of said premises was sound and in good condition; that said representation was untrue and said roof leaked and the goods, wares and merchandise of plaintiff were damaged in the sum of $100," and prayed for recovery for said damages.

The case was tried before the court sitting as a jury, and the court found in favor of appellee on both paragraphs of his complaint and rendered judgment against appellant.

The law seems to be well established that rent paid in advance can not be recovered by the tenant on the destruction of the premises unless the contract provides that it shall be paid back. 24 Cyc. 1159; *Lieberthal* v. *Montgomery,* 121 Mich. 369; *Felix* v. *Griffiths,* 56 Ohio St. 39; *Werner* v. *Padula,* 49 App. Div. (N. Y.) 135, 167 N. Y. 611.

The stipulation in the contract in this case that "if said premises are destroyed by fire * * * said lessee shall have the privilege to terminate this lease," is not sufficient to authorize the recovery of rent paid in advance. A fair interpretation of that clause leads to the conclusion that it only authorizes the termination of the unperformed part of the contract, which would not include the right to recover the rent paid in advance under the contract.

A case almost identical upon the facts is that of *Tarkovsky* v. *Hess,* 64 Ill. App. 513. There the contract under consideration provided that "upon the destruction of said premises by fire the term hereby created shall cease and determine." The question was whether rent paid in advance could be recovered by the tenant. The court, in deciding against the right of such recovery, said:

"Can a proportionate part of such payment be recovered back? We think not. The contract of the parties ought to govern. They provided by their agreement

how the rent should be paid, but did not agree that the rent should be abated for any part of the time for which it should be paid in case the premises should be destroyed. Their only agreement with reference to a destruction of the premises, was that the lease should thereupon terminate * * * But as to rent previously paid they made no provision, and we do not feel called upon to make one for them."

The contract did not contain a covenant on the part of the landlord to repair the premises, nor did it contain a warranty of the condition of the roof. Any attempt to engraft a warranty upon the written contract of lease would vary its terms and is, therefore, not permissible under the rules of evidence. *Delaney* v. *Jackson,* 95 Ark. 131; *Maxfield* v. *Jones,* 106 Ark. 346.

That rule does not, however, exclude the right to establish a cause of action for false representations concerning the subject-matter of the contract. Appellee testified that appellant told him the roof was in good condition and did not leak; but the testimony is not sufficient to establish fraudulent representations which appellee relied on to his disadvantage. In fact, the court made an express finding "that the defendant was guilty of no fraud in the transaction with plaintiff." The court further found that appellant "failed and neglected to repair the roof while plaintiff was relying on him to repair same as per his repeated promises." But this did not justify a recovery of damages on account of the condition of the roof, because, as before stated, the contract contained no covenant to repair nor covenant as to the condition of the roof. The court's judgment was, therefore, inconsistent with the special finding of facts.

The judgment upon each paragraph of the complaint is erroneous and must be reversed. The case being fully developed it is not necessary to remand the cause for a new trial, but will be dismissed here. It is so ordered.

DRESSLER v. CARPENTER.

Opinion delivered March 17, 1913.

1. TAXATION—LIMITATIONS—DONATION DEED.—The two years' statute of limitations against an action to recover forfeited lands held under donation deed does not begin to run until the possession of the defendants began under the donation deed. (Page 357.)

2. LIMITATION OF ACTIONS—NEW SUIT AND NEW ACTION.—When an action is brought within the period of limitation, it arrests the operation of the statute, and when said action is dismissed without prejudice, a new action may be brought within one year after the dismissal of the former action. (Page 358.)

3. LIMITATION OF ACTIONS—NEW SUIT AFTER NONSUIT.—Under Kirby's Digest, § 5083, which provides that a plaintiff may bring a new suit within a year after he suffers a nonsuit, when the grantor has brought a suit for the recovery of land and dismissed it without prejudice, his grantee, being in privity of estate with him, may bring a new action within one year after the dismissal of the former action, and this right is not barred by the grantor's having brought and dismissed a second suit within the one year period. (Page 359.)

4. APPEAL AND ERROR—ISSUE NOT RAISED IN LOWER COURT.—When the pleadings and a stipulation in an action to recover lands state that plaintiff sold the lands to a third party who reconveyed to plaintiff, the defendant can not, for the first time, on appeal, raise the question that the conveyance from plaintiff to the third person was merely colorable, so that an action by plaintiff's grantee could not be considered in the determination of the question of whether the statute of limitations barred plaintiff's action. (Page 359.)

5. JUDGMENTS—CONFORMITY TO PLEADING AND PROOF—RENT.—When plaintiff, in his pleadings and in the proof offered did not lay claim for rents prior to a certain year, he will not be heard to complain of a judgment which does not allow him rents prior to that time. (Page 360.)

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

John L. Ingram and *Coleman & Lewis,* for appellant.

1. When a suit is brought in time and dismissed, a new action can only be brought within one year after such dismissal. The statute does not authorize a succession of actions *in infinitum.* Kirby's Dig., § 5083; Mansfield's Dig., § 4497. The amendment of April 14, 1891, striking out the clause "from time to time" from

the last named statute signifies the intention of the Legislature to prevent an indefinite succession of suits. See also 76 Kan. 89; 90 Pac. (Kan.) 764.

2. The statute of limitations was not tolled by the Wilson suits in the Federal Court.

The first and second Wilson suits were fictitious. 42 Fed. 652. Carpenter was not in privity with Wilson. A suit brought by a plaintiff in the name of a third party without authority from such party, does not toll the statute of limitations. 3 Cranch 639; 113 Fed. 958.

There is no identity of causes of action. If a plaintiff is non-suited, he is allowed to file the same suit within one year; but if the cause of action is different, even though between the same parties, or if a different title is asserted, the statute continues to run until the commencement of the new suit. 95 Fed. 306; 79 Ill. App. 22; 180 Ill. 191; 23 Ark. 685; 76 Ark. 460; 180 Ill. 191; 76 Ark. 463; *Id.* 450; 71 Pet. 202; 145 U. S. 593; 158 U. S. 285; 59 Ark. 441; 88 Miss. 88; 46 So. 561; 107 Ia. 660.

Powell Clayton, for appellee.

1. The statute commenced to run from the date of the donation deed, and not from the date possession was taken under the donation certificate. 65 Ark. 305; 68 Ark. 279; 70 Ark. 326; 77 Ark. 324; 78 Ark. 7, 15.

The first Wilson suit was brought before the cause of action was barred. The fact that other suits were brought and dismissed before this can not operate to shorten the period of limitation. 93 Ark. 215; 245 Ill. 448; 92 N. E. 297; 16 R. I. 637; 19 Atl. 113.

The institution of the suit in the Federal Court by Wilson was as effective in stopping the running of the statute as if it had been brought in a State court. 72 C. C. A. 405, 418; 140 Fed. 385; 100 Fed. 146; 128 N. E. 80; 53 W. Va. 475; 57 Mo. 416; 106 Tenn. 28; 64 O. St. 26. The case is not taken out of the operation of the statute by reason of the transfer from Wilson to appellee. The right of action is preserved to those in privity with the plaintiff. 23 Ark. 684; 10 Ark. 184; 17 Ark. 533; 62 Kan. 193; 61 Pac. 745.

2. Issues not raised in the lower court will not be considered on appeal. 101 Ark. 95, 101; 96 Ark. 405, 409; 95 Ark. 593, 597; 94 Ark. 378; *Id.* 390, 392; 77 Ark. 27; 75 Ark. 312, 317; 74 Ark. 88.

The issues that the Wilson suits were fictitious, brought without authority and that there was no privity can not be urged here for the additional reason that appellants are precluded by the agreed statement of facts. 95 Ark. 389; 61 Ark. 521; 74 Ark. 133.

A delivery and acceptance at the time the Wilson suit was instituted are conclusively established by the record showing that the deed to him was recorded and by the agreed statement of facts showing that the land was conveyed to him and that he brought suit based on that deed. 94 U. S. 405; 61 N. Y. S. 363, 29 N. Y. Supp. 786; 58 Ill. 310, 11 Am. Rep. 67.

3. Defendants are not entitled to any improvements made after receipt of notification that the title would be contested. 65 Ark. 305, 312; 98 Ark. 320, 323; 29 Ark. Law. Rep. 382; 92 Ark. 173; 86 Ark. 368; 67 Ark. 184; 48 Ark. 183; 45 Ark. 410.

Appellee was entitled to rents for three years prior to the institution of the suit. Kirby's Dig., § 2756.

John L. Ingram and *Coleman & Lewis,* for appellants in reply.

The recording of a deed is only *prima facie* evidence of delivery which may be rebutted by attending circumstances. 154 Ill. 199; 95 Ill. 267.

The presumption of delivery from the recording of a deed by the grantor is overcome by proof that the grantee had no knowledge of it, and that the conveyance was not intended to vest any beneficial ownership in him. 3 N. H. 304: 57 S. W. 570; 37 Vt. 538; 68 Minn. 260; 19 Col. 371; 81 Ky. 513; 48 N. H. 268; Devlin on Real Estate (3 ed.) § 292.

McCULLOCH, C. J. Precisely the same questions are presented on these two appeals and the cases have been consolidated here and briefed together.

The plaintiff, W. N. Carpenter, instituted separate actions in the circuit court of Arkansas County, one against the defendants, Frank Dressler, H. Coleman and J. L. Ingram, to recover possession of a quarter section of land in that county, and the other against defendants, George Dressler, H. Coleman and J. L. Ingram, to recover possession of another quarter section of land.

Coleman died during the pendency of the actions and as to him the causes were revived in the names of his children.

On motion of defendants the causes were transferred to the chancery court and proceeded to final hearing there resulting in decrees in favor of the plaintiff for the recovery of each tract of land; but there was a reference to a master in each case to determine the value of the improvements placed on the lands by defendants and the rents and profits of the lands while occupied by them. The master made a finding, in one case, of the value of the improvements in the sum of $265 and rental value of the lands in the sum of $240, leaving a balance due the defendants in the sum of $25 for value of improvements over and above the rental value of the lands; in the other case the master found the value of the improvements to be $450 and rents to be $415, leaving a balance of $35 due the defendants for value of improvements over the rents and profits. There was a decree in each case for the defendants for recovery of the said respective amounts due, and possession was withheld until payment of those amounts should be made.

The defendants in each case appealed to this court from the decree in favor of the plaintiff for the recovery of the land; and the plaintiff has cross-appealed in each case challenging the correctness of the decree as to value of the improvements and amount of rents and profits.

Both of the tracts of land in controversy were patented to the State of Arkansas as swamp and overflow lands, and the plaintiff, W. N. Carpenter, acquired title to each tract during the year 1900 under *mesne* conveyances from the State. He conveyed said lands to one

A. E. Wilson by deed executed October 30, 1905; and said Wilson, by deed executed February 20, 1908, re-conveyed the lands to plaintiff.

The defendants in each case assert title under forfeitures to the State for non-payment of taxes and donation deeds executed by the Commissioner of State Lands to the defendants, Frank Dressler and George Dressler, respectively. They subsequently conveyed portions of the lands to the other defendants.

It is conceded that said forfeitures to the State were void; but the defendants pleaded the two-year statute of limitations by reason of adverse possession under said donation deeds, and the only question presented as to the title to the lands is that relating to the pleas of the statute of limitations.

The donation certifies to defendants, Frank and George Dressler, were issued April 4, 1901; but the donation deeds executed to them by the State Land Commissioner were dated April 23, 1904.

The plaintiff instituted separate actions against the two Dresslers on January 2, 1902, while they were holding their respective tracts of land under said donation certificates. During the pendency of those actions he executed the conveyances to Wilson, and on April 7, 1906, entered a voluntary non-suit in each of the actions.

On April 9, 1906, Wilson instituted separate actions against the same defendants in the United States Circuit Court for the Eastern District of Arkansas, to recover possession of said respective tracts of land, and dismissed the same without prejudice on May 4, 1907.

On the same day Wilson instituted new actions against the same defendants in the United States Circuit Court, and on April 3, 1908, dismissed the same without prejudice.

The present actions were instituted by the plaintiff, Carpenter, on March 16, 1908.

The two-year statute of limitations did not begin to run until the possession of the defendants began under

the donation deeds dated April 23, 1904. *McCann* v. *Smith,* 65 Ark. 305.

The first actions instituted by Wilson on April 9, 1906, were therefore within the period of limitation and arrested the operation of the statute. Those actions were dismissed without prejudice on May 4, 1907, and the present actions were commenced on March 16, 1908, less than one year thereafter.

The plaintiff, being the grantee of Wilson—therefore, in privity of estate with him—had the right to bring new actions within one year after the dismissal of the former actions. *James* v. *Biscoe,* 10 Ark. 184; *Biscoe* v. *Madden,* 17 Ark. 533; *Crow* v. *State,* 23 Ark. 684.

The present actions were instituted within one year after said dismissal but Wilson had in the meantime commenced new actions himself and dismissed them without prejudice. The governing statute reads as follows:

"If any action shall be commenced within the time respectively prescribed in this act, and the plaintiff therein suffer a non-suit, * * * such plaintiff may commence a new action within one year after such non-suit suffered." Kirby's Digest, § 5083.

In *Love* v. *Cahn,* 93 Ark. 215, construing that statute, we said: "But the statute which tolls the statute of limitations for one year where the plaintiff suffers a non-suit does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitation applicable to such claim. This provision of the statute only applies to those causes of action which, under the general statute of limitation applicable to such cause of action, would otherwise be barred before the running of one year from the time of taking such non-suit. The statute, instead of shortening the period of limitation, really extends the period provided by the general statute of limitation applicable to the cause of action."

It is insisted by learned counsel for defendants that the right to institute a new action within one year after

the dismissal of the former action, brought within the original period of limitation, must be limited to one action brought within that time. We do not, however, think that that is the proper construction of the statute. It is true that the statute reads that after the plaintiff suffers a non-suit he may commence "a new action within one year after such non-suit;" but this does not mean that he can only institute one action. The proper construction of it is that any action brought by him, or his privies in estate, within one year after the dismissal of the former action is not barred. This construction necessarily follows from our decision in *Love* v. *Cahn, supra,* and it must result in a decision now that the plaintiff's two causes of action are not barred.

It is further insisted that the deed of conveyance executed in 1905 by plaintiff to Wilson was colorable and was never in fact delivered to him until he executed the deed reconveying the property in 1908, just before the commencement of the present actions; that the original actions instituted by Wilson against these defendants were in fact commenced by plaintiff as attorney for Wilson without the latter's knowledge or authority, and were fictitious and can not be used to toll the statute of limitations. They base their contention on a statement in the deposition of Wilson that the deed was not delivered to him and that he did not know of the institution of said actions in the Federal Court but was afterwards informed thereof and ratified the same. Whether or not this testimony, if it be given the full force contended for by defendants, was sufficient to make the Wilson actions non-effective for the purpose of arresting the operation of the statute, we need not decide, for we are of the opinion that that question was not properly raised below, and can not be raised here for the first time. The plaintiff in each of his complaints set forth in detail his chain of title and the course of litigation with the defendants concerning the same. He alleged that he conveyed the property on the date named to Wilson; that Wilson re-conveyed to him on the date named, and that

said actions were instituted by Wilson and dismissed without prejudice. The defendants in their answer expressly admitted that the plaintiff had conveyed the lands to Wilson as charged in the complaint and that Wilson had instituted actions for the recovery of same from defendants. These same facts were agreed to in a joint stipulation filed in each of the causes, and must be treated as conclusive of the facts that plaintiff did convey the lands to Wilson and that the latter instituted the actions. *Evins* v. *Batchelor,* 61 Ark. 521.

As to the question of value of improvements and amount of rents and profits raised on the cross-appeal, our conclusion is that the decree should not be disturbed. The testimony is voluminous, and from the abstract of it made by the cross-appellant we are not convinced that the findings of the master and of the chancellor are against the preponderance of the testimony. The testimony of some of the witnesses places the value of improvements higher than the sums awarded by the master.

The master charged the defendants with rents for five years, being for the years 1908 to 1912, inclusive, and it is insisted that this was an obvious error for the reason that defendants should have been charged with the rent for two years prior to that time, which would have made three years before the commencement of the action. It is sufficient answer to this contention to say that the plaintiff himself does not seem to have asked for rents prior to the year 1908 and all of his testimony was directed to the rents for that and subsequent years. We are unable to find any evidence in the record, as abstracted, tending to show rental value of the lands for any year prior to 1908.

Upon the whole we are of the opinion that the decree of the chancellor in each case was correct and the same is in all things affirmed.

PRAIRIE CREEK COAL MINING COMPANY v. KITTRELL.

Opinion delivered March 31, 1913.

SUMMARY JUDGMENT AGAINST PRINCIPAL ON SUPERSEDEAS BOND—MOTION BY SURETY.—The surety on appellant's bond superseding a judgment of the circuit court, when the judgment is affirmed in the Supreme Court, and the surety paid the judgment, will not be given a summary judgment against the appellant for the amount paid by him. Express authority for a summary judgment must be found in the statute. Kirby's Digest, § § 1235, 4480, 7925, 7928, *held* not to grant such express authority.

Appeal from Sebastian Circuit Court; *Daniel Hon*, Judge; motion overruled.

Hill, Brizzolara & Fitzgerald, for the surety.

Read & McDonough, for appellant.

PER CURIAM.

Appellant gave a *supersedeas* bond, and the judgment was affirmed. *Prairie Creek Coal Mining Co.* v. *Kittrell*, 106 Ark. 138.

The surety on the *supersedeas* bond now moves this court for summary judgment against appellant, alleging that the amount of the affirmed judgment has been paid by said surety.

The question arises whether or not this court has authority to render such judgment.

The only statute which in express terms authorizes this court to render summary judgment on a *supersedeas* bond only provides for judgment against the sureties. Kirby's Digest, § 1235.

The statute now relied on by the moving party is taken from the Civil Code and reads as follows:

"Judgments and final orders may be obtained, on motion, by sureties against their principals; sureties against their co-sureties, for recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in executions against sheriffs, constables and other officers, for the recovery of money or property collected for them and damages, and in all other cases specially authorized by statute." Kirby's Digest, § 4480.

Succeeding sections specify the length of notice to be given and the form thereof, and the time when the motion will be presented. There is no specification in the statute as to the court wherein the motion shall be presented. The Digestors have, since the enactment of this statute, incorporated in the same chapter of the Digest the Act of January 15, 1857, having reference to summary judgments against sheriffs, coroners, constables and clerks for failure to pay over money and other delinquencies.

This court in *Milor* v. *Farrelly,* 25 Ark. 353, held that a proceeding against a sheriff under the Act of 1857 must be prosecuted in the county where the sheriff and the sureties on his bond reside, and not in the county where the original judgment was rendered.

Other provisions found in chapter 137 Revised Statutes, concerning the rights of sureties against principals and against co-sureties, are brought forward into the Digest. Kirby's Digest, §§ 7924-7929.

Section 7925 provides that, when payment shall be made by a surety in money, he may "recover the same, with interest, in an action for so much money paid to the use of defendant."

Section 7928 provides that where "judgment is given in any circuit court upon any bond, bill or note, for the payment of money or the delivery of property against the principal debtor and sureties therein, and such surety shall pay the judgment, or any part thereof, he shall be entitled, upon motion, to judgment in the same court against the principal debtor for the amount he is entitled to recover."

It is unnecessary for us to determine the relation between these various sections of the statutes. Suffice it to say that there is, as before stated, no statute which, in express terms, authorizes this court to render summary judgment in such cases, and the above-quoted statute taken from the Civil Code can not be construed as giving that authority.

This court held in *Milor* v. *Farrelly, supra,* that the

summary remedy conferred by statute is in derogation of the common law and must be strictly construed. Therefore, express authority must be found in the statute before the power can be exercised.

Whether the rendition of such judgment would be the exercise of original jurisdiction, which is beyond the power of the Legislature to impose upon this court, we need not decide. But in the absence of express statutory authority the court finds itself unauthorized to render summary judgment. Motion overruled.

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

Opinion delivered March 17, 1913.

1. RELEASE—INCAPACITY TO CONTRACT.—It is no defense to an action for damages for personal injuries that plaintiff executed a release to the defendant without any fraud practiced on the plaintiff, if the plaintiff was incapable of understanding what she was doing. (Page 366.)
2. RELEASE—FRAUD—BURDEN OF PROOF.—The burden of proof is upon plaintiff to show that a release executed by her was obtained by fraud or misrepresentations. (Page 367.)
3. PLEADING—COMPLAINT—AMENDMENT.—When plaintiff without leave of the court marked out with a pencil a portion of the complaint, the action of the court in refusing to permit defendant's counsel to read such portion to the jury in his opening statement, is equivalent to granting permission to plaintiff to amend her complaint by striking out that portion of it, and the portion stricken out is no longer a part of the pleadings. (Page 367.)
4. TRIAL—OPENING STATEMENT—FACTS STATED IN THE PLEADINGS.—The object of the opening statement is to get the issues and facts the parties expect to prove before the jury; and facts stated in the pleadings and read in the opening statement, except so far as admitted, can not be considered by the jury save when proved by competent testimony. (Page 367.)
5. EVIDENCE—ADMISSIONS IN PLEADINGS.—A plaintiff is not conclusively bound by statements in her complaint, and they are subject to explanation. If counsel for defendant desired to contradict plaintiff by any statement made in her complaint, the complaint should have been offered in evidence for that purpose. (Page 368.)

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

Thos. B. Pryor, for appellant.

1. In withdrawing instruction 3 from the jury the court eliminated one of appellant's main defenses, *i. e.,* the release, and in his remarks to the jury the court eliminated the essential element to avoid the release, the question of fraud, and in effect told the jury that no matter if the claim agent was acting in good faith yet the release would not be binding upon appellee unless she had sufficient intelligence to understand the nature of the release. 87 Ark. 614; 136 Fed. 118.

2. It was error to refuse to permit appellant to read to the jury, in his opening statement, a portion of the complaint which had been marked out with a pencil, no leave having been granted by the court to amend the complaint by striking out such portion thereof.

Trimble & Trimble, for appellee.

1. The jury could not have been misled by the instruction of the court in withdrawing instruction 3. They were specifically directed to consider in connection with the corrected instruction all the others given, and instructions 8 and 9 given at appellant's request fully covered the question of fraud. 105 Ark. 467.

2. The part of the complaint counsel sought to read was marked out as he admits. It was not a part of the record and it could have served no legitimate purpose to read it to the jury.

HART, J. Appellee instituted this action against appellant to recover damages for injuries alleged to have been received by her, through appellant's negligence while alighting form one of its passenger trains. This is the second appeal. On the former appeal the judgment was reversed for the error of the court in giving certain instructions. The opinion on that appeal is reported in 30th Arkansas Law Reporter, page 471, and reference is made to it for a more extended statement of the issues involved. There was a verdict and judgment

in favor of appellee in the court below and the appellant has duly prosecuted an appeal to this court.

The answer of appellant, among other things, alleges that after appellee received her injury, in consideration of the sum of five dollars paid to her, by an instrument in writing, she released and discharged the appellant from all claims and demands by reason of the injuries alleged in her complaint.

The principal ground relied upon for a reversal of the judgment by counsel for appellant is that the court erred in its instructions on the question of release. On this question the court, at the request of appellant, gave the following instructions:

"3. If you find from the evidence that there was a compromise settlement between the plaintiff and one of the defendant's agents and that there was no fraud or misrepresentation on the part of the agents of the railroad company in obtaining the release executed by the plaintiff, then your verdict should be for the defendant, although you may find from the evidence that her injuries were more serious than she thought them to be at the time."

"6. The law does not undertake to act as a guardian of persons of full age nor to protect them from the consequences of improvident contracts. The question for you to determine in relation to the release executed by the plaintiff at the time she signed same is whether she had sufficient mental capacity to understand the nature and consequences of her act. If she did, then such settlement is binding upon the plaintiff, and she can not recover, and your verdict must be for the defendant."

"8. If you believe from the evidence that the plaintiff accepted five dollars from the agent of the railway company, knowing that the amount was paid to her in consideration of the injuries that she had received, and that she accepted the same with understanding and there was no fraud or misrepresentation used in obtaining the settlement from her, then your verdict should be for the defendant."

"9. The court instructs you that the draft and release which was signed by plaintiff, although by her mark and witness, is *prima facie* evidence of the fact that the settlement was made and the burden of proof is upon the plaintiff to establish that said settlement and release was obtained by fraud or misrepresentation on the part of the defendant's agent, and unless the evidence shows this by a preponderance thereof, then it is your duty to return a verdict for the defendant." Subsequently the court said:

"Gentlemen of the jury, this instruction will be withdrawn: 'If you find from the evidence that there was a compromise settlement had between plaintiff and one of defendant's agents and that there was no fraud or misrepresentation on the part of the agents of the railroad company in obtaining the release executed by the plaintiff, then your verdict should be for the defendant, although you may find from the evidence that her injuries were more serious than she thought them to be at the time.'

"You are not to be governed by that instruction. I overlooked the fact that it said if he practiced no fraud upon her that you should find for the defendant. Even if he practiced no actual fraud, if she was incapable of understanding what she was doing and he knew of that fact, still she would be entitled to recover. Take all the other instructions, together with this correction, I have made as the law in this case."

The action of the court in this regard was assigned as error. It is settled by the opinion in the former appeal in this case and by the case of the *St. Louis, Iron Mountain & Southern Railway Company* v. *Brown,* 73 Ark. 42, that a release of damages for personal injuries may be disregarded by the jury in an action to recover damages for injuries if it appears that it was executed by the plaintiff at a time when his physical or mental condition was such that the jury might find that the party executing the release was incapable of appreciating the character of the instrument and the consequences of ex-

ecuting it. In the instant case appellee was an old woman, being seventy years of age. She could neither read nor write. She was very illiterate and had never transacted any business whatever prior to the time she executed the release. She was approached on the next morning after the injury while, as the jury might have inferred, she was still in a nervous condition, by the claim agent of the appellant and asked to sign a release for the injury she had received. She was carried into the depot and after a short conversation with appellant's agent executed the release in question. She was only there a short time, and her testimony as to what occurred is set out at length in the record. We do not deem it necessary to set it out here. It is substantially the same as on the former appeal, which we held sufficient to send the case to the jury. She testified before the jury. They had an opportunity to judge of her mental condition by observing her demeanor and manner while testifying on the witness stand and the manner in which she answered the questions asked her and, when these matters are considered, we think the jury was warranted in finding that appellee did not understand that the instrument she signed was a release of her claim for personal injuries.

The court in instructions numbered 6, 8 and 9, properly instructed the jury on the question of obtaining the release by fraud or misrepresentation and, under the principles of law announced in the above mentioned cases, the court did not err in modifying instruction numbered 3, by telling the jury that if she was incapable of understanding what she was doing when she signed the release she would be still entitled to recover.

When instruction No. 6 given to the jury at the request of the appellant is considered in connection with the modification made to instruction No. 3, it will be seen that there is no material difference between them.

It is next urged by counsel for appellant that the court erred in not permitting him in his opening statement to the jury to read a certain portion of the complaint which had been marked out with a lead pencil.

He contends that the record shows that there was no leave of the court to amend the complaint by striking out the words in question.

In regard to this it may be said that counsel admits that the portion of the complaint referred to was marked out and the action of the court in refusing to permit counsel to read this portion of the complaint to the jury in his opening statement was equivalent to granting permission to appellee to amend her complaint by striking out that portion of it.

While it is true that the case is ordinarily opened by reading the pleadings, the facts stated in the pleadings, except so far as admitted, could not be considered by the jury until proved to be competent testimony. Thompson on Trials, 2 ed., Vol. 1, par. 260. The object of the opening statement is to get before the jury the nature of the issues to be tried and what each party expects to prove in order to sustain the action or defense, as the case may be. Appellee was not conclusively bound by these statements made in her complaint. They were subject to explanation. If counsel for appellant desired to contradict appellee by any statement made in her complaint, the complaint should have been offered in evidence for that purpose. *Valley Planting Co.* v. *Wise,* 93 Ark. 1.

After the court permitted appellee to amend her complaint by striking out that portion of it referred to, it was no longer a part of the pleadings, and the court did not err in refusing to allow it to be read to the jury by counsel for appellant while making his opening statement.

The judgment will be affirmed.

HOLDRIDGE v. MCKEWEN.

Opinion delivered March 17, 1913.

1. MASTER—REFERENCE—APPOINTED BY CONSENT—CONCLUSIVENESS OF REPORT.—Where a master is appointed with the consent of the parties to a suit in equity, his findings of fact have the same conclusiveness as the verdict of a jury. (Page 372.)

2. APPEAL AND ERROR—CONCLUSIVENESS OF MASTER'S FINDINGS.—When there is no reference to a consent master of questions of law, the parties are not bound by his conclusions of law. (Page 372.)

3. PARTNERS—MAY VARY TERMS OF AGREEMENT—Partners may make variations in the terms of their agreement after the partnership has been entered into. (Page 372.)

4. PARTNERSHIP—AGREEMENT—CONSIDERATION—MUTUAL PROMISES.—The mutual covenants and promises of partners are a sufficient consideration to support the terms of their agreement. (Page 373.)

5. PARTNERSHIP—VARYING TERMS OF AGREEMENT—CONSIDERATION.—When partners are doing a business upon a cash basis, and they agree to vary their course of dealing by defendant's taking notes for the purchase price on the sale of stock, he agreeing to pay plaintiff the cash later, and it was agreed that plaintiff should not be charged with any losses due to bad debts. *Held*, the change in the course of dealing and the adjustment of the differences of the partners in regard to making sales on time was a sufficient consideration to support the agreement, that plaintiff should not stand any of the loss, and the same was a valid and enforceable agreement between the parties. (Page 373.)

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

John L. Ingram and *Powell Clayton,* for appellant.

The master having been appointed by consent of parties, his findings of fact are conclusive, but his conclusions of law are not binding, and, if erroneous, will be set aside. 74 Ark. 336.

The conversation in the mule pen at Stuttgart, more than a year after the partnership was entered into, did not amount to a contract, but was a mere conference between the partners as to the advisability of pursuing a course which either party could pursue without authority from the other.

There was no consideration to support a contract on the part of appellant to stand the losses on sales made on time. It is a question of law as to what constitutes a sufficient consideration. 8 Humph. (Tenn.) 697.

J. M. Henderson, for appellee.

1. The conversation between the parties at the mule pen amounted to a contract, the effect of which was, that

as to McKewen, appellant took the notes in lieu of cash and used McKewen's part of the money until the succeeding fall. The benefits to Holdridge in receiving interest on the notes and in the use of McKewen's part of the profits constituted a sufficient consideration for the contract. 124 N. Y. 538, and authorities cited.

2. The master's findings were even more favorable to the appellant than the testimony would warrant; but, being a consent referee or master, his findings have the weight of a verdict of a jury. 92 Ark. 362, 363; 101 Ark. 15, 16.

3. Appellant's exceptions to the master's report, on the grounds (1) that said report is contrary to law, and (2) is not sustained by the evidence, are too indefinite and uncertain to merit consideration. 16 Cyc. 451, 452; 35 S. W. 762; 129 Mass. 517; 21 D. C. 128; 43 Ill. App. 611; 106 N. C. 107; 12 Mich. 314; 48 W. Va. 639; 37 S. E. 526.

HART, J. L. W. Holdridge and C. P. McKewen were partners dealing in live stock. They formed a partnership in the beginning of the year 1907. Holdridge agreed to furnish the money with which to purchase the live stock and to aid in buying and selling he same. McKewan was to purchase and aid in the purchase and sale of stock and care for same while in his control. The expense of feeding and caring for the stock while in McKewen's possession and of getting them to market was to be borne equally by the partners and the profits were to be divided equally. The partnership continued until sometime in the year 1909, and during this time the firm bought and sold 391 hogs, 372 cattle and 96 head of mules and horses.

McKewen instituted this action in the chancery court against Holdridge for a settlement and accounting of the affairs of the partnership. He alleges that Holdridge was to take care of the account of sales and that the account between the partners is long and complicated and that they were unable to agree upon a settlement and adjustment of the partnership accounts. By agreement

of the parties, J. W. Allen was appointed master to state an account between them. The master proceeded to take testimony and made a detailed statement of the account between the parties and his finding thereon. He found that Holdridge was indebted to McKewen in the sum of $707, and so reported to the chancellor. The chancellor confirmed the report of the master, and a decree was entered accordingly. Holdridge has appealed.

The principal exception to the account of the master upon which Holdridge relies for a reversal of the decree is that the master found that Holdridge should be charged with the losses on certain uncollected notes which were taken in payment of horses and mules sold by the firm. In regard to this item, McKewen testified:

"Mr. Holdridge came to me there in the mule pen at Stuttgart, at his house, and said to me that we could sell the mules at a better price if we could sell them and take notes, but he did not want to sell them on time and pay my part in cash. I told him if he would take the notes approved that I would wait till fall for my money. He did take the notes, and said all right."

McKewen further testified: I told Holdridge I could carry the notes, but if he wanted to take the notes and pay me in the fall I would wait. Holdridge agreed to pay me in the fall my share of the amount of the sale price of the mules, and my share was not dependent upon the collection of the notes given for the purchase price of the mules. Holdridge took these notes payable to himself individually with the exception of two or three notes which I took and made payable to him. He did not object to the security taken by me. Holdridge sued on one of these notes in his own name. Holdridge sold some of the mules to share croppers on his farm. The agreement was that Holdridge was to pay me in the fall, and I did not look to the collection of the notes for my money. The notes bore interest from the date they were executed.

John McGahhey testified: I was present and heard the agreement between Holdridge and McKewen in regard to the sale of some of the mules on time. Holdridge

told McKewen that it would be a quicker sale but he did not feel like paying him money on the notes at that time. McKewen replied that if Holdridge would approve the notes and take them he would wait until next fall for his money. Holdridge agreed to this and several of the mules were sold on time. Notes for their purchase price were given to Holdridge and he approved them. The agreement was made in December, 1908, and the parties had reference to the fall following. Holdridge was to pay McKewen his part of the money in the fall of 1909.

Holdridge testified for himself, and denied that he made any such agreement with McKewen. He said that the notes were taken in his name because he handled the sale end of the business. It is conceded by Holdridge that the master was appointed at the request and with the consent of the parties, and that his findings of fact have the same conclusiveness as the verdict of a jury or the findings of fact of a court sitting as a jury. See *McDonald* v. *Kenny,* 101 Ark. 15; *Carr* v. *Fair,* 92 Ark. 362. It is contended, however, by Holdridge that there was no express reference to the master of questions of law and, therefore, the parties are not bound by his conclusions of law. See *McVeigh* v. *Chicago Mill & Lumber Co.,* 96 Ark. 480. Therefore, Holdridge insists that, even if it be taken as established by the findings of the master that the agreement in question was made, such agreement was without consideration and had no binding force. We can not agree with his contention. It is true that the same rules of construction apply to agreements between partners as in other cases and that such agreements must be founded upon some consideration. When the partnership is formed the mutual covenants and promises of the partners with respect to the common enterprises are regarded as constituting a sufficient consideration. Gilmore on Partnership, page 89; Bates on the Law of Partnership, Vol. 1, § 2; George on Partnership, page 17.

It is well settled that the partners may make variations in the terms of their agreement after the partner-

ship has been entered into. *Hall* v. *Sannoner*, 44 Ark. 34.

Prior to the agreement in question the business of the partnership had been conducted on a cash basis. Neither of the partners had any right to change this course of dealing against the will of the other. Holdridge desired to make the change and McKewen opposed it. In order to settle their differences in this respect they made an agreement that McKewen should not be charged with any losses that might result from selling the mules on time, and the general rule that all partners must bear equally the losses does not prevail where the liability of one of them is limited in that respect by express agreement. The change of their course of dealing and the adjustment of their differences in regard to selling the mules on time was a sufficient consideration for the agreement.

Moreover, the testimony shows that the agreement was made in December, 1908, and McKewen was not to be paid until the fall of 1909. The notes given for the mules bore interest from date and, under the terms of the agreement, Holdridge was to receive this interest. Therefore, we hold that the agreement between the partners that McKewen should not be charged with the losses resulting from bad debts in the sale of the mules was founded upon a sufficient consideration, and is a valid and enforceable agreement between the parties. See *Hall* v. *Sannoner*, *supra*.

It is finally insisted by Holdridge that the findings of the master are without evidence to support them. As we have already seen, the appointment of the master having been made by the consent of the parties and on their motion, his findings are conclusive upon questions of fact and are as binding as the verdict of a jury. The testimony in the case stating the accounts between the parties is voluminous and complicated. The report of the master shows that he carefully considered the evidence in all its details and that his report was made after a close and painstaking consideration of the evidence.

No useful purpose could be served by setting out the evidence at length and making extended comments thereon. We deem it sufficient to say that the findings made by the master are supported by the evidence and, under the rule above announced, will not be disturbed upon appeal.

The decree will be affirmed.

WOLF & BAILEY v. PHILLIPS.

Opinion delivered March 17, 1913.

1. TAX SALE—NOTICE.—The giving of notice is a prerequisite to a valid sale of land for taxes, and when notice is not given in substantial conformity with the statute the sale will be adjudged invalid, notwithstanding a tax deed in proper form may have been duly executed. (Page 378.)
2. STATUTES—RULE OF CONSTRUCTION.—Statutes relating to a subject must be considered as a whole and to get at the meaning of any part thereof, it must be read in the light of other provisions relating to the same subject. (Page 379.)
3. TAXATION—TAX SALE—ADVERTISEMENT.—Where a county has two judicial districts a tax sale will be held invalid when the land lies in one judicial district, and is advertised for sale in a newspaper published in the other judicial district of the said county, under Act No. 313, Acts of 1905, p. 755, which provides, "that hereafter delinquent lands in counties having two judicial districts shall be advertised and sold in the district to which the land lies," when read in the light of § 4923 and § 7085 of Kirby's Digest. (Page 379.)
4. EJECTMENT—PLEADING—DOCUMENTARY EVIDENCE—WAIVER OF OBJECTIONS.—When plaintiff, in an ejectment suit, bases his right of recovery wholly upon the invalidity of the tax sale under which defendant claims, and alleges such invalidity in his complaint, the allegations continue to be a part of the pleadings after the answer is filed, and the complaint will be held to be a substantial compliance with § § 2743 and 2744, of Kirby's Digest, which provide in effect that unless plaintiff in an ejectment suit, shall within three days after the filing of the answer, file exceptions to any documentary evidence exhibited by the defendant, all objections to such evidence shall be deemed waived. (Page 380.)
5. LIMITATIONS—TAX TITLES.—The two years' statute of limitations as to tax titles runs from the date of the tax deed executed by the clerk. (Page 381.)

6. EJECTMENT—BASIS OF RECOVERY.—In an action in ejectment, plaintiff must recover upon the strength of his own title. (Page 381.)

7. ADVERSE POSSESSION—PROOF OF.—When the evidence is indefinite and uncertain, plaintiff will not be held as a matter of law to have obtained title by adverse possession. (Page 381.)

Appeal from Lawrence Circuit Court, Western District; *R. E. Jeffery,* Judge; reversed.

STATEMENT BY THE COURT.

This is an action of ejectment instituted in the circuit court by Wolf & Bailey against Carrie D. Phillips to recover the following lands situated in the Western District of Lawrence County, Arkansas, towit:

The west half of the southeast quarter and the southeast quarter of the southwest quarter of section 2, township 17 north, range 3 west.

The lands in controversy in this case were patented by the United States Government to John Gibbons in 1859. In 1887 these lands were sold to Jesse Gibbons for the non-payment of the taxes of 1886, and in 1889, tax deeds therefore were duly executed to him. Jesse Gibbons at once took possession of the land under said tax deeds. He began to improve them and lived on them from that time until he died in 1890. At the time of his death he left surviving him his widow and one child who remained in possession of the lands. His widow lived on the lands until she married again in about 1895. When his widow married she conveyed her interest in the lands to her daughter. Her daughter still remained on the land and continued in the possession of same until she sold it to the plaintiffs, Wolf & Bailey, in 1901. The plaintiffs at the time of their purchase took possession of the land and through their agent, G. G. Dent, rented the land to various parties until the year 1908; at which time they rented the lands to W. G. Goff who entered into possession as their tenant and remained in possession of them until March, 1910. The lands were sold in 1906 for the non-payment of taxes of 1905, and H. F. Sloan became the purchaser at the tax sale. On August

25, 1909, a tax deed was executed to him for a part of said land, and on August 28, 1909, a tax deed was executed to him for the rest of said land. On November 23, 1910, Sloan conveyed the lands to the defendant, Carrie D. Phillips. Sloan paid the taxes on the land for the years 1906, 1907 and 1908. Carrie D. Phillips took possession of the lands on the 11th day of November, 1910. The lands were advertised for sale for the non-payment of taxes for the year 1905 in a newspaper published in the Eastern District of Lawrence County, but which had a *bona fide* circulation in the Western District of said county, in which said lands were situated. A newspaper was published and had a *bona fide* circulation in the Western District of Lawrence County during the year 1906.

This suit was commenced on the 17th day of August, 1911. The plaintiffs introduced evidence tending to show that they remained in possession of these lands through their tenants until in March, 1910. On the other hand the defendant introduced evidence tending to show that the plaintiffs had not been in possession of the land since the spring of 1909. At the trial of the case the court made an order dismissing the cause of action of the plaintiffs as to part of the lands because of their failure to file affidavit of tender of taxes. But on the next day, at the same term of the court, said order was set aside and the case proceeded to trial and was heard as to all the lands embraced in the complaint. The circuit court held that the advertisement of the lands in a newspaper published in the Eastern District of Lawrence County and having a *bona fide* circulation in the Western District of said county was a valid advertisement for the sale of lands situated in the Western District of Lawrence County, for the non-payment of taxes. It therefore directed a verdict for the defendant and from the judgment rendered the plaintiffs have appealed.

G. G. Dent and Samuel Frauenthal, for appellants.

1. Continuous and adverse possession for more than two years under the tax deed to Jesse Gibbons, even

if it was void, confers a valid title. 79 Ark. 364; 59 Ark. 460; 60 Ark. 499; *Id.* 153; 76 Ark. 447; 77 Ark. 325.

2. As to the Sloan tax title, appellants are not barred from attacking its validity, since this court has uniformly held that the statute limiting the time for testing the validity of a tax sale does not cut off any meritorious defense to an invalid tax deed. 46 Ark. 96; 53 Ark. 204; 55 Ark. 192; 61 Ark. 36. Failure to comply with some statutory requirement, which failure tended to deprive the landowner of a substantial right, is a meritorious defense not cut off by the statute.

The notice of sale of lands for non-payment of taxes for the year 1905, was not given in the manner required by statute. Lawrence County being divided into two judicial districts, a notice of sale for non-payment of taxes on lands situated in the Western District thereof in a newspaper published in the Eastern District, is not a compliance with the statute, notwithstanding such paper may have a *bona fide* circulation in the Western District. Acts 1905, p. 755; 98 Ark. 327. The publication, to be legal, must be in conformity with section 7085 of Kirby's Digest with the exception that as to the newspaper it must be in the district in which the land lies. See also Kirby's Dig., § 4923; 96 Ark. 274.

W. A. Cunningham, for appellee.

1. The Jesse Gibbons title is void because the notice of sale was first published but ten days prior to the date of sale. Kirby's Dig., § 7085; 68 Ark. 426. Void also because the certificate does not affirmatively show that the list and notice were recorded prior to the day of sale. Kirby's Dig., § 7086; 74 Ark. 584; 79 Ark. 580; 87 Ark. 360.

2. Appellants should not be permitted to avail themselves of the statute of limitation by two years adverse possession under the deed. The statute, to be available must be specially pleaded. 77 Ark. 382; 96 Ark. 1.

3. The advertisement of the tax sale under which appellee claims was sufficient; but appellants having

failed to comply with the statute with reference to filing exceptions to documentary evidence exhibited by the defendant, Kirby's Dig., §§ 2743, 2744, should be held to have waived all objections to the tax deeds under which appellee claims. 73 Ark. 221.

As to the publication, the case in 98 Ark. 337 relied on by appellants does not support appellant's contention. See Kirby's Dig., § 7085.

HART, J., (after stating the facts). Among other prerequisites to a valid sale of land for taxes is the giving of notice thereof, and when it is shown that such notice has not been given in substantial conformity with the statute the sale will be adjudged invalid, notwithstanding a tax deed in proper form may have been duly executed. Cooley on Taxation, 3 ed., Vol. 2, par. 928; Black on Tax Titles, 2 ed., § 205; Blackwell on Tax Titles, 5 ed., Vol. 1, § 400.

The principal question for our determination is, was the notice of the sale of the land for the non-payment of taxes for 1905 given in the manner required by the statute?

Lawrence County is divided into two judicial districts. The land was situated in the Western District and the advertisement of sale for the non-payment of taxes was made in a paper published in the Eastern District but which had a *bona fide* circulation in the Western District. The record shows that the lands in question were advertised in 1906 and that during that year a newspaper was published in the Western District of Lawrence County and had a *bona fide* circulation therein. The determination of the question depends upon the construction of sections 4923 and 7085 of Kirby's Digest, and the Act of May 6, 1905 (Acts 1905, page 755). By section 4923 Kirby's Digest it is provided:

"All advertisements and orders of publication required by law * * * shall be published in some newspaper published and having a *bona fide* circulation in the county in which the proceedings are had to which such advertisement or publication shall pertain."

Section 7085 is as follows:

"The clerks of the several counties of this State shall cause the list of the delinquent lands in their respective counties, as corrected by them, to be published weekly for two weeks, between the second Monday in May and the second Monday in June in each year. Such list of delinquent lands shall be published in some newspaper of the county, if any be published therein; if not, in some newspaper published nearest to said county having a circulation in such county. He shall also keep posted up or in or about his office such delinquent list for one year."

The Act approved May 6, 1905 (Act. 313, p. 755), provides:

"That hereafter the delinquent lands in counties having two judicial districts shall be advertised and sold in the district in which the land lies."

The question was raised, but not decided, in the case of *Lee Wilson & Company* v. *Driver,* 98 Ark. 337, other questions being decisive of the case. In that case, however, the court did hold that the provisions of the Act were intended for the benefit of taxpayers and owners and are mandatory. It is a settled rule of statutory construction that statutes relating to a subject must be considered as a whole and to get at the meaning of any part thereof we must read it in the light of other provisions relating to the same subject.

By section 7085 of Kirby's Digest it is provided that the list of delinquent lands shall be published in some newspaper of the county, if any be published therein and, if not, in some newspaper published nearest said county having a circulation in said county. It was the evident and declared purpose of the Legislature by this section to compel the publication of the list of delinquent land in some newspaper printed in the county. To publish the delinquent list in a paper published in another county, but having a *bona fide* circulation in the county in which the land was situated, would not be a compliance with the statute. When the Act of 1905, above quoted,

is read in the light of the previous acts on the subject it is manifest that the purpose and intention of the Legislature was to treat counties having two judicial districts as separate counties so far as the provisions of the Act are concerned. When this is done the Act of May 6, 1905, requires that the notice of sale of delinquent lands shall be published in a newspaper printed in the district in which the lands are situated. This construction, we think harmonizes all the provisions of the statute above quoted and referred to.

It follows, therefore, that the tax sale to Homer Sloan was void.

Finally it is insisted by counsel for the defendant that the judgment should not be reversed because the plaintiffs failed to comply with sections 2743 and 2744 of Kirby's Digest, which provide in effect that unless the plaintiff in an ejectment suit shall within three days after the filing of the answer file exceptions to any documentary evidence exhibited by the defendant, all objections to such evidence shall be deemed waived. We can not agree with his contention in this respect. The plaintiffs in their complaint alleged that the defendant claimed the land under and by virtue of a pretended purchase of said land made by H. F. Sloan at a tax sale held in the Western District of Lawrence County in 1906 for the nonpayment of taxes of 1905, and that said sale is invalid. Thus it will be seen that the plaintiffs base their right to recover wholly upon the invalidity of this tax sale; and the allegations continued to be a part of the pleadings after the answer was filed. We think then the allegations of the complaint were a substantial compliance with the provisions of the statute just referred to.

The defendant claims under two tax deeds executed to Sloan. One of them was executed on August 25, 1909, and the other on August 29, 1909. The complaint in this case was filed on August 17, 1911, and summons was issued and served on the same day. It will be seen, therefore, that two years had not elapsed between the execution of the two tax deeds to Sloan and the com-

mencement of this action. In the case of *Harvey* v. *Douglass,* 73 Ark. 221, the court held that the two years statute of limitations under a tax deed contemplates possession under the tax deed and not under the tax certificate. Again in the case of *Haggart* v. *Ranney,* 73 Ark. 344, the court held that the two years statute of limitations runs from the date of the tax deeds executed by the clerk.

But it is well settled that the plaintiffs must recover upon the strength of their own title. It is conceded by counsel for plaintiffs that the tax sale to Jesse Gibbons, their grantor, was invalid, and that the tax deeds obtained by him thereunder were void. They claim, however, that even though the tax deed was void, they have obtained title by adverse possession, and that the undisputed evidence shows this fact. We can not agree with them in this contention. The proof in this respect is too indefinite and uncertain, to say, as a matter of law, that the plaintiff's have acquired title by adverse possession. Besides, additional testimony might be procured on a retrial of the case and, inasmuch as the judgment must be reversed and the cause remanded, we think it the better practice to grant a new trial instead of reversing the judgment and remanding the cause with directions to the lower court to enter a judgment for the plaintiffs. It follows that the judgment must be reversed because the court erred in directing a verdict for the defendant, and the cause will be remanded for a new trial.

KING v. McDOWELL.

Opinion delivered March 24, 1913.

1. STATUTES—IMPLIED REPEAL.—A general act will be held to repeal a prior special act, when the general act takes up the subject anew and covers the whole subject-matter included in the special act, and it is evident that there is an intention manifested by the Legislature to make the new act contain all the law on the subject. (Page 384.)

2. SPECIAL SCHOOL DISTRICTS—CONSOLIDATION.—Act 116 of the Public Acts of 1911, which provides for the holding of an election to

decide the question of the consolidation of school districts, repeals Act 289 of the Acts of 1909, which provided for consolidation by order of the county court. (Page 385.)

3. STATUTES—ENACTING CLAUSE.—Where the enacting clause of an act of the General Assembly is, "Be It Enacted by the People of the State of Arkansas," the act is valid, the enacting clause being a substantial compliance with section 18, article 5, of the Constitution, and a substantial compliance being sufficient. (Page 385.)

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

Fink & Dinning, for appellants.

The attempted consolidation was ineffectual for two reasons:

1. Act 289 of Acts of 1909, is void for uncertainty.

2. It was repealed by Act No. 116 of Acts of 1911 by implication. It is a general act, comprehensive in its scope, and covers the whole subject. 105 Ark. 77; 80 Ark. 411; 97 U. S. 546; 88 Ark. 324.

Moore, Vineyard & Satterfield, for appellees.

The former act was not repealed by the latter. There is no special repeal and no repugnancy in the two acts. 92 Ark. 270; 28 *Id.* 325; 41 *Id.* 151; 50 *Id.* 127; 53 *Id.* 504. Repeals by implication are not favored. 101 Ark. 238, 71 *Id.* 135; 72 *Id.* 119; 84 *Id.* 329. A general statute will not repeal a special act where there is no express repeal, and no invincible repugnancy between the two. 93 Ark. 621.

HART, J. Twenty-eight residents of School District No. 11, of Phillips County, filed a petition in the county court of said county, asking that said school district be annexed to Marvell Special School District.

The petitioners represented to the court that the proposed annexation of School District No. 11 with the Marvell Special School District was for the purpose of securing better educational advantages for their children. Twenty-five other residents of School District No. 11 duly filed their remonstrance to the petition. They objected to the annexation because they allege that the annexation would place them so far away from the school-

house as to practically deny them any benefit from the common schools of the county.

The county court upon the hearing of the cause, made an order for the annexation of said School District No. 11, of Phillips County, to Marvell Special School District. It was further ordered that the treasurer of Phillips County transfer all the funds to the credit of said School District No. 11 to the account of said Marvell Special School District. Upon appeal to the circuit court, judgment was again rendered annexing said School District No. 11 to said Marvell Special School District.

To reverse the judgment of the circuit court, this appeal is prosecuted. The proceedings for the consolidation of the two districts were had under Act No. 289 of the Acts of 1909.

Hence the decision of the issue raised by the appeal depends upon whether or not Act No. 289 of Acts of the General Assembly of 1909 was repealed by Act No. 116 of Acts of the General Assembly of 1911. Act No. 289 is a special act applicable to Phillips County only. The act is as follows:

"Section 1. That the county court of Phillips County shall have the power to change and consolidate any school district or districts in the county, *provided*: That before it shall assume jurisdiction to make such change or consolidation, there shall be published in a newspaper published in the county a notice of such proposed change or consolidation for thirty days before acting thereon.

"Section 2. That any resident of the district or districts to be affected by such change, or consolidation, shall have the right to object thereto, by making himself a party to the proceedings, and an appeal shall lie from a decision of the county court to the circuit court, in the same manner as is now provided for appeals in other cases from the county court." See Acts of 1909, p. 887.

Act No. 116 is an act to provide for the consolidation of adjacent school districts and prescribing the powers and duties of such consolidated districts. See General

Acts of 1911, page 81. Sections numbered 1 and 2 of the act are as follows.

"Section 1. Any two or more school districts in this State may be organized into and established as a single consolidated school district in the manner and with the powers hereinafter specified.

"Section 2. The board of directors of each school district proposing to enter into the consolidation may, and, upon the written petition of 10 per cent of the electors of the district shall, at any annual election, or at a special election to be held for that purpose, which special election shall be held not less than thirty nor more than sixty days from the date of the presentation of the petition, submit the question of consolidation of the electors of the district."

The act contains sixteen sections and fully and specifically prescribes the manner of the consolidation of adjacent school districts and the powers and duties of such consolidated districts. The general act takes up the subject anew and covers the whole subject-matter embraced by the special act. It is evidenced that there was an intention manifested by the Legislature to make the new act contain all the law on the subject. In the case of *Hampton* v. *Hickey,* 88 Ark. 324, the court held (quoting from syllabus): (1) While the general rule is, that a general act does not repeal a prior special act, the question is always one of intention, and the purpose to abrogate the particular enactment by a later general act is sufficiently manifested when the provisions of both can not stand together. (2) A later statute which extends and enlarges a right before existing impliedly repeals the law by which the former was created or given. (3) 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 subject, whether they are general or special.

In that case, a special act was passed by the Legislature in 1905 authorizing the Special School District of Fordyce to borrow money to build a schoolhouse, to

mortgage the real estate of the district, and to issue bonds or other evidences of indebtedness not to exceed fifteen thousand dollars. Subsequently, at the same session of the Legislature, an act was passed authorizing all special school districts in the State of Arkansas to borrow money without restriction as to the amount. The court held that the latter general act repealed the prior special act. See also *Western Union Tel. Co.* v. *The State,* 82 Ark. 302; *DeQueen* v. *Fenton,* 100 Ark. 504.

Applying the principles of law decided in those cases to the facts as shown by the record in the present case, we think that the general act for the consolidation of adjacent school districts impliedly repealed the special act under which the consolidation in this case was effected. No election was had or attempted to be had under the provisions of the general act and the order of consolidation made under the terms of the special act was invalid.

The enacting clause of Act No. 116 of the General Acts of 1911 is, "Be It Enacted by the People of the State of Arkansas." Therefore, it is urged by counsel for appellee, that the act has never been enacted into a law in accordance with the Constitution. But this question has been decided adversely to their contention in the case of *Ferrell* v. *Keel,* 105 Ark. 380. There the court held that the initiative and referendum amendment referred only to bills initiated by the people under such amendment, and did not repeal section 18 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," and that this is now the proper enacting clause for bills by the General Assembly of the State of Arkansas. But the court held also that the enacting clause, "Be It Enacted by the People of the State of Arkansas," is a substantial compliance with section 18, article 5, of the Constitution, above quoted; and that a substantial compliance with it is sufficient.

It follows that the judgment must be reversed and the cause remanded for further proceedings according to law.

FUTRELL v. OLDHAM.

Opinion delivered March 24, 1913.

1. GOVERNOR—VACANCY—FILLED HOW.—The office of Governor is never to be filled at all except by direct vote of the people, and in the case of a vacancy in the office of Governor, the Constitution (section 12, article 6) provides only for a temporary devolution of the duties and emoluments of the office upon some other functionary, while the vacancy exists. (Page 390.)

2. GOVERNOR—VACANCY—PERSONS ENTITLED TO ACT AS GOVERNOR.—Under section 12, article 6, of the Constitution which provides: "In the case of the * * * resignation * * * of the Governor, the powers, duties and emoluments of the office for the remainder of the term * * * shall devolve upon, and accrue to the President of the Senate," the duties of the office of Governor, during a vacancy in that office, devolves upon the incumbent of the office of President of the Senate, and a change in the incumbency of that office works a change in the performance of the duties of the office of Governor. When another President of the Senate is elected during a vacancy in the office of Governor, the duties of the latter office devolve upon him from the time of his election and qualification as President of the Senate. (Page 390.)

3. LEGISLATURE—PRESIDENT OF SENATE—DUTY TO ACT AS GOVERNOR.—Under article 5, section 17, of the Constitution, which provides for the election of a President of the Senate from among the members whose terms of office continue over, who shall remain president until his successor shall be elected and qualified, and who, in the case of vacancy, shall perform the duties and exercise the powers of Governor; *held*, when such President of the Senate is elected, he becomes President of the Senate for all purposes, and the incumbency of his predecessor ends at that time. (Page 400.)

Appeal from Pulaski Circuit Court, Second Division. *Guy Fulk*, Judge; reversed.

Elmer J. Lundy, W. C. Rodgers, Miles & Wade and *Moore, Smith & Moore*, for appellant.

The Constitution devolves the duties, powers and emoluments of the office of Governor upon the President of the Senate, and not the office itself. The office in case of vacancy devolves not upon the person of the President of the Senate, but upon that office, and therefore upon whatever individual holds it rightfully for the time being. When appellee's term as President of the Senate, ended and appellant was elected to that office and qualified, he

became entitled to exercise the powers and perform the duties of Governor until an election was held and the vacancy filled. Constitution, art. 6, § 12, art. 5, § 17; art. 6, § 14; *Ib.* 13; 32 Atl. 155; 81 Pac. 871; 75 N. W. 211; 47 Pac. 450; 45 *Id.* 1050.

Charles A. Walls, Frank Pace and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

The words, "President of the Senate," are used as descriptive of the person designated to exercise the powers, etc., of the office of Governor for the remainder of the term or until an election is held. Constitution, art. 6, § 12. The words used are *descripti personale.* 9 Wheat. 188; 7 Me. 489; 11 Ore. 389; 45 Pac. 243; 42 Atl. 155.

As to when an office is vacant see 13 So. 705; 32 Fla. 138; 49 So. 1032; 162 Ala. 117; 121 S. W. 64; 71 Atl. 122; 77 N. J. L. 68. "Vacancy," as used, simply means that while there is an incumbent lawfully discharging the duties of the office, the tenure of that incumbent is not until the next regular election, but is subject to be terminated by the special election which he is required to call. *Supra.*

McCULLOCH, C. J. The present litigation involves a construction of the following provisions of the Constitution of this State.

"Each house, at the beginning of every regular session of the General Assembly, and whenever a vacancy may occur, shall elect from its members a presiding officer to be styled, respectively, the President of the Senate, and the Speaker of the House of Representatives; and, whenever, at the close of any session, it may appear that the term of the member elected President of the Senate will expire before the next regular session, the Senate shall elect another president from those members whose terms of office continue over, and who shall qualify and remain President of the Senate until his successor may be elected and qualified; and who, in the case of a vacancy in the office of Governor, shall perform the duties

and exercise the powers of Governor, as elsewhere herein provided." Section 17, article 5.

"In the case of the death, conviction on impeachment, failure to qualify, resignation, absence from the State or other disability of the Governor, the powers, duties and emoluments of the office for the remainder of the term, or until the disability be removed, or a Governor elected and qualified, shall devolve upon and accrue to the President of the Senate." Section 12, article 6.

The first of the above-quoted sections is found in the article devoted to the legislative department of the State Government and the other to the executive department.

Other related sections read as follows:

"If, during the vacancy of the office of Governor, the President of the Senate shall be impeached, removed from office, refuse to qualify, resign, die or be absent from the State, the Speaker of the House of Representative shall in like manner administer the government." Section 13, article 6.

"Whenever the office of Governor shall have become vacant by death, resignation, removal from office or otherwise, *provided,* such vacancy shall not happen within twelve months next before the expiration of the term of office for which the late Governor shall have been elected, the President of the Senate or Speaker of the House of Representatives, as the case may be, exercising the powers of Governor for the time being, shall immediately cause an election to be held to fill such vacancy giving by proclamation sixty days' previous notice thereof * * *." Section 14, article 6.

Senators are elected for terms of four years, but they are divided into two classes so that the terms of approximately half of the Senators expire every two years. The Legislature convenes in regular session biennially on the second Monday in January. The defendant, W. K. Oldham, was elected to the Senate at the general election held in September, 1910, and at the beginning of the legislative session of 1913 he was elected President of the Senate, took the oath of office and served as such. On

March 8, 1913, the Governor, Hon. Joe T. Robinson, resigned, and Mr. Oldham at once began to discharge the duties of the office of Governor. That session of the Legislature ended, by operation of law, on Thursday, March 13, 1913, and at that time the Senate, before adjournment, elected as president the plaintiff, J. M. Futrell, a Senator whose term of office continues over beyond the next regular session in 1915. Mr. Futrell took the oath of office as President of the Senate at the end of the session, and there at once arose a controversy between these two parties as to which of them is the one upon whom devolves the duties and emoluments of the office of Governor. Mr. Oldham declined to relinquish possession of the executive chamber, or to cease performance of the duties of the office of Governor, and this action was instituted against him by Mr. Futrell in the circuit court of Pulaski County to test the question of the rights and duties of the two parties with respect to the office of Governor. The action is based on a statute which provides that "whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise." Kirby's Digest, section 7983.

The circuit court sustained a demurrer to the complaint. Plaintiff elected to stand upon his complaint without amending, and final judgment was rendered against him, and he appealed to this court.

The case turns on the question, whether, on the resignation of the Governor, the then incumbent of the office of President of the Senate succeeded to the vacated office, or whether merely as such President of the Senate the powers, duties and emoluments of the office of Governor devolved upon him while he remained president.

It is contended on behalf of the defendant that the words, "President of the Senate," in section 12, article 6, of the Constitution, are used as descriptive of the person designated to exercise the powers, perform the duties,

and receive the emoluments of the office of Governor for the remainder of the term or until a Governor be elected, and that the office itself devolves on that person for and during the period named. The argument is, that as other language of the same section relating to vacancy in the office of Governor by reason of "death, conviction on impeachment, failure to qualify, resignation, absence from the State or other disability," was obviously used as descriptive of the person, it naturally follows that the words, "President of the Senate," were also used in that sense. The latter words were, however, used for the purpose of prescribing a course of devolution of the powers, duties and emoluments of the office of Governor in the emergency named, and were, therefore, intended in a different sense from the language used in the first part of the section. The obvious purpose for which the terms were employed indicates the different meanings intended. The language of the Constitution seems plain. It specifies that in the contingency named, "the powers, duties and emoluments of the office * * * shall devolve upon and accrue to the President of the Senate." The other quoted section provides that the President of the Senate, "in the case of a vacancy in the office of Governor, shall perform the duties and exercise the powers of Governor." Not that the President of the Senate shall succeed to the office of Governor; nor that the office itself shall devolve upon him, but merely that he shall exercise the powers and perform the duties of the office during the period of the vacancy; and that the emoluments of the office shall accrue to him during that time. That is to say, he acts as Governor and receives the emoluments of that office merely by virtue of his office as President of the Senate, and does not actually become Governor. The vacancy in the office continues until a Governor is elected by the people, either at a special election called for that purpose or at the next regular election, in the event that the vacancy occurs more than twelve months before the expiration of the term. That could not be so if the office was actually filled by the per-

son who was then President of the Senate, for in that event there would be no vacancy, and other words would have been employed by the framers of the Constitution to convey the intended meaning. Language found in the other related sections of the Constitution fully confirms this view. Section 13, article 6, quoted above, provides for the devolution of the duties of Governor upon the Speaker of the House of Representatives. It speaks of a vacancy in the office of the Governor whilst the President of the Senate is performing the duties thereof, thus making it manifest that the vacancy is deemed to continue notwithstanding the accession of the President of the Senate. Again, it refers to the President of the Senate *eo nomine* after the vacancy has occurred, and he had entered upon the discharge of the duties of Governor, thus showing that he is still President of the Senate. If he has succeeded to the office and become Governor *de jure,* why refer to him as President of the Senate? Now, it is certain that there can not be two Presidents of the Senate at the same time, for the term of one incumbent of that office ends when that of his successor begins. Of course, we are not speaking of a mere temporary absence of the president while the Senate is in session, during which time some other Senator may be selected to preside temporarily. So, if the person discharging for the time being the duties of Governor is still President of the Senate, he can not be Governor. He may exercise the powers of the latter office—"exercise the office of Governor," as it is otherwise expressed in another section, but he does not fill the two offices. If, as contended, the President of the Senate fills two offices—that of President of the Senate and of Governor—in the emergency named, then his removal by impeachment, or otherwise, from the first named office, would have separated him from the other office, that of Governor, so as to give way to the Speaker of the House of Representatives. That section clearly contemplates that he is to remain President of the Senate while he is discharging the duties of the office of Governor, and his removal from the office of President

of the Senate displaces him from the exercise of the powers and duties of Governor, and provides, in that event, for the devolution of those duties upon the speaker. If the meaning contended for had been intended by the framers of the Constitution, the language of that section would have been different. They would have specified the removal, by impeachment, or otherwise, of the incumbent of the office of Governor, as the occasion for the succession of the speaker. Instead of doing that, they employed a term which clearly carries the meaning that, if the President of the Senate, who is then, by virtue of his incumbency of that office, exercising the powers of Governor, shall be removed by impeachment, or otherwise, then the speaker shall, "in like manner, administer the government."

If the contention be that the President of the Senate, when the Governor resigns, succeeds to that office, and thereby vacates his former office of president, the language used in that section would be equally inappropriate, for it refers to him as the President of the Senate, and that would be a misdescription if he had ceased to hold that office by reason of having become Governor.

It is true that the word "vacancy" is sometime used with reference to an office temporarily filled when it is evident from the context that such meaning was intended. *State* v. *Murphy,* 32 Fla. 138. But, even as applied to official position, the ordinary and popular meaning of the word is an office that is unoccupied, one without an incumbent "who has a lawful right to continue therein until the happening of some future event." *Ham* v. *State,* 162 Ala. 117; *Sanders* v. *Blakemore,* 104 Mo. 340.

The language of section 14, article 6, further confirms this construction. It speaks of the Governor's office being still vacant after the President of the Senate, or Speaker of the House, enters upon the discharge of the duties thereof, and commands that an election be called to fill the vacancy if it occurs more than a year before the expiration of the term. It refers to the one then performing such duties, not as Governor, but as "Pres-

ident of the Senate or Speaker of the House of Representatives, as the case may be, exercising the powers of Governor for the time being." If the framers of the Constitution had intended to provide for the devolution of the office of Governor, in case of vacancy by resignation, or otherwise, upon the President of the Senate, that intention could easily have been directly expressed in appropriate words. But they chose other terms which clearly observe the distinction between the course of succession of the office itself and the mere devolution of the duties and emoluments of the office for the time being, and deliberately adopted the latter as the best means of having the government administered until the people themselves can elect a Governor.

It follows, from the construction of the language of the section referred to, that the words, "President of the Senate," in section 12, article 6, were not used as descriptive of the person, but of the officer who, in case of a vacancy in the office of Governor, shall exercise the powers and perform the duties of the latter office, until the vacancy can be filled by the people at an election.

Learned counsel for defendant stress the words, "for the remainder of the term," used in this section of the Constitution, as indicative of an intention to cast the office itself upon the person who happened to be President of the Senate at the time the vacancy occurs. These particular words were, we think, used merely to specify the period during which the duties of the office shall be discharged and the emoluments enjoyed, in case the vacancy occurs within twelve months before the expiration of the term. They have no other significance, and can not serve to force or induce the construction of the preceding words to be merely descriptive of the person designated to succeed to the office of Governor.

It is argued that the conclusion we reach lessens the stability of the high office of Governor by permitting frequent changes, that it makes the office follow the vicissitudes of the incumbency of the President of the Senate,

and for that reason this construction should not be adopted.

Alarm on that score, is, we think, unfounded. The central thought of the sections hereinbefore quoted is, that the office of Governor is never to be filled at all except by the direct vote of the people themselves, and provision is made by the Constitution for only a temporary devolution of the duties and emoluments of the office upon some other functionary while a vacancy exists. Frequent changes are not contemplated. On the contrary, the President of the Senate, elected at the beginning, is expected to serve only during the limited time of the session, and the Constitution contains a peremptory command to the Senate, at the end of the session, if the term of the President as Senator shall expire before the next regular session, to elect, from those members whose terms of office continue over, a president, to serve during the longer period until the next regular session. Thus there appears a provision against frequent changes, for one is put in office whose term does not expire until after the expiration of the Governor's term. Nor is it worth while to take fright at the possibility, under the construction we place on those sections of the Constitution, of there occurring an interregnum during the period between the general election in September and the convening of the Legislature in January when, by reason of the death or resignation of the Governor, and of the President of the Senate, and the expiration of the Speaker's term of office, there might be no one to exercise the powers of Governor. Such a situation might, it is true, arise. So, it might, if the construction urged by defendant should be adopted, for, if the President of the Senate succeed to the office of Governor, his death or resignation might occur when there was no one specified to exercise the functions of the office. Absolute immunity from all danger and inconvenience is unattainable in human affairs. Those provisions are expressed in plain language, doubtless well understood by the framers of the Constitution, and they anticipated and protected against every

emergency that they considered not too remote to make it expedient to safeguard. Such a contingency is, indeed, remote. Whether, when it arises, if it ever does, some rational doctrine of necessity may not be found to solve the problem and establish the superior right of some one to discharge the duties of Governor, we need not now attempt to decide. Sufficient unto the day is the evil thereof. Happily, our form of government has thus far proved adequate. The Constitution provides, as we have already noticed, that at the end of the session of the Legislature the Senate shall elect a president from among the members whose terms continue over. If, after the adjournment of the Legislature, a vacancy in the office of Governor should occur, within twelve months before the expiration of the term, and if a vacancy should also occur in the presidency of the Senate, the powers of the office of Governor would devolve on the speaker, and it would then be within his power, and it would be his duty, to call an extraordinary session of the Legislature so that the Senate could fill the vacancy in the office of president. Thus, a method is provided for every reasonably anticipated contingency with respect to the administration of government.

Thus far we have stated our conclusion based on what we conceive to be the plain language of the Constitution without attempting to fortify our view with citation of precedent, but ample support is found in the decisions of other courts construing similar constitutional provisions.

In the State of New Jersey, the Constitution, so far as it relates to the question now under consideration, is identical with our Constitution. The Governor resigned, and the President of the Senate began to exercise the powers of Governor, but thereafter resigned his office of Senator. The Speaker of the House of Representatives then asserted his right to discharge the duties of Governor, basing his claim on the fact that the resignation as Senator vacated the office of President of the Senate, and that the duties of the office of Governor devolved on him

in that emergency. He attempted to exercise the powers of Governor, and the validity of one of his acts in that regard was challenged. The Supreme Court of that State, in disposing of the question said:

"The provision is, that, in case of the resignation of the Governor, the powers, duties and emoluments of the office shall devolve upon the President of the Senate, and not that the President of the Senate shall thereby become Governor, and hold the title to the office until another Governor is elected. If the framers of the fundamental law had intended to transfer the President of the Senate to the executive chair, and thereby to vacate his office of Senator, it is reasonable to believe that they would have said so in no uncertain language. The language used is not ambiguous. It declares that the powers, duties, and emoluments of the office shall devolve on the President of the Senate; it does not confer upon him the title of the office. The President of the Senate exercises the powers of the Governor; the President of the Senate performs the duties of the Governor; the President of the Senate receives the emoluments of that office. He is still President of the Senate, with the added duties required of the chief executive of the State imposed upon him. There is no language in the Constitution from which it can reasonably be inferred that his office of President of the Senate was to be vacated. He retains his office of Senator; and as President of the Senate, and not as Governor, he exercises the added powers and performs the superimposed duties." *State ex rel.* v. *Heller*, 63 N. J. L. 105; 57 L. R. A. 312; 42 Atl. 155.

Many other statements of the opinion reasoning out the conclusions reached are equally appropriate in considering the question now presented to us.

The force of that opinion is sought to be broken by the contention that upon this point it was mere *dictum*. We do not, however, find that to be a correct estimate of the opinion. The court first took up the question of the validity of the act of a *de facto* officer and attempted to dispose of the case on that point, but found that there

was nothing in the record to indicate that the speaker was *de facto* Governor, and, therefore, found it necessary to determine the question whether he was *de jure,* clothed with the powers of the office of Governor. Thus the discussion of this question became highly pertinent, and can in no wise be considered *dictum.*

In Colorado the provisions of the Constitution are substantially the same, except that the office of Lieutenant Governor is provided for, and also the office of president *pro tempore* of the Senate, the former succeeding to the powers, duties and emoluments of the office of Governor for the remiander of the term when a vacancy occurs, and the latter succeeding to the powers of the office of Lieutenant Governor in case of a vacancy. The Governor resigned, and the Lieutenant Governor assumed the discharge of the duties of Governor. The President *pro tempore* of the Senate qualified as Lieutenant Governor, but at the close of the regular session, another president *pro tempore* was elected to succeed him, and the question arose, as in this case, which of these Senators, elected as president *pro tempore,* should thereafter discharge the duties of the office of Lieutenant Governor. The Constitution in that State provided that "the Senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president *pro tempore.*" The court, in disposing of the point, said:

"These sections, read together, provide that the Senate shall, at the beginning and close of each regular session, and at such other times as may be necessary, elect one of its members president *pro tem.,* and that in case of the absence, impeachment, or disqualification from any cause of the Lieutenant Governor, or when the powers, duties, and emoluments of the office of Governor devolve upon the Lieutenant Governor through the death, * * * resignation, absence from the State, or disability of the Governor, the president *pro tem.* shall perform the duties of Lieutenant Governor until the cause preventing the Lieutenant Governor from discharging his official duties

is removed. * * * If the framers of our Constitution had intended that the president *pro tem.* of the Senate should become Lieutenant Governor *de jure* in the contingency under consideration, they could easily have said so. They have not so provided. They have simply said that if, for some permanent cause, the Lieutenant Governor fails to discharge his official duties, they shall be performed while such condition obtains by the President of the Senate as such. * * * We conclude that respondent did not become Lieutenant Governor *de jure* by the duties of Governor devolving upon Lieutenant Governor McDonald through the resignation of Governor Peabody, and that by the election of relator as president *pro tem.*, respondent, being no longer president *pro tem.*, lost his right to perform the duties of Lieutenant Governor, and relator by such election became entitled to perform the duties of such office." *People* v. *Cornforth,* 34 Col. 107, 81 Pac. 871.

In *State* v. *Sadler,* 23 Nev. 356, 47 Pac. 450, the Supreme Court of Nevada, construing similar provisions of the Constitution of that State, said:

"The gubernatorial succession is covered by the foregoing provisions. If a vacancy occurs in the office of Governor, the powers and duties of the office devolve upon the Lieutenant Governor, but there is no vacancy created thereby in the office of Lieutenant Governor. The officer remains Lieutenant Governor, but invested with the powers and duties of Governor."

The Supreme Court of California, construing a similar provision of the Constitution, said:

"It will be seen that in case of a vacancy in the office of Governor, the vacancy is not to be filled, but the powers and duties devolve upon the Lieutenant Governor, who does not cease to be Lieutenant Governor. Under such circumstances, it would hardly be contended that when the powers and duties of the Governor devolve upon the Lieutenant Governor, the latter thereby becomes Governor, and can appoint a Lieutenant Governor. Nor do I think it could be contended that when the presi-

dent *pro tempore* of the Senate acts as Governor, he could appoint a person to fill the vacancy in the office of Lieutenant Governor. If he could, he would then appoint himself out of office, and it would be his duty to do so." *People* v. *Budd,* 114 Cal. 168, 45 Pac. 1060.

The Supreme Court of Minnesota, in *State ex rel. Marr* v. *Stearns,* 72 Minn. 200, 75 N. W. 210, decided that "the president *pro tempore* of the State Senate does not cease to be a Senator when he becomes Lieutenant Governor by reason of a vacancy in the office of Governor, and a corresponding vacancy in the office of Lieutenant Governor."

The case of *Chadwick* v. *Earhart,* 11 Ore. 389, 4 Pac. 1180, is pressed on our attention as holding directly to the contrary. We do not, however, consider that case an authority on this question. The language of the Constitution is different from ours, and the opinion was based upon the language, which the court construed to amount to a devolution of the office itself upon another. The language of the Oregon Constitution is similar to that found in the Constitution of the United States, which provides that, "in the case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of such office, the same shall devolve on the Vice President." The words of devolution were held in the Oregon case to relate to the word "office" and not to the discharge of the powers and duties thereof. No provision is made in the Constitution of the United States for the election of President in case of a vacancy. Giving the same construction to the language of that provision as given by the Oregon court, the Vice President is properly held to become President when a vacancy occurs, and the vacancy is thereby completely filled. That construction is positively negatived by the language of our Constitution, which clearly recognizes the continuance of the vacancy and provides other methods for filling it.

The result of our construction of the Constitution is that, the duties of the office of Governor, during a va-

cancy in that office, devolve upon the incumbent of the office of President of the Senate, and that a change in the incumbency of that office works a change in the performance of the duties of the office of Governor. When another President of the Senate is elected during a vacancy in the office of Governor, the duties of the latter office devolve upon him from the time of his election and qualifications as president.

The remaining question in this case relates to the time when the President of the Senate last elected shall take office.

It is suggested that he is elected at the end of the session, but does not take office until the expiration of the senatorial term of his predecessor. This is not the correct interpretation of the Constitution. The language of section 17, article 5, is that "whenever, at the close of any session, it may appear that the term of the member elected President of the Senate will expire before the next regular session, the Senate shall elect another president from those members whose terms of office continue over, who shall qualify and remain President of the Senate until his successor may be elected and qualified; and who, in the case of a vacancy in the office of Governor, shall perform the duties and exercise the powers of Governor."

If the framers of this section intended to postpone the date of qualification of the new president beyond the time of his election, they would have expressed that intention in better form. The words, "who shall qualify and remain president," necessarily mean that he shall qualify then. At the close of the session. He then becomes President of the Senate for all purposes, the discharge of all the duties of that office thereafter devolve upon him, and the incumbency of his predecessor ends at that time.

It follows, from what we have said and according to the allegations of the complaint, that Mr. Futrell is now the President of the Senate, and during the vacancy in the office of Governor the performance of the duties of

that office devolve upon him, and to him the emoluments of that office accrue. The circuit court erred in sustaining the demurrer to the complaint. The judgment is therefore reversed and the cause remanded with directions to overrule the demurrer.

STATE *ex rel.* MITCHELL *v.* HODGES.

Opinion delivered March 24, 1913.

NOTARY PUBLIC—COMMISSION—MANDAMUS.—Mandamus is the appropriate remedy to compel the Secretary of State to issue and attest with the great seal of the State, a commission as notary public after an appointment by the Governor.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; reversed.

Elmer J. Lundy, W. C. Rodgers, Miles & Wade and *Moore, Smith & Moore,* for appellant.

See *Futrell* v. *Oldham,* 107 Ark. 386, for argument.

Charles A. Walls, Frank Pace and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

See *Futrell* v. *Oldham* for argument.

McCULLOCH, C. J. The relator, W. S. Mitchell, was appointed notary public by J. M. Futrell, as Acting Governor, but appellee, as Secretary of State, refused to attest the commission with the great seal of the State, acting, as he asserts, upon the advice of the Attorney General, that Mr. Futrell is not entitled to exercise the powers of Governor, but that the same devolve upon W. K. Oldham. This action was instituted in the circuit court of Pulaski County against appellee to compel him, by mandamus, to issue and attest with the great seal of the State the commission as notary public according to the appointment of Mr. Futrell.

The conclusion reached in the case of *Futrell* v. *Oldham,* 107 Ark 386, this day announced, is decisive of the present case, Mr. Futrell being, according to the alle-

gations of the complaint, entitled *de jure* to discharge the duties of the office of Governor, his acts as such must be respected. *State ex rel.* v. *Heller,* 63 N. J. L. 105, 57 L. R. A. 312, 42 Atl. 155.

The remedy by mandamus is appropriate according to the decision of this court in the recent case of *State ex rel. Gray* v. *Hodges,* 107 Ark. 272. The judgment of the circuit court is reversed and the cause is remanded with directions to sustain the demurrer to the answer.

JONES *v.* JONES.

Opinion delivered March 24, 1913.

ADMINISTRATOR—WHEN NOT ENTITLED TO LANDS.—An administrator can not stand for or represent the heirs when the title to land is involved, nor is he entitled to the possession of lands unless they are needed to pay debts of the deceased.

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

T. W. Campbell, for appellant.

Whether W. G. and J. L. Jones were solvent or insolvent, whether the deed was taken in Fred F. Jones's name for a fraudulent purpose or not, in either case appellants are entitled to have a resulting trust declared in their favor upon an undivided half interest in the land. W. G. Jones, appellants' intestate, paid one-half the purchase price of the land. If there was no fraud in the transaction by which the deed was taken in Fred's name, then a resulting trust should be declared in favor of the heirs under the general rules of equity. 40 Ark. 62; 64 Ark. 155; 2 L. R. A. 816. If it was taken for fraudulent purposes—insolvency, and to cheat, hinder or delay creditors, appellants are entitled to a half interest in the land under the statute. Kirby's Digest, § 81.

S. A. D. Eaton and *Witt & Schoonover,* for appellees.

1. The proof entirely fails to make a case within the meaning of the statute. Kirby's Dig., § 81, relied on by appellant. None whatever that W. G. Jones was a

"grantor" with respect to these lands. 4 Words & Phrases, 3159; 5 Mass. 438; 77 Ark. 63. This statute, while it is remedial in its nature, yet it empowers the administrator to bring suit for no other purpose than for the benefit of "the heirs-at-law of the fraudulent grantor," and appellant having elected to bring suit in this way, she is bound by her pleadings and admissions and will not be permitted to pursue another remedy, *i. e.*, to have a resulting trust declared. 95 N. W. 344; 7 Ill. App. 612; 11 Johns (N. Y.) 241.

2. Treated as an action to declare a resulting trust, there is such a defect of parties as to defeat recovery. The heirs are indispensable parties, where the relief asked will affect the title to land. 49 Ark. 87; 41 Ark. 88; 34 Ark. 391; Pomeroy, Code Rem., § 256.

McCULLOCH, C. J. The plaintiff, Mollie E. Jones, as administratrix of the estate of W. G. Jones, deceased, instituted this action in the chancery court of Randolph County to cancel a conveyance of a tract of land in said county, executed to defendant, Fred F. Jones. It is alleged, in substance, that during the year 1898 W. G. Jones and one J. L. Jones were copartners in the mercantile business, and became insolvent; that they purchased said tract of land from one Kerr and caused Kerr to convey the same to defendant, Fred F. Jones, in order to cheat, hinder and delay their creditors. W. G. Jones died, and plaintiff, as administratrix of his estate, sues pursuant to the terms of a statute of this State which provides that "any executor or administrator of any fraudulent grantor, who by deed, grant or otherwise, shall have conveyed an estate in land, tenements or hereditaments, with intent to delay his creditors in the collection of their just demands, may apply to a court of chancery by proper bill or petition and have the same set aside and cancelled for the use and benefit of the heirs-at-law of the fraudulent grantor, saving the rights of creditors and purchasers without notice." Kirby's Digest, § 81.

The deed of conveyance of Kerr to Fred F. Jones

recited a consideration of $50 paid in cash by W. G. Jones and J. L. Jones, and two promissory notes of $150 each executed to said grantor by the same parties.

This suit involves an undivided half interest in the land. Fred F. Jones and his mortgagee, Myra E. Birdstrom, are joined as defendants.

The decree of the chancery court was in favor of defendants, and an appeal has been duly prosecuted by plaintiff.

The record discloses testimony tending to establish the charge of fraud on the part of W. G. Jones and J. L. Jones in causing the conveyance to be made to Fred F. Jones for the purpose of cheating and hindering their creditors; but counsel for plaintiff concedes in his brief that it is doubtful whether the evidence is sufficient to establish that fact, and we will, therefore, eliminate that question from the discussion of the case.

The contention now on the part of the plaintiff is that relief should be granted on the theory that the evidence is sufficient to establish the fact that W. G. Jones paid one-half of the consideration expressed in the conveyance and that a trust resulted in his favor which the chancery court, at the instance of the administratrix suing for the benefit of the heirs, should enforce.

The statute under which this suit is instituted only authorizes an administratrix to sue for the benefit of the heirs of a "fraudulent grantor, who by deed, grant or otherwise, shall have conveyed an estate in land * * * with intent to delay his creditors." There is no authority to be found in the statute for a suit by the administrator to enforce a resulting trust for the benefit of heirs.

"The administrator's right to the possession of lands as assets for the purpose of administration is exclusive of that of the heirs," said this court, speaking through Chief Justice Cockrill, in *Chowning* v. *Stanfield,* 49 Ark. 87, "and he can maintain ejectment to gain the possession, but he is not concerned with the title, except in so far as it affects his possessory right, and he is not

authorized to represent the heirs or to stand for them when the title is in question. They are indispensable parties in a controversy where relief is asked which affects the title." "And," said this court in the same case, "an administrator is not entitled to the possession of lands unless they are needed to pay the intestate's debts."

It is not alleged in the complaint nor asserted or shown that there are now any debts of the estate of said decedent. There is no claim that the lands are needed for payment of debts. On the contrary, the plaintiff sues to recover for the benefit of the heirs-at-law of said decedent. We are not at liberty in this action to pass on the rights of the heirs, for they are not parties.

The decree against the plaintiff as administratrix of the estate of said decedent is correct and the same is affirmed.

STONE v. SEWER IMPROVEMENT DISTRICT NO. 1, CITY OF FAYETTEVILLE.

Opinion delivered March 17, 1913.

1. BILL OF REVIEW—JURISDICTION OF CHANCERY COURT.—The chancery court has jurisdiction to entertain a bill of review, founded upon alleged newly discovered evidence of facts occurring since the former decree, even though the cause has been before the appellate court and a mandate issued to the chancery court. (Page 411.)
2. BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.—Before allowing a bill of review on the ground of newly discovered evidence, the court ought to be satisfied that the evidence is new and could not have been discovered by the exercise of ordinary diligence prior to the date of the decree complained of. (Page 411.)
3. BILL OF REVIEW—DOES NOT LIE WHEN.—When the board of a sewer improvement district, brought an action against owners of property in the district, and the assessment made and levied upon the said lands was upheld, and the defendants in the original proceeding filed a bill of review in the chancery court, on the ground of newly discovered evidence, the bill will not lie unless the new evidence is material to the issue decided by the former decree, and a demurrer to the bill of review will be sustained when the bill

alleges merely that the evidence has been discovered since the rendition of the first decree, that a sewer line through a portion of appellant's land has been abandoned because of lack of funds, and alleges that the sewer is impracticable because of the location of appellant's land, and that the population is too scanty to make the sewer desirable or practicable. (Page 412.)

Appeal from Washington Chancery Court; *T. H. Humphreys,* Chancellor; affirmed.

STATEMENT BY THE COURT.

The appellants are the owners of land in improvement districts in the city of Fayetteville.

In the case of *Board of Improvement* v. *Pollard,* reported in 98 Ark., at page 543, appellants contested the validity of the assessment made and levied upon these lands for the year 1909. That cause originated in the chancery court in an action instituted by the board of the improvement district to collect the assessment for that year. The decision of the chancery court was in favor of the appellants here, and the cause, on appeal to the Supreme Court, was reversed.

The contention of the owners was that the land was not benefited by the improvement. The contention of the district was that the owners, having failed to attack the assessments at the time and in the manner pointed out by the statute, were precluded from setting up their invalidity in the chancery court.

This court, in its opinion in the case, upon the issues and facts presented, found and declared as follows: "In the case at bar, while the chancellor found that the property of defendants was not benefited by the improvement, and his finding is sustained by a preponderance of the evidence; nevertheless, there was substantial evidence on the part of the plaintiff showing that the property received additional benefits from improved sanitation, and that it could be connected with the sewer system so as to successfully drain the sewage from this property, and thereby receive benefits. Under such circumstances, the assessment made can not be invalidated, or set aside in this proceeding." And the court re-

manded the case with directions to enter a decree in favor of the plaintiffs (appellees here).

The present proceedings were instituted by the appellants in a bill of review filed in the chancery court with the permission of the chancellor to review the cause in which the decree of the chancellor was reversed, and decree ordered to be entered by the Supreme Court, *supra,* and to have the collection of the assessment, under the mandate of the Supreme Court, enjoined.

The complaint set up the facts showing the creation of the improvement districts and the former proceedings in the chancery court and the Supreme Court, making those proceedings exhibits, and alleged, among other things, the following: "That the defendants, Sewer Improvement District No. 1 and Water Improvement District No. 1, aforesaid, are so interrelated that full and complete relief can not be given these plaintiffs without joinder herein of both said boards of improvement, and for the further reason that there can be no sewer benefits unless there be a full and sufficient water supply of such volume and power as to flush and drain said sewer pipes. That the sewer system has no source of revenue, and for the cost of construction and maintaining a sewer system it must draw upon the funds and revenues of said water system.

"These plaintiffs further allege that at no time has there been made any provision to supply these plaintiffs with an adequate, or indeed, any water supply; nor is any water supply or system intended to be furnished these plaintiffs. That no estimated cost of constructing a water supply system to afford these plaintiffs any water benefits have been made, and none is intended to be made. These plaintiffs allege that the erroneous cost of supplying these plaintiffs with a water supply or constructing a system which would place water within reasonable reach of these plaintiffs, was not included within the original cost of such system, as hereinbefore alleged.

"These plaintiffs further allege that whatever plans

and estimates of cost for either sewer or water service, or improvements have heretofore been made; that since the trial of this cause originally in this court, being the case of *Sewer Improvement District No. 1* v. *A. B. Stone, et al.,* have been now wholly and fully abandoned for a total lack of funds to make any extensions, and for the further reason that the said defendants herein are now fully convinced that the same is wholly impracticable, and that the limited territory, both as a taxing territory and the scanty population to be served can in no way justify the great expenditure of the funds of the district in constructing expensive sewer pumping plants, which will be required, to furnish plaintiffs any sewer benefits whatever.

"These plaintiffs further allege that the pretended survey made by one Knoch in said former suit by which it was pretended that a new sewer system might be constructed along said line, and afford plaintiffs benefits, has been wholly abandoned; and the intention to build along said line to furnish or afford these plaintiffs sewer service and benefits, has also been wholly abandoned, which fact of abandonment will be supported by the testimony of each member of said two boards of improvement, as well as by other conclusive testimony of record. That said witnesses will also testify that there has been a complete abandonment of said projected extension, as to the premises of these plaintiffs, and that no such, or any similar or substituted line of sewer extension, is either contemplated in the future. And in view of the great cost, the project of connecting up plaintiffs' premises with said sewer line as originally established, and which may in the future be established, has been wholly abandoned. That these plaintiffs will also prove beyond any doubt, by said witnesses, that no benefits whatever have been or can be given in the future to these plaintiffs by the said sewer system, as originally planned, and that the same will not be extended to the property of these plaintiffs in the future. They will also prove by these witnesses, that the original assessment was in-

advertently made, and that these defendants now desire that the same shall be corrected, and that further payments thereon be made the subject between these parties of compromise, readjustment and probable total remission.

"That the right of these plaintiffs will suffer irreparable injury if the mandate aforesaid is enforced, or the said wrongful and inadvertent assessment allowed to stand against the property of these plaintiffs upon which it is now a lien, to the extent of nearly $1,400, and by which the title to their property is unjustly and unlawfully clouded. These plaintiffs further allege that the intention to abandon, and the fact of the abandonment itself, alleged herein, were not known nor could have been known to these plaintiffs by the use of any diligence until long after the trial of the original cause." The complaint concludes with a prayer for relief as above indicated.

The appellees (defendants below) moved the court to strike out the complaint, for the following reasons: "First, because said complaint does not state any facts which will authorize this court to review the decision and judgment prayed for in this complaint. Second, because this court has no jurisdiction to grant the relief prayed for by said plaintiffs. Third, because the evidence of the witnesses set forth in the complaint is not newly discovered evidence, but is cumulative and could have been offered by plaintiffs in the original trial. Fourth, because said evidence is incompetent, irrelevant, and wholly inadmissible."

The motion was sustained, the appellants (plaintiffs below) declined to plead further, and the court dismissed the complaint, and appellants duly prosecute this appeal.

Appellants pro se.

1. A bill of review on account of newly discovered evidence is in the nature of an original suit in equity, leave to file which must come from the court which tried the case below, and the granting of such leave is the exercise of a judicial discretion which will not be disturbed

on appeal, unless a clear abuse of discretion is shown. Such abuse will never be presumed. 33 Ark. 161; 154 Ill. 577, 39 N. E. 623; 8 B. Mon. 340; Story's Eq. Pl., § 408; 34 C. C. A. 240; 92 Fed. 115; 3 Tenn. Ch. 211; 19 Vt. 219; 36 Ark. 532; 47 Ark. 17; 183 Ill. 132, 55 N. E. 673; 144 Ill. App. 344; 13 W. Va. 256; 25 N. J. Eq. 145; 78 Miss. 41; 25 Ark. Law Rep. 241; 129 S. W. 1079; 102 Md. 456; 84 Ark. 203. It can be attacked and its sufficiency tested only by the established rules of equity pleading. 2 Daniels Ch. Pr. & Pl. 1579; Story's Eq. Pl., § 418; 3 Enc. Pl. & Pr. 574; 36 Ark. 532; 31 Ark. 616; 33 Ark. 661; 6 Enc. Pl. & Pr. 297-298.

2. The bill will not be condemned on demurrer for mere indefiniteness or uncertainty. All its allgations must be construed liberally with a view to substantial justice between the parties. 54 Ark. 449; 31 Ark. 657; 24 Ark. 73; 52 Ark. 378; 24 Ark. 402; 17 Ark. 113; 70 L. R. A. 326; 6 Enc. Pl. & Pr. 346.

3. The evidence alleged in the bill of review would have been competent in the original case as tending directly to prove lack of benefits, in that it would have proved that the supplemental sewer line through appellants' land had been abandoned. Abandonment includes both the intention to abandon and the external fact by which such intention is carried into effect, and, since the intention is the essence of the abandonment, the facts in each particular case are for the court and jury. 94 N. W. 857; 120 Ia. 410; 30 Atl. 842; 165 Pa. 325; 14 So. 379; 102 Ala. 224; 50 Pac. 318; 90 Ia. 646.

4. The newly discovered evidence alleged is not cumulative. Evidence is not cumulative when it tends to prove a distinct fact not testified to at the former trial. Here the issue of abandonment was not before the court at all. 36 Ark. 540; 114 Ga. 233; 43 Ia. 175; 148 Mo. 478; 43 Conn. 514; 75 Wis. 24; 69 N. W. 329; 84 N. W. 513; 2 Ark. 346; 31 Ark. 616; 59 Ark. 441; 53 Pac. 481.

5. Facts pleaded in the bill and admitted by the demurrer have the same force and effect in support of a

judgment as though proved at a trial. 24 Ark. 410; 6 Ark. 150; 19 Ark. 319; 20 How. 306; 10 Pet. 298; 24 How. 188; Stephen on Pleadings, 155; 74 U. S. 98-99; 6 Enc. Pl. & Pr. 334, 337, 346.

McDaniel & Dinsmore, for appellees, filed no brief.

WOOD, J., (after stating the facts). 1. The chancery court had jurisdiction to entertain the bill of review, which was in the nature of an original bill, and it did not abuse its discretion in permitting the complaint or bill of review to be filed.

"The court of chancery has inherent power, without the consent of the appellant tribunal, to review, on the ground of newly discovered evidence, its decree, though it has been passed upon on appeal, and no principle or practice requires that it shall refrain from doing so until the consent or countenance of the superior court shall have been obtained." *Putnam* v. *Clark,* 35 N. J. Eq. (8 Stewart), 145-150.

The bill in the present case was not a bill of review for errors apparent on the face of the record, but was founded upon alleged newly discovered evidence of facts occurring since the former decree, which, if they had been in existence and brought forward at the former hearing, would have most likely changed the results. See *Holl* v. *Waddill,* 78 Miss. 41 *et seq.*

In *Jacks et al.* v. *Adair,* 33 Ark. 161-171, this court said: "Without multiplying citations it may be taken as the result of American authorities, that whilst all deny the power of the court of chancery, after the action of a court of appeals, to review its decrees for matters which might have been assigned as error, they either expressly announce, or with very few exceptions, concede this power for newly discovered facts; and it must exist of necessity somewhere, or there would in many instances be a total failure of justice. This court can not entertain jurisdiction of a bill of review of its own decrees. Such bills are not of an appellate character, but when founded upon newly discovered facts, as this is, are of original nature." *Killian* v. *Killian,* 98 Ark. 15.

In *Craufurd* v. *Smith,* 93 Va. 623-628, it is said: "The court, before allowing a petition to rehear, or a bill of review, to be filed on the ground of newly discovered evidence, ought to be satisfied that the evidence relied on is new and could not, by ordinary diligence, have been discovered prior to the date of the decree complained of."

The chancellor, having allowed the bill to be filed, must have become convinced in these particulars.

2. The next and only other question to be considered is whether or not the complaint or bill of review stated facts, the truth of which when conceded, as they were by the motion or demurrer, sufficient to change the result of the former decree and to authorize the relief which the appellants seek.

In *Killian* v. *Killian, supra,* speaking of a bill of review, we said: "A bill of review is an independent proceeding, and is a complaint by the party seeking the relief as the complainant. Its object is to reverse or modify a decree rendered in a former case, and it should specifically state the grounds upon which it is based. If it is based upon newly discovered evidence, it should state facts showing that this alleged new evidence is relevant and material to the issue involved in the original case and of such a character and cogency that it would change or at least probably change the result." And, further, "The bill for review will not lie where * * * such new evidence is not in fact material to the issue that was decided by the former decree and could not change the result."

Tested by the above rules, we are of the opinion that the facts stated in the complaint were not sufficient to change the result of the decree on the former hearing as to the legality and validity of the assessment. The facts which have occurred and which are now brought forward in the bill as newly discovered evidence, to change the former decree, are substantially, that since the first decree was rendered the supplemental sewer line through the southeast corner of appellant's land has been abandoned because the sewer improvement dis-

trict had no revenue and no funds with which to build it; that because of its great cost it was impracticable in view of the location of plaintiff's land; that because of the scanty population it was undesirable as well as impracticable. These facts, if they had been shown to exist when the decree was rendered, could not have changed the result of that decree, for admitting that they were true, they only showed that the project of building the supplemental sewer line through the southeast corner of plaintiff's land had been abandoned after the improvement district had been formed, which contemplated as a part of the improvement the building of this supplemental line. But there are no allegations in the complaint to show that the expense necessarily incurred in the formation of the district and the laying off of the same over these lines could or would be paid without the appellant's pro rata part of the assessment. There is no allegation to show that this assessment, or a part thereof, was not necessary to defray this preliminary cost of the formation of the district.

The allegations, in effect, are that the appellants are not, and will not be, benefited because the contemplated sewer line over appellants' land has been abandoned. But there are no allegations to the effect that the appellants would not have been benefited by the contemplated improvement. Now the abandonment of a contemplated improvement that would have been beneficial if made as originally contemplated does not render invalid an assessment that was levied for the purpose of improvement unless it be shown that no part of the assessment was needed for the purpose of defraying the necessary expenses incurred in the preliminary work of surveying the territory and creating the district. This case is ruled in this particular by the recent case of *Board of Directors of Crawford County Levee District* v. *Dunbar,* 107 Ark. 285, where the court, speaking through Chief Justice McCULLOCH, said: "But it is not essential that the benefits be actually realized. Expenses must be incurred in advance of the enjoyment of benefits, and as-

sessments must necessarily be levied upon the basis of anticipated benefits." Citing *Salmon* v. *Levee District,* 100 Ark. 366. And, further, quoting from that case, "The legislative branch of the government is, as we have said in several cases, the sole judge in the matter of creating improvement districts of this character, in establishing the boundaries thereof, and in determining, or in providing means for determining, the amount of assessments based on benefits, and the courts will not interfere unless an arbitrary and manifest abuse of the power is shown. Mere mistakes of the lawmakers, or of those empowered by the lawmakers to make assessments, in fixing the amount or rate of assessments, will not be reviewed and corrected by the courts."

While this was said in regard to the Legislature and districts created directly by it, the same principle applies in regard to agents upon whom they have conferred power to create improvement districts in cities and towns.

Furthermore, the benefits to be derived from the supplemental line of sewer contemplated, and which the complaint shows to have been abandoned, were not the only benefits that the testimony tended to show would come to appellants by reason of the contemplated improvement. In our opinion in the case of *Improvement District* v. *Pollard et al.,* we said there was "substantial evidence on the part of plaintiff showing the property received additional benefits through improved sanitation, by the construction of this sewer system in the proximity of defendants' land." There is no allegation in the complaint that appellants would not still be thus benefited, or that the sewer system in proximity to appellants' land had been abandoned.

In the above case we held that "if any benefit accrued to the land by reason of the improvement then the owner is precluded at any time after the time given him by the statute from raising any objection thereto." And, further, "If it appears from any substantial testimony that the property receives any benefit from the improve-

ment, then the assessment thereof made by the board can not be invalidated by the court, but the owner can only obtain relief therefrom by proceeding in the manner prescribed by the statute. In such event it can not be said that the assessment was made either 'through fraud or through demonstrable mistake.' "

It follows that the bill of review fails to state a cause of action and the court did not err in sustaining the demurrer thereto and in rendering the judgment dismissing the same. Affirmed.

KIRBY, J., concurs in the judgment.

WELLS FARGO & COMPANY v. W. B. BAKER LUMBER COMPANY.

Opinion delivered March 24, 1913.

1. JUDGMENT BY DEFAULT—FALSE RETURN BY OFFICER.—Where a default judgment has been rendered against a defendant, he may show the falsity of the officer's return, to excuse his failure to make his defense at the time of the trial and to prevent his being compelled to submit to a judgment and have his rights unjustly concluded without an opportunity to be heard. (Page 423.)
2. APPEAL AND ERROR—MOTION TO SET ASIDE JUDGMENT—JURISDICTION OF CIRCUIT COURT.—Where the trial court overrules defendant's motion to set aside a default judgment rendered against him, the court retains jurisdiction, during the term, to set aside the judgment, even though an appeal has been prayed by defendant, and granted, so long as the appeal remains unperfected. (Page 423.)

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

STATEMENT BY THE COURT.

The lumber company brought suit for damages against the express company, alleged to have been caused by the negligent failure to deliver a piece of machinery to the foundry to which it was consigned for repairs, and also claimed special damages.

A judgment by default was rendered and upon a trial upon the question of damages a verdict and judgment was rendered in favor of appellee. Appellant, a

few days afterward, during the same term of court, at which the judgment was rendered, filed a motion to set aside the judgment by default, alleging that it had received no notice of the suit before judgment was taken and that it had no notice whatever of the pendency of the suit until after judgment had been rendered on September 25, 1912. That the pretended service upon C. E. Hagan, was not made upon him; that at the time of the service he was not the agent of the express company in Cleburne County, and that the sheriff was mistaken in the identity of the party upon whom the process was served. The motion further alleged that the defendant had a just defense to the action and, if permitted to do so, would show that the plaintiff was not entitled to recover any amount whatever in the suit and that it did not owe plaintiff anything. Prayer was that the judgment be set aside and that the defendant be allowed to defend the suit. The motion was demurred to on the grounds that it did not state facts sufficient to constitute a cause for a new trial, nor show that the defendant was entitled to the relief prayed for and because it sought to contradict the return of the sheriff on the summons. The affidavits of B. Massingill, the sheriff, and C. E. Hagan, were filed with the motion and, in addition, the court heard their oral testimony. The sheriff's return on the summons was as follows:

"State of Arkansas, County of Cleburne. I have this 25th day of July, 1912, duly served the within by serving a copy and stating the substance thereof to the agent of the Wells Fargo Express Company at Heber Springs, Arkansas, as I am herein commanded." (Signed) "B. Massingill, Sheriff."

The amended return reads:

"State of Arkansas, County of Cleburne. I have this 25th day of July, 1912, duly served the within summons by delivering a copy and stating the substance thereof to C. E. Hagan, general and only agent of defendant, Wells Fargo Express Company, at Heber Springs, and in charge of the office, and management and

control of the business of said Wells Fargo & Co., at Heber Springs, at said office in Cleburne County, Ark." (Signed) "B. Massingill, Sheriff." "Filed July 27, 1912, J. L. Little, Clerk."

The sheriff stated he did not know Hagan personally and could not state the service was had upon him, but did know that he served the summons upon some man at the station, who represented that he was in charge of the station and the business of the defendant. Did not know his name, but learned afterwards the name of the agent at this point and substituted his name. He knew he would not have served it upon the man, except he believed he was the agent of the company and he did believe it, but he could not say it was C. E. Hagan from personal knowledge. He could have been mistaken as to the name of the man upon whom he served it. He had just seen C. E. Hagan and could not say he was the man upon whom he had served the summons. He did not know the man whom he served, neither the man nor his name. He was under the impression that Hagan was not the man whom he served.

Hagan stated he was not in charge of the station at Heber Springs at the time of the service of the summons, but was station agent at Alpena, Arkansas, residing there, and not at Heber Springs, nor the station agent there.

The acting superintendent of the express company stated that when a summons was served upon the company the agent was required to communicate the fact to the home office, and it became a part of the record of that office. That in this suit, the home office never had any record or knowledge of it until after the default judgment was taken, and they got the information over the phone from the route agent, Mr. Foster, of Helena, who had passed through Heber Springs during the day and had been told by the agent about it. He stated that Hagan was not the agent of the company at Heber Springs on the 25th day of July, 1912, but that he was agent at Alpena, in Boone County. That he was later

promoted to the Heber Springs office on August 5. That they had a good defense to the suit and wanted to be allowed to make it. That R. D. Powell was the agent in charge of the office, immediately preceding the coming of Hagan. That he was not in their employ and they were not aware of his present address, although they had been using their utmost endeavors to find him.

The superintendent of the company in Arkansas stated that the company maintained only one office in Heber Springs, that a summons was served on its agent in January, 1912, in which the Baker Lumber Company was plaintiff and the Wells Fargo Express Company was defendant, for the same cause of action and the Wells Fargo Company removed that case to the Federal Court.

The court overruled the motion to set aside and vacate the judgment, and appellant filed a motion for a new trial, which was overruled and prayed and was granted an appeal to the Supreme Court, 90 days being given in which to file a bill of exceptions.

On the afternoon of the same day, September 30, 1912, the defendant filed a supplemental motion, in which it averred that no summons had been served upon it in this case; that it did not know of the pendency of the suit until after the default judgment had been taken; that the judgment was rendered without actual, constructive or legal notice of any sort having been given to it of the pendency of the suit. That the summons was not served upon C. E. Hagan, or any other agent of the defendant; that the sheriff's return on July 25 did not disclose the name of the party upon whom service was made; that thereafter he amended it, and upon the suggestion of the attorney for appellee, inserted the name of C. E. Hagan as sole agent in charge of the said express company's office. That Hagan was not served and was not the agent at Heber Springs at that time, but was its agent at Alpena Pass, in an adjoining county. It asked that the first motion filed be considered "Exhibit 1" to this motion, with the affidavits of the sheriff and Hagan attached to it, and the oral evidence of Mas-

singill and Marshall heard thereon, and that the affidavit of R. D. Powell, who was the agent and the only agent of the defendant in charge of the station at Heber Springs on July 25, 1912, and before that date for several months and continuously thereafter until August 5, 1912, be considered. Alleged that the summons was not served upon the said Powell, at that time, nor at any other time. That Powell was not in the employ of the defendant, but was a conductor on a local freight on the Missouri & North Arkansas Railroad and after the trial of the first motion in the morning Powell came through Heber Springs in the afternoon and the defendant, through its agent, Marshall, discovered that fact and obtained his affidavit, which was secured after the trial had occurred in the morning. That it did not now know the whereabouts of Powell before and was using every means in its power to locate him without avail. The affidavit of Powell filed with this motion is as follows:

"My name is R. D. Powell. I am employed by the M. & N. A. Ry. as a train conductor. During the period dating from June 17 to August 5, I was joint agent at Heber Springs, Arkansas, for the M. & N. A. Ry. and Wells Fargo & Company Express, and during this period the Wells Fargo & Company Express, had no other agent at Heber Springs. There was never a summons served on me in a suit of W. B. Baker Lumber Company against Wells Fargo & Company Express, during the time that I was agent for Wells Fargo & Company Express at Heber Springs, Arkansas."

On October 1, 1912, the defendant filed an affidavit of Gardner Oliphint, a stenographer, who was at the trial and took down the testimony and the instructions given by the court. It also filed an answer, admitting the receipt of the piece of machinery for transportation to Harrison, Arkansas, denying any special agreement to transport same with unusual diligence or speed. Alleged that it was to be transported and delivered in the usual course of business. Denied any request made for any unusual promptness and that any representations were

made or notice given of consequences that would result from the failure to promptly deliver the machinery; denied all knowledge of any special necessity for its repair and return and that it had any information that the absence of the cylinder could or would cause plaintiff's mill to be shut down and that any other damages, general or special would, on that account, result to the plaintiff. Denied that the plaintiff was damaged in the sum claimed, or any other amount; that the machinery was not delivered to the foundry without delay and all knowledge of any special damages that could or would occur to plaintiff because of the failure to transport the machinery with the utmost dispatch.

The supplemental motion, with the affidavit of Gardner Oliphint, the stenographer, setting out the record of the trial with the answer, were on motion stricken from the files. The motion for a new trial was filed, setting up this action of the court as a ground therefor, which was overruled and from the judgment, an appeal was prayed.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

If it is conceded that the judgment which was rendered was valid on its face, and that a motion to quash or set aside the return could not be maintained, nevertheless, under the facts shown, the court should have set aside the judgment and permitted the appellant to defend; and its refusal to do so was an abuse of discretion which this court should correct. 55 Pac. 750; 40 N. W. (Minn.) 71; 41 N. W. 244; 33 Ark. 778; 50 Ark. 458, 462; Kirby's Dig., § 4426; 47 N. E. 177; 45 N. E. (Ind.) 526; 104 Ind. 390; 30 Atl. 422; 113 Ill. App. 501; 63 N. H. 111; 16 Wis. 52; 25 Wis. 486; 51 N. Y. Supp. 1136; 63 Ark. 323; 101 Ark. 142.

The court had control of its orders and judgment in the case, including the order granting the prayer for appeal, until the lapse of the term, and had jurisdiction to set aside the judgment at any time during the term and before the jurisdiction of the Supreme Court at-

tached by virtue of the appeal. Kirby's Dig., § 2446; 6 Ark. 100; 27 Ark. 296; 150 U. S. 31; 15 Wall. 384; 18 Wall. 163; 101 U. S. 745; 11 Ark. 631; 72 Ark. 475; 88 Ark. 391. The jurisdiction of the Supreme Court can attach only when the appeal is perfected by lodging the transcript of the record in said court.

Troy Pace, for appellee.

The return of the sheriff is conclusive and can not be attacked in the manner attempted by appellant. On the law of the case the demurrer to the motion to set aside the judgment should have been sustained; yet, since the trial court gave the appellant the benefit of a more liberal construction, and held that the return was only presumption, its finding on the evidence should not be disturbed. 40 Ark. 141; 11 Ark. 368; 49 Ark. 397; 89 Ark. 506; 63 Ark. 517; 50 Ark. 464: 54 Ark. 541; 34 Ark. 495; 72 Ark. 265.

The supplemental motion was properly stricken from the files by the court, because it was without jurisdiction to hear it, while the order granting an appeal to the Supreme Court was in force. There was no motion to set aside the order granting the appeal. 150 U. S. 31; 15 Wall. 384; 101 U. S. 745; *Id.* 752; 27 Ark. 295.

KIRBY, J., (after stating the facts). It is undisputed that the application to set aside the default judgment was made at the same term of court at which the judgment was rendered and shortly after its rendition.

"During the whole of the term, at which a judgment or order is rendered, it remains subject to the plenary control of the court, and may be vacated, set aside, modified or annulled * * *. This is a power inherent in all courts of general jurisdiction and is not dependent upon nor derived from the statutes." 23 Cyc. 901.

In *Ashley* v. *Hyde,* 6 Ark. 100, this court said:

"During the term at which judgment is rendered, the power of every court of record to set aside, vacate and annul its judgments and orders, is undoubted. This

is a power of daily exercise by the courts, in the granting of new trials, arrests of judgment and in other proceedings of like character. Its exercise and propriety can not be questioned; it is based upon the substantial principles of right and wrong, and for the furtherance of justice."

In *Underwood* v. *Sledge,* 27 Ark. 296, this court said:

"It is well settled in this State, that a court has control over its orders and judgments during the term at which they are made, and, for sufficient cause, may modify or set them aside."

In *Aspen Mining Co.* v. *Billings et al.,* 150 U. S. 31, Mr. Chief Justice Fuller, delivering the opinion of the Supreme Court of the United States, said:

"The general power of the circuit court over its own judgments, decrees and orders, during the existence of the term at which they are made, is undeniable, and an order allowing an appeal is subject to that power, so long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate tribunal."

It is also true, this court held in *Ry. Ex parte,* 40 Ark. 141, in a case of a default judgment, that the truth of the sheriff's return upon a copy of the writ could not be controverted either in the action or in a review upon *certiorari.*

But it has further held, however, that an officer's false return of service of process shall not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment based thereon.

"Evidence tending to contradict the record is heard in such cases, not for the purpose of nullifying the officer's return but to show that by the judgment the defendant has been deprived of the opportunity to assert his legal rights without fault of his and that it would be unfair to allow the judgment to stand without affording him the chance to do so. The principle that affords relief to one that has been summoned, but has been pre-

vented through unavoidable casualty from attending the trial governs." *State* v. *Hill,* 50 Ark. 461; See also *Kolb* v. *Raisor,* 47 N. E. 177; *Locke* v. *Locke,* 30 Atl. Rep. 422; *Cook* v. *Haungs,* 113 Ill. App. 501; *Clough* v. *Moore,* 63 N. H. 111; *Carr* v. *Bank,* 16 Wis. 52.

Appellant was not entitled to show the falsity of the officer's return to defeat the jurisdiction of the court rendering the judgment under the doctrine of the cases above cited, but only to excuse its failure to make its defense at the time of the trial and prevent its being compelled to submit to a judgment and have its rights unjustly concluded without an opportunity to be heard.

The testimony is well-nigh conclusive that the summons was not served upon an agent of the express company, as the return shows it to have been, both persons who had been agents denying that it was served upon them and the sheriff not being able to say upon whom it was served; but only that he delivered the copy to a man who said he was agent, whom he could not identify as either man who had been agent there, and the testimony shows further that the company had no notice in fact of the bringing of this suit, nor the service of summons, and that as soon as it had information that a default judgment had been taken against it, immediately and without delay, shortly thereafter, and at the same term of the court, it moved to set aside the judgment and that it have opportunity to make its defense to the suit, which was alleged, to be a good one.

It was within the discretion of the court to permit the setting aside of the default judgment and the motion should have been granted and the defendant given an opportunity to make its defense. *Rice* v. *Simmons,* 89 Ark. 360.

It is true, the second and supplemental motion to set aside the judgment, accompanied by the affidavit of the person who had been the express company's agent on the date of the service of the summons, was not filed until the afternoon of the day upon which the first was overruled and from which an appeal had been prayed and

granted, appellant not sooner being able to procure the affidavit of said person, but it was at the same term of court at which judgment was rendered, and since no appeal had, in fact, been perfected from the judgment overruling the first motion, the court had as much jurisdiction of the cause and to grant the relief prayed as though the first motion had not been overruled and appeal prayed therefrom. *Aspen Mining Co.* v. *Billings, supra; Clay* v. *Noterebe's Executors,* 11 Ark. 631; *Robinson* v. *Arkansas Trust Co.,* 72 Ark. 475; *Claiborne* v. *Leonard,* 88 Ark. 391.

For the error of the court in refusing to grant the motion and set aside the default judgment, its judgment is reversed and the cause remanded for a new trial that appellant may have opportunity to make its defense against a claim which it was prevented from defending in the first instance through no fault of its own.

WESCO SUPPLY COMPANY *v.* EL DORADO LIGHT & WATER COMPANY.

Opinion delivered March 24, 1913.

1. CORPORATIONS—ASSETS—CREDITORS—TRUST FUND.—The assets of an incorporated company are a trust fund for the payment of its debts, which may be followed into the hands of any person acquiring them with notice of the trust. (Page 428.)

2. CORPORATIONS—TRANSFER OF ASSETS—CREDITORS.—When one corporation of which A is the president, manager and owner of all the stock, sells all its assets to another corporation of which A is also president and manager and owner of four-fifths of its stock, and the new company issued its stock directly to A in payment for the transfer and A knew that the old company was indebted to the plaintiff, and knew of the insolvent condition of the old company, *held,* the new company is not an innocent purchaser of the assets of the old company and is bound to the payment of the creditors of the old company to the extent of the value of the assets received therefrom, whether it agreed to assume the obligations of the old company or not. (Page 430.)

3. CORPORATIONS—CREDITORS—TRANSFER OF ASSETS.—When a corporation with knowledge of the insolvent condition of another corporation, takes over its assets, it will be liable to the creditors

of the insolvent company in the amount of the consideration paid for its assets, which amount must be pro rated among the creditors, if the amount of the debts exceed the value of the assets received by the purchaser, and the burden of proof is upon the purchaser to show that the debts exceed the assets, and the pro rata share due plaintiff. (Page 430.)

Appeal from Union Chancery Court; *E. O. Mahoney*, Chancellor; reversed.

STATEMENT BY THE COURT.

Appellants brought this suit against appellee to recover the amount of a judgment for the sum of $587.34 which it had obtained against the El Dorado Light & Power Company. The complaint alleges that on December 1, 1908, said light and power company was a corporation organized and doing business in the State and indebted to it in said sum for goods and merchandise sold and delivered to it. That it obtained judgment therefor in the Union Circuit Court on April 8, 1910, in the sum of $587.34, including interest from December 1, 1908; that on December 28, 1908, the defendant absorbed fraudulently all the assets of the El Dorado Light & Power Company and consolidated the same with itself, fraudulently taking over all its assets and appropriating the same to its own use and issuing its capital stock to the stockholders of the El Dorado Light & Power Company in payment for said assets, leaving no property belonging to said old company with which to pay plaintiff's claim or judgment and that it still has the property of the old company so taken over in its possession. It prayed judgment in the alternative for the amount of the judgment against the old company and interest, or that the appellee company be declared a trustee, holding the assets of the old company in trust for the benefit of the creditors and that same be subjected to the payment of its said judgment, a copy of which was exhibited with the complaint.

Appellee answered, denying the material allegations of the complaint, that it absorbed the assets of the El Dorado Light & Power Company, and alleged that it

only purchased a part of the assets of the said company, and paid therefor an adequate price without knowledge of appellant's claim against said company.

The testimony tends to show that the property of the El Dorado Light & Power Company was of the value of from $10,000 to $25,000, and that the new corporation, the El Dorado Light & Water Company, bought out the old company and its plant and other visible property passed into the possession of the new company.

John P. Holmes stated that he was the president of the old company, and owned practically all of its stock, in fact all but a few shares owned by his wife and one share held by W. D. Chew, all of which he acquired before the transfer; that he did not regard the company insolvent, although it could not pay its debts; that the new corporation was organized with an increased capital stock and it bought all the property of the old corporation, except about $1,500 in accounts, 65 per cent of which were good. The new company issued to him, as he was the owner of all the stock in the old, in payment for the property purchased of it, $20,000 of its stock, which was of the value of fifty cents on the dollar; that the old company owed him, individually, about $12,000, which he paid off, and that he applied all the stock issued to him and the proceeds realized from the accounts of the old company to the payment of its debts, all of which were paid, so far as he knew, except the debt to appellant. He was president when it became indebted for the supplies purchased by him from appellant company, for which the judgment sued on was afterwards obtained and continued so until the transfer of the assets to the new company, of which he was also president, a director, its general manager and owner of four-fifths of the stock thereof. He owned all of the stock of the old company at the time of the execution of the deed conveying the property to the new company and said it was the intention that the conveyance to the new company should transfer all of the property of the old, except the book accounts, already mentioned. That he knew the debt

due appellant company had not been paid when the transfer was made; that he, himself, negotiated the sale of the old company to the new company and acted also for the new company in making the purchase with another stockholder, Mr. Hudson. Said that the company was not exactly insolvent at the time of the transfer, but it was unable to liquidate its indebtedness and that the old company had never had any assets since the sale, except the accounts, which were collected by him. That he knew of no other debts due by it except the one to appellant company for which it obtained judgment and that it paid all other debts in full.

The deed from the old to the new company was introduced in evidence, and recites a consideration of the sum of $20,000 and contains a description of the property conveyed, including all rights enjoyed by it under a franchise, upon which it was operating for lighting the streets and private property and all contracts.

The court, after hearing the testimony, dismissed the complaint for want of equity, at appellant's costs, from which judgment it appealed.

Warren & Smith, for appellant.

The new corporation, appellee, is liable to the creditors of the old, to the extent of the assets received by it from the old corporation; and the assets of the old corporation may be followed in equity, as trust funds, into the hands of the new company taking with notice of the trust. 54 So. 807; 1 Beach on Private Corp. 558-9; *Id.* 560-61; 73 Atl. 254; 49 So. 934; Clark on Corp. 556; 10 Cyc. 303, par. (c) and (e); *Id.* 306, par. IV; *Id.* 309, par. VI; *Id.* 315; *Id.* 1302, par. (II).

There can be no preference by an insolvent corporation in this State. Kirby's Dig., § 949. Its assets must be *prorated.* 67 Ark. 11. See also 3 L. R. A. 435; 60 N. E. (N. Y.) 327 and cases cited; 26 L. R. A. (N. S.) 651. Under the circumstances of this case, notice to Holmes was notice to appellee. 99 N. E. 132.

Marsh & Flenniken, for appellee.

The transaction between the El Dorado Light & Power Company and appellee was a sale, and, there being no allegation nor proof that the latter agreed to pay or assume the debts of the former, it is not liable for the debt sued on. 97 Ark 106; 67 Ark. 94.

The proof is undisputed that Holmes used the stock in paying off the debts of the power company as far as it would go. It will not be presumed that he received the stock as a *stockholder* for his *interest* in the assets of the power company when the proof shows that he immediately took the stock and applied it, or its proceeds, to the payment of the power company's debts.

The price paid was a fair consideration, and the power company got the benefit of the price in that it was applied to the debts of that company. It, therefore, did not give or sell its assets to appellee to the *prejudice of its creditors.*

KIRBY, J., (after stating the facts). If the formation of the new corporation and the taking over of the assets of the old upon the issuance of the $20,000 of the stock of the new corporation to John P. Holmes, the owner of all the stock in the old corporation, in payment therefor, be regarded a reorganization of the old corporation, the rights of creditors would not be prejudiced thereby. 10 Cyc. 286.

"The assets of an incorporated company are a trust fund for the payment of its debts, which may be followed into the hands of any person acquiring them with notice of the trust." *Jones-McDowell Co.* v. *Arkansas M. & A. Co.,* 38 Ark. 17; 1 Beach on Private Corporations, 558; see also Note 11, L. R. A. (N. S.) 1119.

It is undisputed that all the stock issued by the new company in payment for the assets of the old company was issued directly to John P. Holmes, who was the president and manager of the old company, and also the owner of all its stock and the transfer stripped the old company of all its assets, except the small amount of book accounts and deprived it of its power to continue

the business for which it was formed and it was intended by both the seller and the buyer that it should do so. It is not disputed that the old company was in financial difficulties and unable to meet its obligations and while thus indebted it entered into this contract and agreement with the new concern, transferring substantially all its assets to the new company, which was thereafter to continue the business. The new corporation, in paying for the assets of the old, did not issue its stock to the old company, nor to a trustee for the benefit of its creditors and stockholders, but directly to the stockholder owning all the stock. This stockholder does not claim to have made any adjustment of the debts of the old concern, or an equitable distribution of these assets in satisfaction thereof, but does say that he spent practically the value of all the stock so received and the proceeds of the accounts collected in payment of its debts, he, himself, being the principal debtor, in the amount of something over $9,000. He was president, business manager and owner of all the stock of the old corporation at the time of the transfer complained of; he was also president, business manager, director and owner of four-fifths of the stock of the new concern at the time of the sale and transfer and the delivery of the stock of the new corporation to him as an individual stockholder of the old corporation in payment of the property of the old corporation so transferred. He knew the indebtedness of the old company upon which judgment was obtained against it had not been paid, and he made no distribution of the proceeds realized from the sale of the assets of the old corporation to the payment of this indebtedness which should have been done and such proceeds *pro rated* among all the creditors of said old company, the law not permitting preferences among the creditors of insolvent corporations. Kirby's Digest, § 949; *Dozier* v. *Arkadelphia Cotton Mills,* 67 Ark. 11.

As against creditors, the transfer of the property to the new corporation was illegal and in fraud of their rights and they had the right to follow such trust fund

for the payment of its debts into the hands of any person purchasing with notice of the trust.

The president of the new company, its business manager, who was also a director and owner of four-fifths of its stock at the time of the transfer of the assets of the old company and the issue and delivery of the stock of the new company to him individually in payment therefor, knew of the insolvent condition of the old company; knew of the debt of appellant creditor and the new company can not be regarded as an innocent purchaser under the circumstances. Such being the case, the new corporation is bound to the payment of the creditors of the old concern to the extent of the value of the assets received therefrom without regard to whether there was any agreement to assume its obligations and the court below should have ascertained the amount of the indebtedness of the old corporation and have prorated the consideration paid by the new corporation among the creditors of the old, including appellant, if the amount of its debts were greater than the value of the assets received by the new corporation, and, under the circumstances of this case, the burden of proof devolved upon the new corporation to show such indebtedness and the proper application of the money to the payment thereof, failing in which it should have been required to pay the full amount of appellant's claim herein sued for.

Because of the error in dismissing the complaint, the judgment will be reversed and the cause remanded, with instructions to ascertain the amount that should have been prorated and distributed to appellant upon its debt upon the application of the value of the entire assets of the old corporation to the payment of all its debts and render judgment therefor against appellee company, or for the whole amount of its claim in case it can not be definitely ascertained.

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

Opinion delivered March 31, 1913.

1. RAILROADS—DUTY TO TRESPASSER ON TRACK—DISCOVERED PERIL—PRESUMPTION—BURDEN OF PROOF.—In an action for damages against a railroad company for injury to a trespasser upon its track the burden of proof is upon plaintiff, in order to recover damages for the injury, to show that the employees in charge of the train discovered the peril of deceased's position in time to have avoided injuring him, and negligently failed to use proper means to avoid injuring him after discovering his peril; and the mere proof of the killing does not raise a presumption that the killing was the result of negligence. (Page 438.)
2. RAILROADS—DUTY TO TRESPASSER ON TRACK—DISCOVERED PERIL—BURDEN OF PROOF.—Under Act 284, p. 275, of the Public Acts of 1911, the proof of injury to a trespasser upon defendant's track under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, makes out a *prima facie* case and the burden of proof then devolves upon the railroad company to show that a proper lookout was kept as required by the statute, and that it used ordinary care to prevent the injury after the discovery of his perilous position. (Page 441.)
3. RAILROADS—DUTY TO TRESPASSER ON TRACK—NEGLIGENCE.—In an action against a railroad company for damages for the negligent killing of deceased, under Act 284, p. 275, Acts 1911, an instruction is improper which declares that failure on the part of the railroad company to keep a constant lookout or to exercise ordinary care to avoid injuring deceased after his peril had been discovered rises to the grade of wanton or reckless conduct. (Page 442.)
4. INSTRUCTIONS—PLEADING—DAMAGES.—In an action for damages against a railroad for the negligent killing of deceased, where the complaint does not allege as an element of damage the loss to the children of the deceased of parental care and training, an instruction authorizing such damages is erroneous. (Page 442.)

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

STATEMENT BY THE COURT.

This is a suit for damages for the wrongful death of O. E. Gibson, alleged to have been caused by the negligence of appellant company, in running a train over

him and not keeping a constant lookout, the complaint alleging:

"That the servants of the defendant operating the train did not keep a constant lookout, as required by law, and that had they kept such a lookout they could have discovered the deceased's peril in time to have prevented injury to him by the exercise of reasonable care." "That they negligently, wilfully and wrongfully ran over and killed the deceased, when by the exercise of reasonable care, they could have prevented injuring him."

The answer denies all the material allegations of the complaint and alleges that about 5 o'clock on the afternoon of the day of the injury the deceased was lying down drunk, or asleep, on the side of the railroad track south of Hope as its passenger train approached and while the operatives in charge of said train were keeping a lookout, and, on account of the darkness, its servants failed to discover deceased in time to stop the train, but immediately upon seeing him did everything in their power to stop the train, but were unable to do so and pleaded the negligence of deceased in bar of the action.

O. E. Gibson was killed by appellant's train on the 27th day of January, 1912, south of Hope, shortly after 5 o'clock. The train was due, under its schedule, at Hope at 4:49, was from forty-five to fifty minutes late, making its time of arrival at Hope about 5:39 and was running about thirty miles an hour. The track was straight for a distance of about three miles south of Hope and the trainmen noticed a dark object on the left-hand side of the track, which the engineer took to be a tie lying down beside the track and a little too close; he discovered it when he was about 500 or 600 feet from it, kept a close watch from then on, fearing it wasn't in the clear, although he could see it was on the outside of the track entirely and when he got within about 200 feet of it thought it might be a man and began to stop the train. The emergency brakes were at once applied and the whistle blown and bell rung. The train struck the man and the last coach cleared the place where he was

struck before it was stopped. The train consisted of an engine and eight cars. The engineer testified it was as good a stop as could be made; that nothing else could have been done to stop the train quicker.

The fireman testified likewise; that after discovering that the object beside the track might be a man, all efforts possible to stop the train were made and the bell was rung and the whistle blown and "the air put in the emergency." That they were 500 or 600 feet from the object when they first discovered it. That he was sitting on his seat in the cab and was within 150 feet from the object when he first concluded it might be a man and rang the bell and hollered to the engineer. The engineer, he believed, also hollered at him and he had put the air over in the emergency. He said the train was making about thirty miles an hour.

Expert locomotive engineers testified relative to the effect of an electric headlight between sundown and dark and that it did not give as good light at that time as after dark; that a man could be seen by such a light in the twilight 500 or 600 feet, standing, and would be more perceptible if on the track than to the side of it; that from 200 to 250 feet the engineer should be able to discern the difference between a crosstie and an animate object the size of a man, his ability to do so depending much upon the particular time between sundown and dark, and the position in which the object was lying. That an ordinary passenger train going into Hope on that grade of track where deceased was injured should be stopped in between 750 and 800 feet, going at the rate of thirty miles per hour. That it would take about three seconds for the brakes to take full effect against the wheels; that the train running forty-four feet a second would go 140 feet before the brakes had the full effect and it could not be stopped in less than 750 or 800 feet. If the train was running eighteen miles an hour the train could be stopped in between 475 and 500 feet, and could not be stopped in 300 feet. The other expert testified likewise and said between sundown and dark the effect

of the headlight to render objects discernible beside the track is very poor. Between sundown and dark your light is not much good; there is a shadow goes with these lights. You will see a shadow and think it is something else. Assuming that the engineer is on his engine and there is a man lying with his head about the end or between the ties with his feet extending away from the track, the engineer would be doing mighty well at that time of night, if he was able to discover it was a man a block distant. If he could see that there was an object there for a distance of 450 feet he would be doing mighty well. The engineer would be somewhere close to a block of it before he could discern that the object the size of a man beside the track was a man in the twilight hour with the headlight burning. If he did discover it was a man and put on his emergency brake about three seconds would elapse before the clutch would begin to take hold and then it would depend upon the speed he was making. The train should go about 600 or 700 feet before the stop.

If Mr. Gibson was lying beside the track, with his head up on the ends of the ties or between the ends of the ties near the rail, it would not have been possible to have stopped the train with eight cars before striking him. He could not have stopped the train in time to have prevented striking him after he first discovered the object there. He said if a train was going only eighteen miles an hour it could be stopped in about 500 feet, but that the last test made by him was of a train going twenty miles an hour with a train of six cars, with a grade of one and one-half per cent and a stop was made in 720 feet.

There was testimony to the effect that Gibson had been drinking during the day and several persons saw him sitting on the side of the railroad track; one witness stated that he passed him sitting there, and that he had gone about 1,000 yards down the track when he met the approaching train and stepped off the track to let it pass; that before he did so he looked back and could see

Gibson still sitting up and could see the headlight shining on him. That the engineer was looking out of the window towards Hope and he thought at first he was looking at him, but when the engine passed the engineer seemed, to witness, to be looking ahead at the man on the track. This witness said it was dark, but that it was light enough to see.

Testimony was introduced showing the age of deceased, the amount of his contributions to his wife and infant daughter, who was past seventeen years of age, no claim being made for damages for pecuniary loss to the children over age. One or two witnesses stated that no signals were given before this train stopped, but the great preponderance of the testimony shows that signals were given before the train came to a standstill.

The court instructed the jury, giving, among others, over appellant's objections, instructions numbered 1, 3 and 7, as follows:

No. 1. "You are instructed that whenever it is shown by the plaintiff that deceased was killed by the operation of the train the law presumes that the killing was negligent, and the plaintiff is entitled to recover, without showing anything further, and the burden is upon the defendant to show that it was not guilty of any negligence, causing deceased's death."

No. 3. "You are instructed that the defendant can not be held liable for negligence in this case, if the deceased by his own negligence contributed to the injury complained of, unless it was a wilful injury or one resulting from the want of ordinary care on the part of the defendant to avert it after the negligence of the deceased had been discovered, or resulting from a neglect to keep a constant lookout for persons and property on the tracks, but such failure either to keep such constant lookout or to exercise ordinary care to avoid injuring deceased after his peril had been discovered, if you find it was discovered, or find that defendant's servants failed to keep a lookout, rises to the grade of wanton or reckless conduct and renders immaterial the inquiry as to

the contributory negligence of the deceased in exposing himself to a danger."

No. 7. "If you find for the plaintiff, your verdict should be for such a sum of money as will be a just and fair compensation with reference to the pecuniary injuries resulting from the death of said O. E. Gibson, to the widow and children of said deceased, and you are further instructed that, in estimating the pecuniary injury, if you believe from the evidence that the widow and children of said Gibson, deceased, have sustained any injury for which the defendant is liable, you have a right to take into consideration the support of the said widow and minor child of the said deceased, and the damages, if any, sustained by the minor child by the loss of the instruction and physical, moral and intellectual training of the minor children by the deceased, and also the age of the said minor child, and also the age of the deceased, his condition of health, his probable expectancy; all these things are proper for you to consider in arriving at the amount of damages."

The jury returned a verdict and from the judgment thereon the railroad company prosecutes this appeal.

E. B. Kinsworthy, W. V. Tompkins and *T. D. Crawford,* for appellant.

1. The first instruction would probably be correct where a person is killed at a highway crossing and the plaintiff's evidence does not make out a case of contributory negligence against him; but it has no application where the plaintiff's testimony shows that he was a trespasser and guilty of negligence which caused his injury and death. 65 Ark. 235; 69 Ark. 380; Act 284, Acts 1911, § 1, makes no change in the statute which it amends, Kirby's Dig., § 6607, with reference to the burden of proof. The statute only places the burden on the railroad to prove that the lookout has been kept.

2. The third instruction errs in stating that the *failure to keep* a lookout rises to the grade of wanton or reckless conduct and renders immaterial the inquiry as to the contributory negligence of the deceased in expos-

ing himself to danger. It makes the defendant liable for a failure to keep a lookout whether it would have been effective or not. It is contrary to the evidence, both that a constant lookout was kept and that there was no negligence after the peril of deceased was discovered. 69 Ark. 380.

3. The seventh instruction does not state the correct measure of damage. 60 Ark. 550.

4. If the trainmen were keeping a constant lookout, and stopped the train as soon as possible after discovering that deceased was a human being and in danger of being struck, appellant is not liable, and the jury should have been so instructed, and also that the burden was on the plaintiff to prove that they failed in this duty with respect to stopping the train. 47 Ark. 497.

Steve Carrigan, Jr., and *Mehaffy, Reid & Mehaffy,* for appellee.

1. The first instruction is correct. The act of 1911 permits a recovery "notwithstanding the contributory negligence of the party injured, where, if a lookout had been kept, employees in charge of the train could have discovered the peril of the person injured in time to have prevented the injury, etc." The Townsend case, 69 Ark. 380, can have no application here because the act changes the burden and puts it on the defendant to show that it was not negligent in failing to keep a lookout. Kirby's Dig., § 6773; 63 Ark. 636; 65 Ark. 235; 99 Ark. 228, and cases cited; *Id.* 422, and cases cited.

2. There is no error in the third instruction. Since it is the law that appellant is liable if it failed to keep a lookout and by keeping a lookout it could have discovered the peril of deceased in time to have avoided injuring him, it can make no difference whether the failure to keep a lookout rises to the grade of wanton or reckless conduct or not. 151 S. W. 246; 141 S. W. 81; 152 S. W. 947; 92 Fed. 470; 47 S. E. 614; 23 S. E. 265; 29 S. W. 232; 54 Tex. 618; 33 S. E. 240; 45 S. E. 657.

3. There is no error in the seventh instruction. It does not say, and no one contends, that to consider the

support of the widow and minor child is the measure of damages. 60 Ark. 550; 81 Ark. 274; 57 Ark. 307; 93 Ark. 183; *Id.* 127; 101 Ark. 315

KIRBY, J., (after stating the facts.) Instruction numbered 1 is erroneous and was prejudicial. This court has frequently held that when the damage to property is shown to have been caused by the operation of trains coming in contact with it, that a *prima facie* case of negligence is made against the railroad company.

In *Green* v. *St. Louis, I. M. & S. Ry. Co.*, 99 Ark. 228, the court said:

"It is true that, in suits against a railroad company for the recovery of damages done to property by the running of its trains, the burden of proof of showing due care upon its part is cast upon the railroad company by virtue of the statute of this State making railroad companies responsible for all damages done or caused by the running of their trains." (Citing cases.)

It has likewise been held that proof of the injury to a person at road crossings or in the street, where he had the right to be, by the operation of a railroad train, is *prima facie* evidence of negligence on the part of the railroad company. *Little Rock & F. S. Ry. Co.* v. *Blewitt*, 65 Ark. 237; *St. Louis, I. M. & S. Ry. Co.* v. *Neely*, 63 Ark. 638.

But the court has invariably held that no such presumption arises in case of an injury to a trespasser by the operation of railroad trains and that the burden of proof in such cases devolves upon the plaintiff to show in order to recover damages for the injury that the employees in charge of the train discovered his perilous position in time to have avoided injuring him and negligently failed to use proper means to avoid injuring him after discovering his peril. *St. Louis, I. M. & S. Ry. Co.* v. *Watson*, 97 Ark. 560; *Jones* v. *St. Louis, I. M. & S. Ry. Co.*, 96 Ark. 370; *Chicago, I. T. & P. Ry. Co.* v. *Bunch*, 82 Ark. 522.

Nevertheless, it is contended that under the lookout statute of May 26, 1911, appellee was entitled to said

instruction and also instruction numbered 3, as given.

The first section of that act provides:

"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."

This statute is an amendment to section 6607 of Kirby's Digest, our first statute requiring a lookout to be kept by the operatives of a railroad train, which was enacted to avoid the effect of certain of the court's decisions, relative to the liability of railroad companies for injuries caused by the operation of their trains. The court construing it held that it did not affect the defense of contributory negligence in the case of a trespasser and that it was not its purpose to abolish the rule of contributory negligence in such cases.

In *St. Louis S. W. Ry. Co.* v. *Dingman*, 62 Ark. 252, the court said: "It simply requires the employees in charge of trains to keep a lookout, and provides that the railroad company shall be liable for all damages resulting from the failure to keep such lookout."

In *St. Louis, I. M. & S. Ry. Co.* v. *Leathers*, 62 Ark. 238, the court said: "In our opinion it makes the failure to keep a constant lookout by the employees of a railroad company negligence, and puts the burden upon the railroad company to establish the fact that it has

kept such lookout. This is the extent of the change made in the law by this statute, which, in our opinion, does not, in such cases as this, abrogate the doctrine of contributory negligence."

In the Dingman case the court, after stating the rule before the act, said: "But now the company is liable if, by proper care and watchfulness, it could have discovered and avoided the danger."

Now this last act provides the railroad company 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 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 and the burden of proof devolves upon the railroad company to establish the fact that the duty to keep the lookout has been performed as in the first act. It was the evident purpose of this act to provide a different rule of liability against a railroad company causing an injury by the operation of its trains in case of failure to keep a lookout for persons on its track than was prescribed by the old act, which required the same lookout to be kept, and placed the burden of proof upon the railroad company in case of an injury to establish the fact that the duty to keep a lookout had been performed. It was not intended, however, that upon proof of the killing of a trespasser by the operation of a train that the presumption should arise that the killing was negligent and the plaintiff entitled to recover damages without showing anything further, and casting the burden of proof upon the company to show that it was not guilty of any negligence, causing the death, as declared in said instruction numbered 1.

Before the adoption of the amended act, the railroad company was only liable to the payment of damages for the injury to a trespasser in case it discovered his perilous position in time to have avoided the injury,

and failed to use reasonable care to prevent such injury after such discovery, and the burden of proof to show these facts was upon the one seeking a recovery for the injury. If it had been the intention to make the railroad company liable by the passage of this statute, *prima facie,* for all injuries to persons upon the tracks, unless it could show that it kept a proper lookout and did not discover the person injured in time to have avoided the injury, and after discovering his perilous position used all reasonable care to avoid the injury, it would have been easy enough to have said so and required different language to provide such rule.

In *Central Railway Co.* v. *Lindley,* 105 Ark. 294, 151 S. W. 246, a case of an injury to horses, not by the train striking them, but by frightening them in its operation and causing them to jump into a trestle, the court, construing this lookout statute, said:

"In other words, the statute makes it the duty of the railroad companies to keep a lookout for property upon its tracks, and makes 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."

Before its passage, it had only been held that a *prima facie* case of negligence was made out against the railroad company on proof of injury to the animal by the operation of a train, by actually coming into contact with it, and the rule in this respect is not changed by the statute. We think the construction there placed upon the act applies to persons alike and that the railroad company now owes the same duty to keep a lookout to avoid injuring the trespasser upon its tracks, and that upon proof of injury to such person by the operation

of its trains under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, that a *prima facie* case is made and the burden of proof then devolves upon the railroad company to show that a proper lookout was kept as required by the statute and that it used ordinary care to prevent the injury to the person after his discovery in a perilous position in order to escape liability for such injury.

Instruction numbered 3 should not have declared that the failure to keep a constant lookout or to exercise ordinary care to avoid injuring deceased after his peril had been discovered, rises to the grade of wanton or reckless conduct. The statute declares the duty and it was sufficiently brought to the jury's attention, without such expression, which could not assist them in arriving at a proper verdict.

Instruction numbered 7, relative to the measure of damages, is erroneous, under the pleadings; the loss of parental care and training to the minor children, not having been alleged as an element of damages in the complaint. *Helena Hardwood Lbr. Co.* v. *Maynard,* 99 Ark. 377; *St. Louis, I. M. & S. Ry. Co.* v. *Sweet,* 57 Ark. 287.

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

McLAUGHLIN v. CITY OF HOPE.

Opinion delivered March 31, 1913.

1. PLEADING—MOTION TO MAKE DEFINITE.—Where a complaint states a cause of action defectively the defect is reached by motion to make more definite and certain and not by demurrer. (Page 445.)
2. PLEADING—SUFFICIENCY OF COMPLAINT ON DEMURRER.—When the facts stated in a complaint with every reasonable inference deducible therefrom constitute a cause of action the demurrer should be overruled. (Page 445.)

3. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—SEWER SYSTEM BEYOND CORPORATE LIMITS.—Cities and towns have power to open, construct and keep in order and repair sewers and drains and enter upon and condemn private property for such purposes, outside the corporate limits of the city. Sections 2906, 2920, Kirby's Digest. (Page 446.)

4. EMINENT DOMAIN—LIABILITY OF MUNICIPAL CORPORATION FOR POLLUTING STREAM.—The owner of the land on a stream has the right to have the water which flows from the land of the upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit, and while he must submit to the natural wash and drainage coming from cities and towns above, under art. 2, § 22, of the Constitution, a city will be liable to him for polluting the stream with sewage to such an extent as to render his leasehold worthless and make an abandonment of his property necessary, since the city is damaging his property for a public use. (Page 446.)

5. MUNICIPAL CORPORATIONS—POLLUTING STREAM—DAMAGE TO PROPERTY BELOW.—The turning of sewage into a branch by a city and polluting the water thereof to the damage of riparian owners below is a damage done to said property for public use within the meaning of art. 2, § 22, Constitution of 1874, for which the city must make compensation. (Page 449.)

6. EMINENT DOMAIN—POLLUTION OF STREAM BY CITY—PERMANENT INJURY—DAMAGES.—When the action of a city in constructing its sewer system so as to turn its sewage into a branch indicates an intention to acquire a permanent right to continue to so use and pollute the stream, the damages to a riparian owner below should be assessed upon that basis as though the city were proceeding to acquire it under its power of eminent domain. (Page 449.)

7. ACTIONS—MUNICIPAL CORPORATIONS—DAMAGE TO PROPERTY.—An individual has a right to bring an action against a municipal corporation for damages for polluting with sewage a stream flowing by plaintiff's land. Kirby's Digest, § § 2903-5. (Page 449.)

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

STATEMENT BY THE COURT.

P. H. McLaughlin brought suit for damages against the city of Hope, arising from the construction of its sewer system, which discharged the sewage of the city into Hanegan's branch, which flowed through certain lands, the property of S. B. Henry, part of which upon

the branch had been leased by him for a mill site, and upon which a saw mill had been erected for the purpose of manufacturing certain timber, belonging to said Henry, and purchased by McLaughlin of him, into ties.

The complaint alleges that the mill was located on said stream of water for the purpose of using it in making steam to propel the machinery for manufacturing the timber into finished ties. That after leasing the mill from the owner of the land, he moved his mill and located it on the banks of the branch and used the water therefrom in the operation of the machinery. That after the mill had been located and put in condition for operation and the contract for the manufacture of the ties entered into and some of the timber cut and delivered at the mill and some ties manufactured, that the sewage from the city of Hope was discharged into Hanegan's branch and carried on down through and crossing the lands described in the complaint and so polluted the water therein as made it unfit for generating steam and appellant was compelled to abandon the use of it for that purpose and there was no other water on the premises that could be used for the purpose of operating the mill. It alleged further that the city of Hope, its agents, officers and servants so constructed its sewers as to discharge the sewage from said city of Hope into said branch and to cause noxious odors to spread over and about said mill site and mill premises to such an extent that plaintiff was compelled to abandon the same; that said noxious odors rendered said mill premises uncomfortable, undesirable and unhealthful as a place for people to work; that as a result plaintiff was unable to get hands to help carry on the work, and that plaintiff himself was unable to endure the the noxious odors and was forced to abandon his said mill site. Damages were also claimed for the loss of profits that could have been realized on the manufacture of the timber into ties.

A demurrer was interposed and sustained to this

amended complaint and, from the judgment, dismissing it, plaintiff prosecutes this appeal.

Jobe & Montgomery, for appellants.

1. Appellants have a legal right to sue. 24 Cyc. 1056 (111); 4 Wash. 749; 31 Pac. 28; 74 Ill. 433; 71 Ark. 302; 13 N. E. 686; 73 Am. Dec. 66; 13 Cyc. 151.

2. If they have the right to sue for a legal injury, the city it liable. 84 Am. St. 902; Const. art. 2, § 22; 15 Cyc. 662; 98 Ark. 206; 94 Fed. 561; 77 Am. St. 335; 41 *Id.* 367; 42 *Id.* 840.

3. A legal injury was committed by the city in violation of private rights and it is liable for the damages. 14 Am. St. 319; 95 Ark. 297; 93 *Id.* 46; 51 Am. *St. Louis, I. M. & S. Ry. Co.* v. *Moss,* 75 Ark.64; *Murrell* v. *Henry,* 70 Ark. 163.

O. A. Graves, for appellee.

1. There is no bill of exceptions in the case. 71 Ark. 82; 70 *Id.* 364; 81 *Id.* 332.

2. The complaint states no cause of action. 54 N. E. 1062; 48 L. R. A. 707. No negligence or want of care or skill is alleged.

3. Municipal corporations are not liable for the negligent or tortious acts of their agents and servants. 49 Ark. 139; 73 *Id.* 447; *Ib.* 519.

KIRBY, J., (after stating the facts). The allegations of the complaint are not as definite and certain relative to the damages claimed for the injury as should have been made, but where the complaint states a cause of action indefinitely the defect is reached by motion to make more definite and certain and not by demurrer. *St. Louis. I. M. & S. Ry. Co.* v. *Moss,* 75 Ark. 64; *Murrell* v. *Henry,* 70 Ark. 163.

When the facts stated in a complaint with every reasonable inference deducible therefrom constitute a cause of action the demurrer should be overruled. *Claxton* v. *Kay,* 101 Ark. 352; *Cox* v. *Smith,* 93 Ark. 373. Is a cause of action stated?

McLaughlin, the allegations of the complaint being true, moved his mill and set it up on the banks of this branch, first having acquired a site by lease from the

owner of the land, expecting to use the water of the branch in making steam for the operation of the plant, and there being no other water available and by the discharge of the sewage of the city into the stream polluting its waters and because of the noxious odors arising therefrom, he was compelled to abandon his mill site and move his mill. The owner of the land was also joined as a party to the suit.

It is contended by the city that no negligence, lack of skill or want of care in the construction of its sewer system is alleged and that it could not be held liable for the negligent and tortious acts of its officers in any event, under the authority of *Arkadelphia* v. *Windham,* 49 Ark. 139; *Collier* v. *Fort Smith,* 73 Ark. 447; and *Gray* v. *Batesville,* 74 Ark. 519.

Cities and towns in the State have power to open, construct and keep in order and repair sewers and drains and to enter upon and condemn private property for such purposes. Sections 2906, 2920, Kirby's Digest. If the statute does not expressly confer such power to be exercised without the city's limits, it is granted by implication, being indespensibly necessary to carry into effect the express power granted by the statute to open, construct and keep in order sewers and drains.

Our Constitution provides: "Private property shall not be taken, appropriated or damaged for public use without just compensation therefor." Art. 2, § 22, Const. 1874.

Plaintiff does not seek to recover damages arising from the negligent, unskilful or wrongful construction of the sewer system, but only for discharging the sewage into the stream upon the lands of his lessor and pulluting it to such an extent as to render worthless his leasehold estate as a mill site and make the abandonment of it necessary. The statute does not, as in some States, expressly authorize the discharge of the sewage into natural streams, or drains and creeks, and if it did the question would still remain whether, under the Constitution, the Legislature had any such power without

requiring compensation made to the owner of the stream. The owner of the land on a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome a condition as a reasonable and proper use of the stream by the upper owner will permit. He must also submit to the natural drainage and wash coming from cities and towns.

In 1 Lewis on Eminent Domain, section 60, it is said: "All the authorities agree that small streams, incapable of navigation, are wholly private property; that the title of the riparian owner extends to the middle of the stream."

And in section 61, "It may be laid down as a well settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from its premises in the quantity, quality and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietor to make a reasonable use of the stream as it flows past their lands. This right is a part of his property in the land and, in many cases, constitutes its most valuable element. It necessarily follows, therefore, that any violation of this right in the exercise of the power of eminent domain, is a taking of private property, for which compensation must be made."

In section 84, it is said that, "An injury to riparian rights for public use is a taking for which compensation must be made." "These riparian rights * * * are property and are valuable * * * and can not be abridged or capriciously destroyed or impaired. They are rights to which, once vested, the owner can only be deprived in accordance with the law of the land and if necessary that they be taken for public use it must be for due compensation." See also Mills, Eminent Domain, § § 79-1821; Gould on Waters, § 204; Wood on Nuisances, § § 332-427; Angell, Water Courses, § 457-8.

Our court has held that it is the right of each proprietor along the natural drain of each water course to

insist that the water shall continue to flow as it has been accustomed to do. *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297; *St. Louis, I. M. & S. Ry. Co.* v. *Magness,* 93 Ark. 46.

Nicholls on Eminent Domain, § 167, says: "No private riparian proprietor has the right to pour drainage or other noxious matter into a private stream, so as to materially and unreasonably pollute the water, or any constitutional right to pollute the water at all. Upon the question of whether a city or town may be authorized to gather the house sewage of its inhabitants and throw it into a private stream, without compensating the owners below, the cases, though not numerous, are in direct conflict, though the majority deny the existence of such a right. * * *"

After a review of the authorities in a well considered opinion, the Supreme Court of Oklahoma, in *Markwardt* v. *Guthrie,* 90 Pac. 26, 9 L. R. A. (N. S.) 1158, announces the conclusion:

"(1) That the settled doctrine of the English courts, as well as some of our State courts, is that a lower riparian proprietor is entitled to recover damages for the pollution of the waters of a stream by a municipal corporation, by the discharge of sewage into the stream, on the broad ground of common sense and natural justice; (2) that the Supreme Court of the United States and a number of the State courts base their decisions on the ground that it is a taking of private property for public use, within the meaning of the Federal Constitution; (3) that other States hold that it is a damage to property within the meaning of their constitutional inhibitions against the taking or damaging of property without just compensation; and (4) a number of the States hold that the lower riparian proprietor is entitled to recover damages for injury to his health, comfort and repose, on the ground that it is the maintenance of a nuisance. While these decisions are based upon different ground, yet, upon whatever ground they may rest, they all, with the exception of the decisions of the In-

diana courts, seem to uniformly hold that, under such circumstances, damages are recoverable; and many of them hold that, where the evidence is clear and convincing, injunction will lie to restrain the continuance of the nuisance."

For other cases, denying the right of a city to discharge its sewage into private streams to the injury of the owners without compensation therefor, see *Mansfield* v. *Balliett,* 65 Ohio St. 451; 58 L. R. A. 628; *Platt Bros.* v. *Waterbury,* 48 L. R. A. 691, and cases in editor's note, 72 Conn. 351; 45 Atl. 154; 77 Am. St. Rep. 312.

If the turning of the sewage into the branch and the pollution of the water thereof to the damage of the riparian owners be not regarded as a taking of the property for public use, within the meaning of the Constitution, it certainly is a damage thereof for public use, within its meaning, for which compensation must be made. *Hot Springs Ry.* v. *Williamson,* 45 Ark. 429; *Dickerson* v. *Okolona,* 98 Ark. 206; *Tate* v. *St. Paul,* 56 Minn. 530; *Ashley* v. *Port Huron,* 35 Mich. 296; 24 American Report, 552. Since the city's action in constructing its sewer system so as to turn the sewage into said branch indicates an intention to acquire a permanent right to continue to so use it and pollute the stream, the damages to the owner should be assessed upon that basis and as though the city were proceeding to acquire it under its power of eminent domain. 1 Farnum, Water Rights, § 139-A.

McLaughlin having moved and set up his mill upon the banks of this stream under a lease, with the right to use the waters thereof in the operation of his mill and the mill site being rendered worthless and its value for the purpose for which the land was leased destroyed by the draining of the sewage of the city into the branch, was entitled to damages to the extent of the injury to his leasehold interest. *Nicholls Eminent Domain,* § 174; 2 Lewis, Eminent Domain, § § 719, 950.

Our statute authorizes the bringing of a suit where a corporation authorized by law to appropriate private

property for its use may have done so, and appellants had the right to prosecute this suit against the city of Hope a cause of action being sufficiently alleged in their complaint. Sections 2903-5, Kirby's Digest.

The court erred in sustaining the demurrer to the amended complaint and the judgment is reversed and the cause remanded with directions to overrule the demurrer, and, if necessary, permit such amendment to the complaint as will render it more definite and certain as to the amount of damages claimed and for trial in accordance with law.

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

Opinion delivered March 31, 1913.

1. ACTIONS—FAILURE OF RAILROAD TO MAINTAIN LIGHTS—NATURE OF PROCEEDING.—An action against a railroad company for failure to maintain lights at switches under § § 1 and 2, Act No. 23, Public Acts of 1911, is under the terms of the act a civil action, in which a penalty is collected in the name of the State, and the act does not create a public offense. (Page 454.)
2. RAILROADS—SUCCESSIVE PENALTIES FOR FAILURE TO MAINTAIN LIGHTS AT SWITCHES.—Under Act 23, § § 1 and 2, Public Acts 1911, requiring railroad companies to maintain lights at switches, and fixing a penalty for each separate offense, which shall be recovered in a civil action in the name of the State, a cumulative penalty is not imposed, and for successive violations of the statute only one recovery can be had for all violations prior to the bringing of the action. (Page 455.)

Appeal from Bradley Circuit Court; *Henry W. Wells,* Judge; affirmed in part and reversed in part.

STATEMENT BY THE COURT.

On July 20, 1912, R. W. Wilson, prosecuting attorney, in the name of the State, for the use and benefit of Bradley County, filed in the Bradley Circuit Court three hundred and sixty-five complaints against the St. Louis, Iron Mountain & Southern Railway Company. In case No. 317 the complaint alleged that on the 20th day of July, 1911, and during the night time of said date the

defendant operated a train on which it transports freight and passengers for hire over its road from McGehee to Warren, Ark., and return, and that it failed to place and maintain lanterns or lights (a green light to indicate the main line track and a red light to indicate the side track) at its first main switch east of the depot at Warren. On August 16, 1912, the cause was heard before the court sitting as a jury and a penalty of twenty-five dollars was assessed against the defendant.

In cases numbered 318 to 682 the pleadings are the same as in No. 317 except that each complaint names a different date on which the offense is alleged to have been committed, covering a full year from the 21st of July, 1911. Over the objection of the defendant these cases were consolidated and tried as one case under the number of 318. On August 16, 1912, the consolidated cases were submitted to the court sitting as a jury and the court found for the plaintiff in all cases from 318 to 682 except cases numbered 572 to 585 inclusive. The court imposed a penalty of twenty-five dollars in each case, making a total of $8,750.

The evidence in the cases shows that appellant ran and operated a train over its line of road during the night time of each day from July 21, 1911, to July 20, 1912, without ever placing a switch light at any main line switch, or this particular one with the exceptions of about fifteen nights during the high water when the train could not get over its road.

From the judgment rendered in each case, the defendant has duly prosecuted an appeal to this court.

E. B. Kinsworthy, James C. Knox and *T. D. Crawford,* for appellant.

But one penalty was recoverable. Penal statutes are to be strictly construed. 6 Ark. 131; 43 Ark. 415; 87 Ark. 411; 68 Ark. 34; 79 Ark. 213. And the penalty imposed by such a statute will be imposed only when the case is brought within the strict letter of the law. 64 Ark. 271. Nothing will be taken as intended that is not

clearly expressed in the statute. 79 Ark. 517, 521. See also L. R. 2 C. P. Cas. 583; 71 Cal. 541; 120 Ala. 206; 175 N. Y. 328; 46 N. Y. 644; 144 N. C. 532, 541; 157 Pa. St. 367, 378; 19 N. H. 286; 45 N. Y. 446; 179 N. Y. 448; 107 Fed. 870; 97 S. W. (Tex.) 724; 72 Miss. 491; 119 Ky. 769; 86 Pa. St. 427; 13 Lea (Tenn.) 1.

The statute, Act 23, General Acts 1911, provides for "a penalty of a fine of not less than twenty-five dollars nor more than one hundred dollars for each separate offense." The offense is a failure "to place and maintain sufficient lights during the night time on all its main line switches." Had the Legislature intended to make the failure to maintain such lights each night a separate offense it would have said so.

The conservation of the public good does not require the accumulation of a large number of penalties, and the action of the prosecuting attorney in waiting a year before taking steps to enforce the penalty does not evidence good faith toward the public.

R. W. Wilson, for appellee.

1. The language of the statute, the use of the words "violate," "conviction," "fine" and "offense" shows conclusively that the Legislature intended it as a criminal statute. The appeal should be dismissed for failure to lodge the transcript here within sixty days after the date of the judgments. Kirby's Dig., § 2614, and cases there cited.

2. Under the statute a fine is recoverable for "each separate offense," and each night the appellant fails to maintain the light required by the statute constitutes a "separate offense." Whenever a statute provides for the recovery of a penalty for each separate offense, the recovery of cumulative penalties is allowed. 133 Wis. 478; 14 Am. & Eng. Ann. Cas. 1061; 3 T. R. 509; 4 T. R. 228; L. R. 10, C. P. 591; 65 Ill. App. 355; 170 Ill. 474; 49 Wis. 459; 32 Ill. App. 286; 165 Ind. 613; 75 N. E. 272; 72 N. E. 174; 142 Mass. 96; 71 Cal. 541; 72 Miss. 491; 17 So. 168; 157 Fed. 459; 159 Fed. 33; 86 C. C. A. 223;

163 Fed. 642; 165 Fed. 833; 91 C. C. A. 519; 166 Fed. 160; 107 Fed. 870; 162 Fed. 775; 13 N. Y. 78; 25 Barb. 199; 52 N. Y. 383; 21 App. Div. 146; 47 N. Y. S. 349.

On the question of construing the statute and what is meant by "each separate offense," see 36 Cyc. 1102 (A), 1106 (2) (a), 1108 (c), 1110 (d), 1111 (e), 1114 (3) (a), 1175, 1183 (b); 90 N. E. 456; 62 Ala. 179; 29 Ala. 40; Black's Law Dict., "offense;" 29 Cyc. 1351-2; Kirby's Dig., § 1546.

E. B. Kinsworthy, J. C. Knox and *T. D. Crawford,* for appellant in reply.

The offense denounced by the statute is a continuous one and does not subject the offender to accumulative penalties, in the absence of a clear expression showing the legislative intent that penalties shall accumulate. 13 Am. & Eng. Enc. of L. (2 ed.) 63; 86 Pa. St. 427, 432; 120 U. S. 274; 61 S. W. 275; 7 Johns. (N. Y.) 134.

HART, J., (after stating the facts). The act under which the prosecuting attorney proceeded is Act. No. 23 of the Public Acts of 1911, and is as follows:

"Section 1. Any company, corporation or officer of any court or any person or persons operating any line of railroad during the night time in this State shall be required to place and maintain sufficient lights during the night time on all its main line switches, of the line of railroad so operated, and of the color green indicating main line and red to indicate side tracks.

"Section 2. That any company, corporation or officer of court or any person or persons, operating any railroad in this State, who shall violate any of the provisions of this act, shall be liable on conviction to a penalty of a fine of not less than twenty-five dollars nor more than one hundred dollars for each separate offense, which penalty shall be recovered in a civil action in the name of the State."

The prosecuting attorney has moved the court to transfer the cases numbered 2468 and 2469 from the civil docket to the criminal docket and dismiss the appeal be-

cause the defendant did not lodge a transcript in the cases in the clerk's office of the Supreme Court within sixty days after the judgments were rendered in the lower court. The act creates no public offense and according to its terms subjects the railroad to a penalty to be recovered by a civil action in the name of the State. General Acts of 1911, page 11. See also *Kansas City, Springfield & Memphis R. R. Co.* v. *The State,* 63 Ark. 134, and cases cited; *Choctaw, Okla. & Gulf R. R. Co.* v. *State,* 75 Ark. 369.

Therefore, the motion to dismiss the appeal will be overruled.

It is contended by counsel for the defendant railway company that but one penalty was recoverable for its failure to place and maintain a light on its first main line switch east of the depot at Warren. On the other hand, it is contended by counsel for the State that accumulative penalties should be recovered. The general rule governing the construction of acts of this kind is aptly stated in 33 Cyc., page 680, as follows: Since penal statutes are strictly construed, it is held that in cases of successive violations of the statute, only one penalty can be recovered for the violation prior to the institution of the suit unless the language of the statute clearly expresses a contrary intent; but where the statute clearly so provides, an accumulation of penalties may be recovered for each and every violation.

Many cases have been cited by counsel for both sides applying the rule, and inasmuch as the question whether a statute imposing a penalty is to be construed as authorizing a recovery of cumulative penalties, turns in a great measure upon the language of the particular act under consideration, we deem it useless to review these decisions. In many instances such statutes by express terms make the penalty accumulative upon each succeeding day of default. The object had in view by the Legislature in the act under consideration was to compel railroad companies to maintain switch lights during the night time on all its main line switches so that its servants

engaged in operating trains over its line of road could tell by the color of the switch lights whether the switch was open or closed. This is for the protection of the traveling public. To effectuate this intention the act in question was passed. The offense prohibited by the act is of a continuing nature and, under the general rule, a statute imposing a penalty in such cases does not authorize the recovery of cumulative penalties. The law-makers intended to compel the railroads to obey the act at once. We think that but one penalty can be recovered upon the statute for all acts committed prior to the commencement of the action. If after this, the statute is again violated, another penalty may be recovered in another action commenced thereafter, and so on as long as violations continue. This construction tends to compel the railroad companies at once to comply with the provisions of the statute and each separate suit brought after failure to comply with the act will give the railroad company notice that the statute is being violated. We think that from a consideration of the entire act such was the intention of the lawmakers. This construction of the statute does not work any hardship against the railroad companies, and will be a prompt and effectual means of making them comply with the statute. See *Chicago, R. I. & P. Ry. Co.* v. *Fitzhugh,* 83 Ark. 481.

It follows that the judgment in No. 2468 will be affirmed, and the judgment in the consolidated cases numbered 2469 will be reversed and the cause of action dismissed.

CITY OF EL DORADO *v.* FAULKNER.

Opinion delivered March 31, 1913.

1. EVIDENCE—PROOF OF TOWN ORDINANCE.—In the absence of proof of their destruction or loss, parol testimony is not admissible to prove an ordinance or resolution of a town or city council. (Page 457.)

2. TRIAL—CITY ORDINANCE—BURDEN OF PROOF—SALARY TO DEPUTY MARSHAL.—In an action against a town by a deputy marshal for salary fixed by an ordinance, the burden is upon plaintiff to prove the existence of an ordinance obligating the city to pay him the salary claimed, and in the absence of such ordinance, he is entitled only to "receive the like fees as sheriff and constable." Kirby's Digest, § 5592. (Page 457.)

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

Appellant pro se.

Oral evidence of the purported ordinance was not admissible. If such an ordinance was passed, the original or a certified copy thereof was the best evidence, and should have been produced. Kirby's Dig., § 3066; 66 Ark. 535. See also Kirby's Dig., § 5473; 40 Ark. 105; 22 Mich. 104. The court erred in directing a verdict for the appellee, the evidence not being legally sufficient to support it. 97 Ark. 438, 442; 90 Ark. 23; 99 Ark. 491.

Mahony & Mahony, for appellee.

There was sufficient evidence to justify the conclusion that the resolution had been lost, and, under the circumstances, it was proper to admit oral evidence of its passage and provisions.

It is proper to direct a verdict where there is no conflict in the testimony.

McCULLOCH, C. J. The plaintiff, J. D. Faulkner, sued the city of El Dorado to recover salary as deputy marshal. He claims that the marshal appointed him as deputy, and that a resolution or ordinance of the city council fixed the salary of deputy marshal at $75.00 per month, and provided that the city should pay the same. This was denied by the city, and it was the issue of fact to be tried by the jury. The plaintiff introduced as a witness the former mayor of the city and proved by him that an ordinance or resolution had been passed fixing the salary of deputy marshal at $75.00 per month. Neither the record books of the city council nor printed copy of ordinances were introduced in evidence, but the recorder testified that he had searched the records and

failed to find any such ordinance or resolution. All of this testimony was introduced over the objection of the defendant, but the court admitted it, and as no testimony was introduced in conflict with it, the court gave a peremptory instruction to find for the plaintiff for the full amount of the salary during the period that he served.

Parol testimony is not admissible to prove an ordinance or resolution of a town or city council. *Pugh* v. *City of Little Rock,* 35 Ark. 75; *Hencke* v. *Standiford,* 66 Ark. 535; McQuillin on Municipal Corporations, § 872.

There may be exceptions to this rule where the records have been destroyed or lost and can not be produced. Upon proof of such destruction or loss, parol testimony would be admissible for the purpose of establishing the contents of the lost records. But there was no testimony in this case that any such ordinance or resolution had been adopted and duly recorded and the record thereof lost or destroyed. The recorder testified that he was frequently absent from council meetings, and that some of the resolutions introduced and adopted by it had been misplaced so that he failed to place them upon the record; but there was no testimony at all that the record of such an ordinance or resolution had been lost or destroyed. All the testimony on that subject is that of the former mayor, who stated that at some meeting at which he presided, the council passed a resolution fixing the salary of the deputy marshal at $75.00 per month. The burden was upon the plaintiff to prove the existence of an ordinance obligating the city to pay him a salary as deputy marshal for, in the absence of such an ordinance, he is, under the statute, entitled only to "receive the like fees as sheriffs and constables." Kirby's Digest, § 5592.

The court erred in admitting parol testimony as to the resolution or ordinance of the city council, and also in giving the peremptory instruction in favor of plaintiff. The judgment is reversed and the cause remanded for a new trial.

HAYCOCK v. TARVER.

Opinion delivered March 31, 1913.

1. EXECUTION—INJUNCTION—JURISDICTION OF CHANCERY COURT.—Where a sheriff is about to levy an execution upon plaintiff's stock of merchandise, which will break up his business and destroy his credit, and an action of replevin or for the value of the property would be inadequate, equity has jurisdiction to restrain the act. (Page 460.)

2. HUSBAND AND WIFE—APPARENT OWNERSHIP OF PROPERTY—ESTOPPEL.—Where a wife permits her husband to use her property as an apparent basis of credit, she will be estopped to assert ownership in herself against creditors who have been misled to their prejudice. (Page 461.)

Appeal from Jefferson Chancery Court; *John M. Elliott,* Chancellor; reversed.

A. T. Whitelaw, for appellant.

1. The chancery court is without jurisdiction where the party has a complete and adequate remedy at law, unless there is shown to exist some one of the established subjects of equity jurisdiction. 29 Ark. 340; 27 Ark. 676; 36 Ark. 481; 48 Ark. 331; *Id.* 510; 93 Ark. 266-269; 14 Ark. 339; 20 Ark. 610; 29 Ark. 340; 30 Ark. 128; 75 Ark. 114; 67 Ark. 441.

2. If the business was Rosa Tarver's, she must be held to have ratified the act of her husband in renting the store building, as she accepted the benefit of his contract. 50 Ark. 458; 29 Ark. 131; 54 Ark. 216; 55 Ark. 240; 66 Ark. 209.

3. If the property mentioned in the complaint was in fact the property of Rosa Tarver, the conduct of herself and husband in permitting him to manage and control the business in his own name, holding himself out to the public as the owner thereof so as to induce the belief that he was the real owner, should estop her from claiming the property as against these appellants. 86 Ark. 486-488; 84 Ark. 355; *Id.* 227; 76 Ark. 252; 74 Ark. 161-166; 50 Ark. 42.

4. Having received the benefit of the rent, appellee would not be entitled to equitable relief until she had

paid or offered to pay, what was justly due for the rent of the building. 9 Ark. 535; 33 Ark. 294; 53 Ark. 150; 67 Ark. 236; 63 Ark. 576; 65 Ark. 398; 74 Ark. 241; 81 Ark. 279.

A. H. Rowell, for appellee.

1. Sufficient ground for the intervention of the chancery court is shown in the allegations of the complaint to the effect that appellee had no remedy at law to prevent the levy, and that if the execution was levied on the goods at the time stated, it would result in loss of trade and irreparable injury to her business, leaving her without adequate measure of damages or remedy at law to recover the same. 48 Ark. 331; 20 Ark. 610; 30 Ark. 128; Kirby's Dig., § 3965; 35 Ark. 184; 1 High on Injunctions 103; 138 U. S. 271.

2. The deed showed that the real property belonged to Mrs. Tarver, and the tax assessment showed the property in her name. When appellant elected to sue J. W. Tarver, he waived whatever right he may have had to sue appellee. 1 Clark & Skyles on Agency 1016; 64 Ark. 213.

3. The doctrine of ratification is not applicable here. The proof shows that the business was owned by Mrs. Tarver; that the wholesale grocer so considered it and always billed the goods to her and looked to her for payment; that it was listed in Dunn's Commercial Agency as her business, and the tax record shows that it had been listed as her's, and that she had paid taxes thereon for seven years. And there is no testimony that she permitted her husband to use her property as his own.

McCULLOCH, C. J. Appellee instituted this action in the chancery court of Jefferson County to restrain appellants from levying an execution on her property. Appellant, Haycock, obtained a judgment at law against appellee's husband, J. W. Tarver, for the recovery of money due upon contract, and sued out an execution, which was placed in the hands of Edgar Brewster, the other appellant, who was the sheriff of Jefferson County. The sheriff attempted to levy the execution upon a stock of mer-

chandise in a storehouse in the city of Pine Bluff, appellee claiming that the property belonged to her, and that she was operating the business. The chancellor overruled a demurrer to the complaint, and, on final hearing of the cause, rendered decree in appellee's favor, restraining the sheriff from levying the execution on the property in question.

The first ground urged for reversal of the cause is, that the chancery court had no jurisdiction. Appellants invoke the rule, which is well established, that ordinarily a court of equity will not restrain trespass, nor interpose to prevent a sale of personal property, where there is an adequate remedy at law. That principle is well established, but notwithstanding the relief sought is to prevent the sale of chattels the circumstances may be such that a remedy at law is inadequate. It is alleged in the complaint that the sheriff was about to levy the execution upon the stock of merchandise, and thereby interfere with appellee's mercantile business and break it up and destroy her credit. An action in replevin to recover the possession of the property or an action to recover the value thereof, would not be an adequate remedy, for other damages in excess of the value of the property would, according to the allegations of the complaint, be sustained. This is sufficient to give a court of chancery jurisdiction to restrain an illegal act about to be committed under those peculiar circumstances. *Watson* v. *Sutherland,* 5 Wall. (U. S.) 74; *North* v. *Peters,* 138 U. S. 271.

About ten years ago appellee and her husband, J. W. Tarver, came to Pine Bluff, according to the testimony, and bought out the small stock of goods and grocery business of W. A. Tarver, who was the uncle of J. W. Tarver. Some time thereafter they moved into a building owned by appellant, Haycock, and a written lease was entered into between him and J. W. Tarver for the term of five years. The business was conducted in that house until about five months before the expiration of the lease. This was in November or December, 1910. Another building was embraced in the lease which appellee

and her husband occupied as a place of residence. The rent was not paid for the last five months and in March, 1911, Haycock sued J. W. Tarver and obtained judgment against him for $250.00, the balance due on the rent. The execution sought to be levied on the property in controversy was issued on this judgment.

Appellee claims, and sought to prove, that the stock of goods and the business belonged to her, and that she operated it, her husband acting as her agent. She testified that she purchased the stock of goods and business from W. A. Tarver with her own money, and that the business has always been owned and controlled by her. W. A. Tarver testified that she purchased the business with her own funds, and J. W. Tarver testified to the same effect, he being called as a witness on behalf of appellee and no objection being made to his testimony. There is other testimony tending to support the contention of appellee that she owned the stock of goods and operated the business. There is, however, other testimony which establishes the fact very clearly that, even if the business was purchased with funds of appellee, it was conducted by her husband, J. W. Tarver, in a way which deceived the public at large and those who dealt with him concerning the ownership of the business. The insurance was for a considerable time carried in the name of J. W. Tarver. The lease of the storehouse in which the business was conducted was entered into between appellant, Haycock, and J. W. Tarver. The sign upon the window and the advertisements in the newspapers all proclaimed it as the business of J. W. Tarver. The account at the bank was, up to the time of the rendition of the judgment in Haycock's favor, kept in the name of J. W. Tarver and was only changed when attempt was made to reach the funds by garnishment. J. W. Tarver had active charge of the business and looked after it in detail, doing nearly, if note quite, all the buying. Appellee accepted the lease on the building when she knew, or ought to have known, that the contract was made in her husband's name. She permitted credit to be extended

upon the faith of his ownership of the business and under those circumstances she can not assert ownership in herself against creditors who have been misled to their prejudice. *Driggs* v. *Norwood,* 50 Ark. 42; *Geo. Taylor Com. Co.* v. *Bell,* 62 Ark. 32; *Morris* v. *Fletcher,* 67 Ark. 105; *Roberts* v. *Bodman-Pettit Lumber Co.,* 84 Ark. 227.

The testimony in the case clearly convices us that to all appearances to one dealing with the business it belonged to the husband, J. W. Tarver, and it is evident that appellant, Haycock, extended credit under that belief. The conclusion reached by the learned chancellor is, we think, clearly against the preponderance of the testimony, and the decree is therefore reversed and the cause is remanded with directions to dismiss the complaint for want of equity.

CULBERHOUSE v. HAWTHORNE.

Opinion delivered March 31, 1913.

1. MORTGAGES—LIMITATION OF ACTIONS—BURDEN OF PROOF.—Where plaintiffs are the children of deceased, and bring an action in chancery to restrain the foreclosure of a mortgage executed by their parents, which mortgage is not barred on its face by the statute of limitations, the burden is upon plaintiffs to allege and prove facts sufficient to justify the court in granting the relief prayed. Kirby's Digest, § 3108. (Page 467.)

2. MORTGAGE—FORECLOSURE—LIMITATION OF ACTIONS—BURDEN OF PROOF.—Where a husband and wife give their note and execute a mortgage to secure the same, in an action by their children and heirs, to restrain a foreclosure of the mortgage on the ground that the debt is barred, the burden is upon the plaintiffs to show that the debt is barred as to both of the mortgagors. (Page 466.)

3. LIMITATION OF ACTIONS—MORTGAGE EXECUTED BY HUSBAND AND WIFE.—When a husband and wife give their note and execute a mortgage to secure the same, the right of the mortgagee to foreclose may be barred as to the husband by reason of the statute of nonclaim, but not as to the wife because no administration was had on her estate, and the mortgagee's right to foreclose is therefore not barred. (Page 466.)

4. APPEAL AND ERROR—DECISION OF CHANCELLOR—PRACTICE IN SUPREME COURT.—Although the reasons upon which a chancellor bases his

decree are unsound, the decree will be affirmed if upon the whole record the decree is correct. Chancery cases are tried *de novo* in the Supreme Court, on the record made below. (Page 468.)

Appeal from Craighead Chancery Court, Western District, *Chas. D. Frierson,* Chancellor; affirmed.

Lamb & Caraway, for appellant.

1. The claim was barred after March 22, 1910. Kirby's Digest, § 110; Act May 28, 1907, Acts 1907, p. 1170. It was barred by the statute of nonclaim. 92 Ark. 522; 94 *Id.* 60; Kirby's Dig., § 5399; 64 Ark. 317.

2. The act of 1911, p. 256, was not retroactive, nor did it revive a claim already barred. 6 Ark. 484; 63 *Id.* 573; 68 *Id.* 333; 115 U. S. 209; L. R. A. 70; 3 Pet. 30; 17 Wall. 570; 10 Ark. 516; 11 *Id.* 183; 90 N. C. 542; 8 Cal. 1; 91 Pac. 330; 57 Tex. 142.

Hawthorne & Hawthorne, for appellee.

1. The act of 1907, shortening the period of the statutes of nonclaim is unconstitutional. 45 L. R. A. 118; 65 Ark. 1; 29 Ark. 238; 92 *Id.* 522.

2. But if barred by nonclaim the trustee could sell under the power of sale in the trust deed. 64 Ark. 317; 14 *Id.* 246; 94 *Id.* 60; 34 *Id.* 312; 94 *Id.* 613; 92 *Id.* 522; 3 S. W. 273.

3. The act of 1911 is retroactive, and it is within the power of the Legislature to restore a remedy and revive claims already barred by nonclaim. 31 Ark. 392; 22 *Id.* 535; 43 *Id.* 469; 34 *Id.* 312; 115 U. S. 620; 20 Wall. 137, 150; 58 Ark. 117; 90 *Id.* 600; 43 *Id.* 420; 34 *Id.* 312; 14 L. R. A. 59; 114 Mass. 155; 13 Ga. 306; 7 Cal. 1; 44 Pac. 451; 91 *Id.* 330; 32 Ark. 410; 75 S. W. 608.

Lamb & Rhodes, amici curiae.

The act of 1911 is not retroactive, but prospective. The Legislature can not revive rights barred by limitation. Cooley, Principles Const. Law (3 ed.) 359; 50 Me. 111; 5 Met. (Mass.) 400; 121 Mass. 558; 20 Am. Rep. 131; 1 Heisk. (Tenn.) 280; 13 Am. Rep. 5; 96 U. S. 595; 115 U. S. 620.

McCULLOCH, C. J. It appears from the pleadings and proof in this case that on June 13, 1907, Ben O. Hughes and his wife, Iola Hughes, jointly executed and delivered to the Union Central Life Insurance Company a promissory note for the sum of $1,000.00, for borrowed money, due and payable ten years after date, with interest at the rate of 8 per cent per annum from date until paid, evidenced by interest coupons attached to the principal note. On the same date said parties executed and delivered to J. R. Clark, as trustee, a deed conveying certain lands in Craighead County in trust to secure the payment of said notes, the deed containing a provision to the effect that if any installment of interest be not paid at maturity the principal note, and interest accrued thereon, should become due and payable at once for the purpose of foreclosing the trust deed.

Hughes and his wife both died prior to March 20, 1909, and on that date letters of administration were duly issued upon the estate of B. O. Hughes by the probate court of Craighead County, and the administration proceeded in due course to a final settlement of the estate. The claim of the Union Central Life Insurance Company, evidenced by the aforesaid note and interest coupons, was not presented to the administrator within the time prescribed by law, but was presented thereafter, before the close of the administration, and was disallowed on the ground that it was barred by the statute of nonclaim.

The precise date of the death of Mrs. Iola Hughes does not appear in the record, and it is not shown that there has been any administration upon her estate.

A foreclosure of said deed of trust was attempted by advertisement of the lands for sale on December 9, 1911, under the power contained in the deed; and appellants, who are children and heirs at law of B. O. Hughes, suing by their guardian, instituted this action in the chancery court to restrain the trustee and beneficiary from foreclosing said deed, on the ground that the same was barred by the statute of limitations.

On final hearing of the cause the court dismissed the complaint for want of equity, and plaintiffs appealed.

The statute, as it existed at the time of the execution of the deed of trust, provided that "in suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given." Kirby's Digest, § 5399.

This statute applied to suits for possession after sale under a power of attorney, as well as foreclosure suits in equity. *American Mortgage Co.* v. *Milam,* 64 Ark. 305; *Hill* v. *Gregory,* 64 Ark. 317.

In *Mueller* v. *Light,* 92 Ark. 522, where all the decisions of this court bearing upon that statute are referred to, it was held (quoting from the syllabus) that "where the mortgagor dies before the statute bar of five years applicable to the mortgage note has attached, the statute of limitation which applies to the mortgage is the statute of nonclaim," and that the right to foreclose is barred where the debt itself is barred by the statute of nonclaim.

The General Assembly of 1911 enacted a statute, which went into effect after the debt involved here was barred by the statute of nonclaim and prior to the commencement of this action, amending the former statute. It reads as follows:

"In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. * * * Provided, that in all cases where any indebtedness has been or may hereafter be secured by any mortgage or deed of trust, such mortgage or deed of trust may be enforced or foreclosed at any time within the period prescribed by law for foreclosing mortgages or deeds of trust so far as the property mentioned or described in such deed of trust or mortgage is concerned; but no claim or debt against the estate

of a dead person shall be probated against such estate whether secured by mortgage or deed of trust or not, except within the time prescribed by law for probating claims against estates." Section 1, Act 260, Acts of 1911, page 256.

Learned counsel on both sides present, for decision, the question whether the act of 1911 can be given a retroactive effect so as to revive a debt already barred. But, as we are disposing of the case upon another theory, that question is not reached.

If it be conceded that the debt is barred as to the estate of B. O. Hughes, there is nothing in the record to show that it was barred as to Mrs. Iola Hughes, the other mortgagor, who not only joined in the execution of the mortgage, but who executed the note jointly with her husband. The statute of nonclaims never began to run so far as her estate is concerned, because there had been no administration thereon, and the debt is not barred as to her estate, even under the original statute before amended by the act of 1911. *A. R. Bowdre & Co.* v. *Pitts,* 94 Ark. 613.

The effect of our decisions construing that statute is, that, "when the debt is barred, the right to foreclose the mortgage is barred." *Mueller* v. *Light, supra.*

If the debt was not barred as to one of the mortgagors and obligors, then the foreclosure is not barred, even though the debt is barred as to the other obligor, because, under the express terms of the statute, if the debt is not barred entirely, the foreclosure is not barred. The debt itself may be barred as to one of the obligors, and not enforcible against him or his estate so far as any personal liability is concerned; but the debt being a lien upon the mortgaged property as long as it remains enforcible against any of the obligors, the lien remains in existence and can be foreclosed. In other words, as long as the lien subsists as to one of the parties, it necessarily subsists as to all.

There is no affirmative proof in the record showing whether or not the note was executed by Mrs. Hughes for

the benefit of her separate estate, so as to fall within her power as a married woman to contract. If it was for the benefit of her separate estate, she had the power to enter into the contract; otherwise, she did not have such power and the contract was void. *Crenshaw* v. *Collier,* 70 Ark. 5.

Where suit is instituted against a married woman upon contract executed by her, the burden is upon the plaintiff to allege and prove such a contract as she is competent to make. *Warner* v. *Hess,* 66 Ark. 113; *Harden* v. *Jessie,* 103 Ark. 246.

The rule is also well established by decisions of this court that, in a suit to recover money alleged to be due upon contract, where the plea of the statute of limitations is interposed, the burden of proof is upon the plaintiff to show that his action is not barred. *McNeil* v. *Garland,* 27 Ark. 343; *Railway* v. *Shoecraft,* 53 Ark. 96; *Leigh* v. *Evans,* 64 Ark. 26; *Watkins* v. *Martin,* 69 Ark. 311; *Swing* v. *Arkadelphia Lumber Co.,* 90 Ark. 394.

But neither of the above announced rules as to the burden of proof applies in the present case, for this is not an action instituted by the mortgagor to recover upon contract nor against the estate of a married woman to establish her liability for the debt. The plaintiffs have come into a court of equity to restrain the foreclosure of a mortgage which is not barred upon its face. It devolved upon them to allege and prove facts sufficient to justify the court in granting the relief for which they prayed. The statute places the burden of proof "on the party who would be defeated if no evidence were given on either side." Kirby's Digest, § 3106.

The plaintiffs allege in their complaint that the debt is barred as to the estate of B. O. Hughes, and they state facts sufficient to show that it is barred unless the act of 1913 is effectual to revive it; but there is no allegation at all with reference to facts concerning the estate of Mrs. Iola Hughes, the other obligor. Nor is there any proof at all as to the material facts on that point. The note and mortgage were introduced in evidence, and also

there is affirmative testimony to the effect that Mrs. Hughes executed the same, and in order to obtain the extraordinary relief of injunction against the assertion of an apparently valid lien, it devolved upon plaintiffs to prove all the facts essential to the relief asked. The decree of the chancellor was therefore correct and the same is affirmed.

ON REHEARING.

McCULLOCH, C. J. It is said that we decided this case on an issue not presented below, and not within the pleadings. That is a mistake. Appellants were plaintiffs below and sought to restrain foreclosure of the deed of trust under the power of sale contained therein. It was alleged that the debt was barred by the statute of limitations, and the burden of proof was on the plaintiffs to establish that fact. The issue in the case was, whether or not the debt was barred, and every fact necessary to establish the statute bar, either as to B. O. Hughes or Mrs. Hughes, was within the pleadings. Plaintiffs' case failed because it was not shown that the debt was barred as to both of the mortgagors. The record does not disclose what reasons were argued before the chancellor as grounds for granting or denying the injunction, nor does the record show the chancellor's reasons for refusing to grant the injunction. He merely entered a decree dismissing the complaint for want of equity. If it be conceded, however, that the reasons upon which the chancellor based his decree are unsound, that affords no ground for reversing the decree, if, upon the whole record, it is correct. We try chancery cases here *de novo,* on the record made below, and render such decision as the chancellor should have rendered. If the correct result has been reached, but on the wrong ground, we affirm the decree. Plaintiffs chose the point of attack, and the record was made and closed before the case was presented to the chancellor. Upon that record we find that the correct decree was rendered, and it becomes our duty to affirm it.

There remains the question, which we do not find it necessary to decide now, whether, even if the proof had

developed the fact that Mrs. Hughes did not make the contract with reference to her separate estate so as to bind herself, the statute bar had attached against the foreclosure. The validity of her obligation as joint maker of the notes and as mortgagor is one question, and the bar of the statute of limitations is quite another. If there was a cause of action against her, it is unquestioned that it was not barred by the statute of limitations or by the statute of nonclaims, and since it is shown that she executed the notes and mortgage, it is a debatable question whether the foreclosure was barred even if it had been proved that Mrs. Hughes did not make the contract with reference to her separate estate.

In any view of the case, upon the record presented, the decree is correct, so the petition for rehearing is denied.

THOMAS v. STATE.

Opinion delivered April 7, 1913.

1. BURGLARY—INTENT TO COMMIT GRAND LARCENY—EVIDENCE.—Under an indictment for burglary, alleging a burglarious entry with intent to commit grand larceny, circumstances may warrant the inference that the house was entered with the intent to commit grand larceny even though property taken was less than $10 in value, or the circumstances may warrant the inference that the house was entered with the intent to commit some other felony, even though the design was not actually carried out. (Page 472.)
2. TRIAL—ARGUMENT OF COUNSEL.—The prosecuting attorney in his argument to the jury was permitted to say: "It has been argued here that there is no testimony on which you can convict this defendant. If there was not, his honor on the bench, always fair and safe for defendant, would have taken this case out of your hands and directed you to find a verdict of not guilty." *Held*, error. (Page 472.)
3. TRIAL—OPINION OF JUDGE.—A trial judge has no right, either directly or indirectly, to express to the jury his opinion upon the weight of the evidence. (Page 472.)

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

Jo Johnson, for appellant.

1. The court should have sustained appellant's motion for peremptory charge to acquit. The evidence is clear that there was never as much as $10.00 in the meter at one time, and that at the date in question there could not have been more than twenty-five cents. If there was an intent to commit petit larceny only, there was no burglary. 61 Ark. 341, 347.

2. The remarks of the prosecuting attorney in argument to the jury were unfair and prejudicial, and those remarks particularly which declared that the court would have taken the case from the jury if there were no testimony on which they could convict were not true in law. The court's refusal to exclude this language was an endorsement thereof, and an invasion of the province of the jury to pass upon the weight and credibility of the testimony. 74 Ark. 256.

His declaration, "I *know* he is guilty, and I ask you to convict him," is a declaration of fact and not a mere expression of opinion. 100 Ark. 437, 444; 95 Ark. 233; 61 Ark. 130; 58 Ark. 473.

Wm. L. Moose, Attorney General, and *John P. Streepey,* Assistant, for appellee.

1. Since the record does not disclose what instructions were given to the jury, the presumption is, that they were properly instructed upon all questions material to the issues raised, including the statement that he knew that the defendant was guilty. At most, it was a mere expression of opinion. 96 Ark. 7, 14; *Id.* 177, 181.

2. There is sufficient evidence to sustain the verdict. The jury were the sole judges of the credibility of the witnesses, and the weight to be given their testimony.

McCULLOCH, C. J. This is an appeal from a judgment of conviction for the crime of burglary, appellant being charged with having, in the night-time, broken and entered a house in the city of Fort Smith occupied by one Johnson as a pool hall. It is further charged that the defendant entered the house with felonious intent to steal

the personal property of said Johnson of the value of $25.00.

At the trial of the case the State introduced a witness who testified that he saw appellant raise the window of Johnson's pool hall and enter the room; that he followed appellant into the room and heard him knocking on something up toward a portion of the room occupied as a barber shop; that he (witness) went up to appellant and asked him what he was doing there, and appellant replied that he was drunk, and that thereupon he and appellant both left the room. It was found, on examination the next day, that a gas meter in the room, arranged on the slot machine plan so that the consumer could pay as he used the gas, had been broken or "tampered with," as stated by the witnesses. Testimony was also adduced to the effect that the money had been removed from the gas meter the day before the alleged burglary. There was also testimony tending to show the customary monthly consumption of gas in the establishment. It appears that there was another gas meter in the room, which was found not to have been disturbed.

Appellant testified in his own behalf, denying that he entered the place at all, and he introduced several other witnesses whose testimony tended to establish the fact that he was at another place about the time the State's witness said he entered the house.

It is insisted, in the first place, that the testimony is not sufficient to sustain the verdict, in that there was not enough to show that appellant entered with intent to steal more than $10.00. The argument is, that the gas meter, according to customary consumption of gas, never contained as much as $10.00 at one time, and that, therefore, he could not have intended to steal more than that amount. The State's testimony tended to show that appellant was interrupted before he fully carried out his design in entering the house. In reply to argument of counsel on this point it is only necessary to refer to decisions of this court holding that circumstances may warrant the inference that the house was entered with intent

to commit grand larceny even though it turned out that that amount of property was not stolen, or that the circumstances might warrant the inference that the house was entered with the intent to commit a felony even though the design was not actually carried out. *Harvick* v. *State,* 49 Ark. 514; *Monk* v. *State,* 105 Ark. 12; *Birones* v. *State,* 105 Ark. 82.

We are, however, of the opinion that the court erred in overruling appellant's objections to certain remarks of the prosecuting attorney made in his closing argument. The prosecuting attorney said this:

"It has been argued here that there is no testimony on which you can convict this defendant. If there was not, his Honor on the bench, always fair and safe for defendant, would have taken this case out of your hands and directed you to find a verdict of not guilty."

This was objected to by appellant's counsel, and the court overruled the objection.

The question of the legal sufficiency of evidence is one of law, which the court must decide in determining whether a case should be submitted to the jury (*Catlett* v. *Railway,* 57 Ark. 461); and the language of the prosecuting attorney, interpreted literally, could be construed to refer to that question. Perhaps some jurors might so interpret the language and not construe it as an expression of the court's opinion upon the weight of the evidence. But the language used would ordinarily be understood by jurors of average intelligence to mean an expression of opinion as to the weight of the evidence. When understood in that light, the failure of the court to disapprove the statement would be accepted as an approval of a statement of the court's view that the evidence was of sufficient weight to sustain the verdict. *Cogburn* v. *State,* 76 Ark. 110.

A trial judge has no right, either directly or indirectly, to express to the jury his opinion upon the weight of the evidence. This is expressly forbidden by the Constitution.

"In the midst of doubt as to what their verdict should

be as to appellant," said Judge BATTLE, speaking for the court in *Sharp* v. *State,* 51 Ark. 147, "it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions which they were required to decide;" and "any expression or intimation of an opinion by the judge as to questions of fact or the credibility of witnesses necessary for them to decide in order for them to render a verdict would tend to deprive one or more of the parties of the benefits guaranteed by the Constitution, and would be a palpable violation of the organic law of the State."

The language used by the prosecuting attorney in his argument is almost identical with that condemned by this court in the recent case of *Paul* v. *State,* 99 Ark. 558.

The error was prejudicial because the State relied for a conviction entirely upon the testimony of a witness whose character was impeached by the testimony of several other witnesses, and appellant introduced numerous witnesses whose testimony tended to show that he did not commit the offense.

There is other argument of the prosecuting attorney assigned as error, but it is unnecessary to extend the discussion further than to say that it was merely an expression of the attorney's opinion which, however inappropriate in an argument to the jury, was not prejudicial.

For the error indicated, in the court's refusal to disapprove and exclude the argument quoted above, the judgment must be reversed and the cause remanded for a new trial.

WILLIAMS v. NEIGHBORS.

Opinion delivered April 7. 1913.

SPECIFIC PERFORMANCE—PAROL CONTRACT.—Where defendant agreed orally to deed property to plaintiff for a nominal money consideration, and plaintiff's agreement to erect a store thereon, plaintiff is entitled to a specific performance of the contract, when he erected a store on the property, even though he sold out the business at the end of seven months.

Appeal from Randolph Chancery Court; *G. T. Humphries,* Chancellor; affirmed.

W. A. Cunningham, for appellant.

The proof fails to show that there was in fact a meeting of the minds of the parties. Before a court is authorized to decree a specific performance of a contract, there must have been a contract, and the proof of the contract must be clear and unambiguous. 63 Ark. 100.

S. A. D. Eaton, for appellee.

Appellant admits that he promised to make appellee a deed, and that on the faith of this promise, the latter went into possession and made valuable improvements. This was a sufficient consideration to justify the decree. 32 Ark. 97; 63 Ark. 100; 82 Ark. 45; Pomeroy, Spec. Performance, Con. 130.

McCULLOCH, C. J. Appellant, James Williams, owned a quarter section of land in Randolph County, Arkansas, on which was situated a small frame storehouse, leased to one Presley, who subleased it to the appellee, L. F. Neighbors. There is a postoffice or village there called Hamil, at which there were two stores, one of which was the building on appellant's land. The building was destroyed by fire about the middle of December, 1910, while it was occupied by appellee as a storehouse. Appellant proposed to convey a quarter of an acre of the land, described as lying in a square in a certain corner of said quarter section, to appellee as a site for a new store building, and the latter accepted the offer and proceeded at once to erect a frame building at a cost of $150.00, which he afterward occupied as a store until he sold out to another person seven or eight months later.

Appellee instituted this action in the chancery court of Randolph County against appellant to require specific performance of the alleged agreement to convey the said quarter of an acre of land. He alleged in his complaint, and testified, that appellant entered into an oral agreement with him to sell him the said tract of land for a consideration of $3.00 and the cost of the preparation and

execution of the deed, and that pursuant to said oral agreement he entered into possession with appellant's consent and built the storehouse.

It is undisputed that appellant agreed to convey the land in question to appellee, but the former denies that it was a sale outright and claims that he let the appellee into possession of the land and agreed that he would make him a deed in order to induce him to carry on the business there, so that there would be more than one store at that place. Appellee admits that the construction of the storehouse there was of interest to appellant, and was a part of the inducement for the trade, but he denies that the sale was conditional or that he was not to have the deed if he sold out. Both parties gave their depositions and offered other testimony to support their respective contentions.

The chancellor found for appellee and decreed specific performance.

After a careful consideration of all the testimony in the record we are of the opinion that the finding of the chancellor is sustained by the evidence, and that appellee is entitled to specific performance of the agreement.

It appears that the real value of the quarter of an acre of land is very small, but that the price named by appellee, $3.00 an acre, was not the full value and that the proposal to erect the storehouse was a part of the inducement for the sale. But the testimony, even that of appellant himself, does not show that the sale was conditional upon appellee's carrying on the business there. There is nothing to indicate that the trade was not made by appellee in perfect good faith with intention to operate the business there for an indefinite length of time. It is true that he sold out his business seven or eight months later; but he had a right to do this, as there was no stipulation against it in his agreement with appellant.

Even if we treat the amount to be paid for the land merely as a nominal consideration and the proposed conveyance merely as a donation, still, appellee is entitled to a specific performance because of the fact that, pursuant

to the donation, he entered into possession of the land and made valuable improvements thereon upon the faith cordance with the proposal. *Guynn* v. *McCauley,* 32 Ark. 97; *Meigs* v. *Morris,* 63 Ark. 100; *Young* v. *Crawford,* 82 Ark. 33.

Considering the testimony as a whole, we are convinced that the decree of the chancellor is correct and the same is affirmed.

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

Opinion delivered March 31, 1913.

1. MASTER AND SERVANT—ASSUMED RISK—NEGLIGENCE OF MASTER.—A railroad brakeman who was killed because of the negligence of the railroad company in failing to furnish grab irons and hand-holds, which were necessary for the proper protection of the brakeman in the discharge of his duties, will not be held to have assumed the risk of the employment, because such negligence was not one of the ordinary risks of his employment. (Page 482.)
2. MASTER AND SERVANT—DUTY TO FURNISH SAFE APPLIANCES.—The absence of grab-irons and hand-holds from a freight car is not an open and obvious defect of which a brakeman must take notice. The brakeman had a right to assume that the company had not been negligent in providing safe appliances for his work. (Page 483.)
3. MASTER AND SERVANT—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.—Where the proof shows that two freight cars were not properly equipped with grab-irons and hand-holds, and that deceased, a brakeman, fell between the cars and was killed, while attempting to cross from one car to the other, the evidence will be held sufficient to warrant the jury in concluding that deceased's death was caused by failure of the railroad company to provide proper grab-irons and hand-holds on the ends of the two cars between which he fell when attempting to cross from one to the other. (Page 483.)
4. EVIDENCE—MASTER AND SERVANT—INJURY TO SERVANT—CIRCUMSTANCES.—In an action against a railroad company for negligent killing, where there is no eye-witness to the injury and the cause thereof is not established by affirmative or direct proof, if the facts established by the circumstances will justify an inference that the negligent condition alleged produced the injury, the jury

are not left to the domain of speculation, but have circumstances upon which, as reasonable minds, they may ground their conclusions. (Page 484.)

5. NEGLIGENCE—PROXIMATE CAUSE—CIRCUMSTANTIAL EVIDENCE.—Negligence that is the proximate cause of an injury, may be shown by circumstantial evidence as well as by direct evidence. (Page 485.)

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

STATEMENT BY THE COURT.

Louis Hempfling was a brakeman in the employ of appellant. On the night of the 22d of January, 1912, about 10 o'clock he left Argenta on a freight train consisting of coal cars and a caboose, going west to Spadra. After opening the switch, while in the discharge of his duty, he boarded the twelfth car from the caboose while the train was pulling out of Argenta, and in passing from the twelfth to the thirteenth car, going towards the engine, where his duty called him, he fell between the cars. His body was found lying face downward, the head being towards Argenta and the feet towards Fort Smith. The head was severed from the body and indicated that it was run over by the wheels on the right hand or north side of the train as it was passing west. The clothing was not disturbed, and the blood and brains were immediately around the body, indicating that the body had not been dragged by the train after it was struck.

The appellee, as administratrix of Hempfling's estate, brought this suit, predicating her right of action upon the negligence of the appellant in failing to equip the two Illinois Central cars between which Hempfling fell with handholds or grab-irons, which were shown to be necessary to enable brakeman to pass safely from one car to another in the discharge of their duties. Negligence was also alleged in failing to provide a safe track for the passing of trains at the rate of speed that the train was running at the time.

The appellant denied all the material allegations of

the complaint, and set up affirmatively the defenses of contributory negligence and assumed risk.

Giving the facts their strongest probative force in favor of the appellee, the testimony tends to show the following:

Hempfling was a stout healthy man, pretty active and got about the cars in good shape. He was an experienced brakeman, a man of good habits, and industrious, and was earning about $100 per month at the time he was killed. The thirteenth car was an 80,000 capacity and the twelfth car 100,000 capacity. The twelfth car was about forty-two inches from the floor to the top of the side. The thirteenth car was about thirty-six inches from the floor to the top of the side. The twelfth car was a solid car, that is, didn't have drop ends. The thirteenth car was a drop-end car, and had the ends down at the time of the accident. The twelfth car had handholds on the sills on both ends and one grab-iron on the front end, the direction in which the train was going, to the right of the middle, and about eighteen inches down from the top of the car, making the grab-iron about twenty-six inches from the floor. The thirteenth car had a sill handhold between the coupler and the outside of the car on the right side. There were no grab-irons at all on the thirteenth car except on the sills. The handholds on the sills were used for breaking purposes while the brakemen were on the ground. A majority of the Missouri Pacific-Iron Mountain cars have grab-irons in the middle of the end of the cars, over the couplers, ranging in number from three to five. The 80,000 capacity cars have from three to four and the 100,000 capacity cars from four to five. These grab-irons are from the drawbar to the top of the car at different distances. They are from eighteen to twenty-five inches long. They are placed there for the use of the train men in going from one car to another and are for the protection of the brakemen while the train is in motion. The brakemen, whether they cross to the right or to the left of the center of the car in passing from one car to the other

car, reach these grab-irons from any part of the end of the car. Most of the Missouri Pacific-Iron Mountain system cars had ladders down the center of the ends. That was the latest way in which they were equipped. The different railroads haul cars interchangeably and a brakeman don't pay any attention to what system or company a certain car belongs. He performs his duty with reference to the train he is on regardless of any car in it being the property of another company.

The train on which Hempfling was employed that night was made up at Argenta, where the railway company maintain an inspector whose duty it was to go over the train and see that it was in good order before the train left. If in the inspector's judgment a car was not properly equipped with grab-irons it would be his duty to have them put on or cut the car out of the train.

The thirteenth car had only about an inch and a half of sill between the end of the car and the drop end; but these projections were not sufficient to constitute footholds. The space between the two cars was something like two and a half feet. It was the usual and customary method for brakemen to use the grab-irons in going from car to car while the train was in motion. It was more convenient and less dangerous for them to use these handholds and their absence increased the hazard to the brakemen if the train was in motion and making a speed of ten to fifteen miles an hour, as it was doing when Hempfling was killed. A brakeman can steady himself in going from car to car while the train is in motion without using the handholds on the end.

The rules of the Interstate Commerce Commission, although adopted after the injury, were introduced without objection, for the purpose of showing what was considered by it as proper equipment of cars for the necessary protection of train men in the way of grab-irons or handholds, and these rules showed that eight or more handholds to the car, four at each end, in addition to the sill handholds, were necessary. It was also shown that in all of the large cars they usually have foot rests

and two handholds above them, and where there were no foot rests three handholds above where the foot rests would be.

It was shown that at the place where Hempfling was killed there were low joints in the track where the rails come together, which would cause the cars to roll and tilt as they passed over the track and make "it disagreeable to get over."

One of the witnesses testified that in attempting to pass from one car to the other "it is safer to take hold of the handhold. If there is no handhold to the car to which you are going you have to step from the other car to that car without holding to anything, and if the end of the front car is down there would be no handhold or anything else Hempfling could have held to; he just had to jump to the front car." Witness further testified that he didn't need the grab-irons on any car, but that he usually used the grab-irons.

Another witness testified that there would be no danger at all if there were grab-irons in the usual and proper place, but that if the grab-irons were not there the result is a brakeman "might get the worst of it. He is always expecting them there because it is the general rule that they are there."

There was further testimony to the effect that it would not be safe for a brakeman to go over the cars at the place where Hempfling was killed where the cars didn't have grab-irons upon them; that it would be a chance whether he got over. Witness testified that if a brakeman in pursuance of his duties in crossing cars finds no grab-irons that he is supposed to get over anyhow. One witness testified that "if a brakeman would lose his balance in leaving a car and fall towards the drop end of car, if the drop end had grab-irons he could grab at these grab-irons like a drowning man grabbing at a straw. If there had been a grab-iron where they are always found on this drop-end door, a brakeman falling on that door might have saved himself." Another one

states that if he had fallen where the grab-irons were, if they had been there, he might have caught hold of them.

A witness who was a fellow-brakeman with Hempfling and who was on the twelfth car when Hempfling boarded the same, in describing the occurrence, says: "I started towards the caboose and he started towards the engine and climbed over the car. I don't know whether I got over the next car or up on the first car. I heard something that attracted my attention like a lamp globe brake and I looked around and couldn't see him, and I felt the car run over something, and went there and found his lamp globe and gave them a stop signal, and stopped the train, and I went back and found him dead. The lamp globe was broke and the lantern was up in the car that he was getting into." Witness didn't remember how far in the car, but he thought just near the end gate. Witness didn't know where the lamp struck when it crushed.

Another witness testified that the oil "which had apparently been spilled from Hempfling's lantern was on the thirteenth car, on the left-hand side, near the center of the car, as the train was proceeding, and about two feet from the end gate." Witness discovered oil and a piece of the lantern globe. The lantern itself had been picked up by some one else when witness got there.

The appellant requested a peremptory instruction, and also presented prayers for instructions to the effect that there was no negligence "because of any defect in handholds" and "because of any defective condition of the track." And also presented requests for instructions to the effect that under the facts disclosed Hempfling had assumed the risk.

The court, at the instance of the appellee, and also at the instance of the appellant, gave instructions presenting the issues of negligence, contributory negligence and assumed risk. The jury returned a verdict in favor of the appellee in the sum of $4,000. Judgment was entered for that sum, and appellant duly prosecutes this appeal.

Thos. B. Pryor and *Vincent M. Miles,* for appellant.

1. No negligence is proven. 44 Ark. 524. Negligence must be proven. 67 C. C. A. 421; 139 Fed. 737; 145 *Id.* 327; 101 Wis. 371; 133 N. Y. 659; 179 U. S. 658; 47 Minn. 384; 190 Fed. 717.

2. Deceased assumed the risk. 57 Ark. 503; 82 *Id.* 11; 56 *Id.* 206; 143 Mass. 197; 196 U. S. 57; 191 *Id.* 64.

U. L. Meade and *Hill, Brizzolara & Fitzhugh,* for appellee.

1. Negligence of imposed duties on the master's part was duly proven. 127 Mo. 336; 81 Me. 572; 153 Mass. 297; 7 N. Y. Supp. 510; 103 Ark. 61; 57 Ark. 402; 76 *Id.* 436. Deceased did not assume the risk. Cases *supra.* 37 C. C. A. 1.; 94 Fed. 781.

2. It is negligence not to have cars equipped with appliances for the safety of employees in general use by all well regulated railroads. 9 So. 276; 164 Pa. St. 17; 127 Mo. 326.

WOOD, J., (after stating the facts). The issues in the case, on the pleadings and facts adduced, were submitted to the jury upon correct declarations of law from the trial court, and the evidence was amply sufficient to sustain the verdict. If Hempfling was killed by reason of the negligence of appellant, as alleged in the complaint of the appellee, then there was no assumption of risk on the part of Hempfling, because such negligence was not one of the ordinary risks incident to his employment as a brakeman. The negligence in failing to exercise ordinary care to provide handholds or grab-irons necessary for the proper protection of the brakemen while in the discharge of their duties, and also to provide a safe track, was the negligence of the master, which the servant under the evidence did not assume.

Under the evidence it was customary for cars like the ones under consideration to be furnished with as many as four handholds for the protection of brakemen. Hempfling had every reason to anticipate that these handholds had been furnished. He had no opportunity

before he started upon his journey to ascertain that they had not been provided, nor was it his duty to make any inspection of the car to ascertain this defective condition of the cars. Nor was it such an open and obvious defect that he was bound to know thereof. On the other hand, he had a right to assume that the company had not been negligent in providing safe appliances for doing the character of work that he was called upon to do. It was the duty of the inspector not to permit defective cars to go into the makeup of a train.

Learned counsel for appellant, while conceding that the testimony tended "to prove that there were a less number of grab-irons on the two cars than was usual and customary," and "that the track over which the train was being operated at the point at which decedent met his death was rough and uneven," nevertheless contend that "there is not a syllable of testimony in the record that either of these conditions contributed in any way to the death of plaintiff's decedent." This is the most serious question presented by the record. But we are of the opinion that the testimony was sufficient to warrant the finding of the jury that Hempfling's death was caused through the negligence of appellant as alleged in the complaint. The facts adduced in evidence, as disclosed in the statement, were sufficient to warrant any reasonable mind in concluding that Hempfling's death was caused by the failure on the part of the appellant to provide grab-irons on the ends of the two cars between which he fell at the time he was crossing from one to the other.

Hempfling was an experienced brakeman, in good health, strong and active. As one of the witnesses expressed it, "he was a good steady man, industrious and kept at his work." It is not at all probable that such a man, pursuing his work in the usual way, would have fallen between the cars and lost his life if there had been the usual and customary safeguards provided by the appellant, and which were necessary to be provided for

the protection of brakemen while crossing from one car to the other.

While there was no eye-witness to the manner of Hempfling's death, it is certain that he came to his death by falling between the cars, and it is reasonably certain that he would not have fallen if the customary handholds for his protection had been provided.

This is not a case where the evidence is consistent, "equally with the existence or nonexistence of negligence," as in *C. & O. Railway Co.* v. *Heath,* 48 S. E. 508. It is not a case where negligence and proximate cause of death are to be inferred merely from the accident and left as mere matter of conjecture or guesswork for the jury, as in *Midland Valley Railway* v. *Fulgham,* 181 Fed. Rep. 91, and the many cases there cited. Nor is it a case where the proof shows that "one of a half dozen things may have brought about the injury." Nor was it a case where one of several things, for some of which the appellant was responsible and some of which it was not responsible, produced the injury, leaving the jury to guess which one, as in the case of *Bolen-Darnall Coal Co.* v. *Hicks,* 190 Fed. 717, relied on by counsel for appellant. But here, as we view the evidence, the death of Hempfling was consistent only with the conclusion that he fell from the car by reason of the fact that he had no grab-irons by which to hold as he was attempting to pass from the twelfth to the thirteenth car, as mentioned in the testimony. In other words, his death was consistent only with the existence of negligence on the part of the company in failing to provide these handholds.

The jury were not invited to guess, without any proof, as to the probable cause of Hempfling's death. The law is well settled that where there are no eye-witnesses to the injury and the cause thereof is not established by affirmative or direct proof, then all the facts established by the circumstances must be such as to justify an inference on the part of the jury that the negligent conditions alleged produced the injury com-

plained of. Where such is the case the jury are not left in the domain of speculation, but they have circumstances upon which, as reasonable minds, they may ground their conclusions. Negligence that is the proximate cause may be shown by circumstantial evidence as well as by direct proof.

Here practically the uncontroverted evidence shows that appellant was negligent in failing to provide handholds which were necessary to insure the safety of the brakemen in the discharge of their duties, and we conclude that there was, at least, substantial evidence to warrant the jury in finding that the absence of these handholds caused the death of Hempfling. There was no evidence to warrant an inference that Hempfling fell between the cars by reason of any inadvertence or any imprudence on his part in attempting to cross from one car to the other. There was nothing to warrant the inference that his fall was the result of mere accident. On the contrary, a brakeman of Hempfling's build, health, experience and habits of work would not likely have fallen through negligence or inadvertence. Such a conclusion, under the evidence, would be unreasonable. But it was quite reasonable for the jury to conclude that Hempfling started to cross from one car to the other in the usual way, as the evidence shows, and that in reaching for the grab-irons which he expected to find he discovered and probably rested his foot on the one grab-iron on the car, while holding to the top and naturally supposed that the other grab-irons were also present on the car as they should have been, and in attempting to lower his foot to one of these grab-irons below the top one, he went down straight under the car because the grab-irons were not there. The position of the broken globe and lantern and the place where the oil was found on the drop end of the other car are not inconsistent with the idea that Hempfling went to his death in the manner indicated; because in the fall Hempfling, in attempting to catch the grab-iron on the thirteenth car and thus support and save himself, might have struck

the lantern in the manner indicated by the position of the oil and the lantern itself and broken globe. Or, the jury might have concluded that Hempfling attempted to pass over the car by jumping down from the twelfth to the thirteenth car and in so doing that he slipped and fell between them, striking his lantern at the place indicated by the oil on the drop end in an attempt to catch a handhold which he supposed was present on that end; and the jury were warranted in finding that if this was the way in which he fell he might still have saved himself from death by the presence of the handhold. But in either event, in a clear fall between the cars, with no handholds to catch to and nothing else on which to hold, Hempfling was caught in a veritable death trap.

The witnesses showed that no matter in what manner he may have fallen, if the handholds had been provided he might have saved himself by catching same as he went down. So, as stated, the conclusion of the jury that the unfortunate death of Hempfling was the result of the absence of the handholds on the ends of the cars is not based on conjecture but has substantial basis in the evidence to rest upon.

The law applicable here is well stated in a somewhat similar case from Missouri, as follows:

"In actions for damages on account of negligence plaintiff is bound to prove not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred." *Settle v. St. L. & S. F. Rd. Co.*, 127 Mo. 336; see also *Guthrie v. Maine Central Ry. Co.*, 81 Me. 572; *Coats v. Boston & Maine Ry.*, 153 Mass. 297; *Pullutro v. D. L. & W. Railroad*, 7 N. Y. Supp. 510; cited in appellee's brief.

In the recent case of *St. Louis, Iron Mountain &*

Southern Ry. Co. v. *Owens*, 103 Ark. 61, 145 S. W. 879, the facts tending to show the causal connection between the alleged negligent act and the death of the brakeman were established by circumstantial evidence only. To say the least, they were no more cogent than the facts relied on in this record to show such connection. In that case the court, after announcing the rule that there must be something more than mere conjecture to sustain the finding of the jury, said:

"While this salutary rule is not to be ignored, it is equally well settled that any material fact in controversy may be established by circumstantial evidence, and that, though the testimony of witnesses may be undisputed, the circumstances may be such that different minds may reasonably draw different conclusions therefrom. Such a state of case calls for a submission to the jury of the question at issue; and where the circumstances are such that different minds may reasonably draw different conclusions therefrom, and the result is not a mere matter of conjecture without facts or circumstances to support the conclusion, then it is the duty of an appellate court not to disturb the finding of the jury."

Applying the doctrine of the above cases to the facts of this record, the judgment is correct, and it is therefore affirmed.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY, *use* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* RANKIN.

Opinion delivered March 24, 1913.

1. ADVERSE POSSESSION—BOND FOR TITLE.—The possession of land by the purchaser from the holder of a bond for title is not adverse to the owner, and limitations will run against the owner only from the time it has knowledge of the adverse holding, even though he has knowledge of the possession. (Page 492.)

2. ADVERSE POSSESSION—WHEN TITLE PERFECTED.—Where possession is in fact adverse for nine years, title will be perfected against the

record owner, whether it has knowledge of the adverse possession, or not. (Page 492.)

3. DEEDS—QUITCLAIM DEED—INTEREST CONVEYED BY GRANTOR.—The grantee in a quitclaim deed takes only the interest held by the grantor, and when the grantor has only a right to receive a deed under a bond for title upon performance of the terms of the bond, the grantee has no greater right. (Page 493.)

4. VENDOR AND PURCHASER—QUITCLAIM DEED—NOTICE.—A grantee in a quitclaim deed takes with notice of all imperfections in his grantor's title. (Page 493.)

5. ADVERSE POSSESSION—POSSESSION OF GRANTEE UNDER TITLE BOND.—When A purchases land from B, who holds under a bond for title, the possession of A is the possession of his grantor and is subordinate to the title of the holder of the record title. (Page 493.)

6. VENDOR AND PURCHASER—VENDOR'S LIEN—LACHES.—A suit brought in 1906 by a party who executed a bond for title in 1891, to have the deferred payments declared a lien on the land, is not barred by laches, when the owner paid all of the taxes on the land and had no knowledge that a purchaser from the holder of the title bond, was claiming adversely, even though it knew of the latter's possession, when the facts do not show that it had abandoned its claim. (Page 493.)

Appeal from Faulkner Chancery Court; *Jeremiah G. Wallace,* Chancellor; reversed.

STATEMENT BY THE COURT.

Appellant was the plaintiff below and brought this suit on October 23, 1906, to collect the balance of purchase money alleged to be due it upon the sale of west half of southeast quarter (south of chute), section 28, township 4 north, range 14 west, lying in Faulkner County, Arkansas. The complaint alleged that plaintiff was the owner of the land above described on January 2, 1891, and on that date contracted to sell it to the defendant, G. E. Rankin, for the sum of $374.56, of which $46 was paid in cash at the time, the balance to be paid in six annual installments; that defendant, Rankin, agreed to pay all taxes thereafter assessed against the land and to cut no timber or wood on said land, except for clearing for actual cultivation and for fences, buildings and fuel. That plaintiff agreed to make defendant, Rankin,

a good and sufficient deed to said land upon his making said payments, and keeping his contract; and that this contract was reduced to writing and signed by the parties, and that by virtue of this contract, defendant, Rankin, made the cash payment and entered into the possession of the land and remained in the possession until December 25, 1896, at which time the said Rankin assigned his said contract by quitclaim deed to defendant, S. G. Smith, who is now in possession of said land; that said Smith took subject to the vendor's lien of plaintiff and that the deferred payments have never been made. Plaintiff prayed judgment for the balance due, with interest; and that said sum be declared a lien on said land. Plaintiff made the contract, above referred to, an exhibit to its complaint, and it contained the provisions above mentioned and further provided that it should not be assigned, unless the assignment was countersigned by the commissioner of the land department of the railroad company; and also that upon default in any payment the company should have the right to declare the contract null and void and to take possession of the lands described therein.

The service against Rankin was by publication and he made no defense, but the defendant, Smith, answered and denied that plaintiff had ever owned the land or that it had ever conveyed it to Rankin, or that Rankin was indebted to it in any sum on account of his purchase, and denies that Rankin assigned to him any contract of purchase. The answer further alleged that if said Rankin did in fact execute any obligation for purchase money, it was long since barred by the statute of limitations and plead his own adverse possession of the land for a period of more than seven years before the institution of the suit. The defendant, Smith, made the deed from Rankin to him an exhibit to his answer. This deed was dated December 15, 1896, and the consideration was recited to be $20.

Plaintiff filed a reply in which it denied there was any consideration for the conveyance from Rankin to

Smith, and denied that Smith had ever held the land adversely or that its title had ever been disputed, and alleged it had paid all taxes due on said land. Plaintiff later amended its complaint, showing the sale of the land to St. Louis, Iron Mountain & Southern Railway Company.

The evidence on the part of the railroad company showed its ownership of the land at the date of the bond for title to Rankin and its uninterrupted payment of taxes down to date of this suit, and the execution of the bond for title by the parties thereto.

The evidence upon the part of the defendant, Smith, was to the effect that he paid $20 in cash for the land and there was some other consideration. That Rankin had been in the possession of the land for some time and he supposed was the owner of it, and that upon his purchase he placed his tenants in possession of the land, and had since been in the actual and adverse possession of it. That he made no investigation of the title, but supposed Rankin owned the land and did not know his title was not perfect. Smith further testified that his bookkeeper paid his taxes and he supposed had paid on this land for the different years, but the receipts do not appear in the record. Upon the contrary, the receipts for all the years in controversy are in the name of the railroad company.

No excuse was offered, in either the pleadings or the proof, for the delay in the institution of this suit, and the deed from Rankin to Smith contained no reference to the source of his title, and the proof appears to support his statement that he purchased the land in good faith and had occupied it without knowledge of the railroad's interest from the date of his purchase. But it does not appear that the railroad company knew of his possession until a year before the institution of this suit.

The cause was heard at the September, 1912, term of the court, which found that the cause was barred by limitation and laches and dismissed the complaint for want of equity.

C. M. Walser, for appellant.

1. Appellee, Smith, took with notice of all imperfections in his grantor's title. 50 Ark. 322; 31 Ark. 91; 23 Ark. 736; 14 Ark. 69; 42 Kan. 754; 56 Ala. 256; 34 Fed. 368; Wade on Notice, § § 11, 23 and 330; Devlin on Deeds, § 733; 39 Cyc. 1693. His possession was that of his grantor, and as such was subordinate to appellant's title. 27 Ark. 61; 21 Ark. 202; 18 Ark. 142; 14 Ark. 628; 99 Tex. 539; 19 Fed. Cas. 695; 79 S. W. 863; 6 Johns. Chy. (N. Y.) 398; 1 Cyc. 1049; 39 Cyc. 1821.

2. The statute of limitations does not run against a vendor in favor of a vendee holding under a contract of purchase. 83 Ark. 374; 76 Ark. 405; 41 Ark. 523; 71 Ark. 164; 34 Ark. 312. Where the original possession was in privity with the rightful owner, the statute will not begin to run until there is an open and explicit disavowal and disclaimer of holding under that title brought home to the other party. *Id.*

3. The burden of proving adverse possession rests on the party relying on it for title. 57 Ark. 97; 61 Ark. 464; 65 Ark. 422. And a statement that one has been in open, actual and notorious possession of the land and that no one disputed his ownership, will not support the claim. 84 Ark. 587; 40 Ark. 366; Harvelle on Ejectment, § 420.

R. W. Robins, for appellee, Smith.

The finding of the chancellor on the question of adverse possession is not only supported by the weight of the evidence but by all of it, and his finding on this question of fact should not be disturbed. 101 Ark. 510; *Id.* 493; *Id.* 336; 100 Ark. 555; *Id.* 370; *Id.* 166; 98 Ark. 459; 97 Ark. 568; *Id.* 537. Courts of equity can not forever remain open and nothing will call it into activity but conscience, good faith and reasonable diligence. Laches and neglect are always discountenanced. 55 Ark. 85; 83 Ark. 385; 96 U. S. 612, 24 L. Ed. 855; 2 Story, Eq. Jur., § 1520; 2 Amb. 645.

If appellant was not actually apprised of Smith's possession, certainly reasonable diligence could have dis-

covered his deed on record, and that he and his tenants were in possession and cultivating the land. 87 Ark. 232; 33 Ark. 466; 101 Ark. 163; 90 Ark. 149; 76 Ark. 25; Kirby's Dig., § 762; 56 Ark. 601.

The contract specifically provided that no assignment thereof could be made without the consent of appellant; it will therefore not be heard to claim that it had the right to presume that Smith's deed and possession were not hostile to its title, or that the conveyance by Rankin simply amounted to an assignment of his contract.

C. M. Walser, for appellant, in reply.

Since appellant had never parted with the legal title, the claim that it is chargeable with laches is untenable. 61 Tex. 166; 113 Fed. 433.

The law imputes to Smith notice of such facts as might have been ascertained by the exercise of reasonable diligence, or by making proper inquiry. In this case it would have disclosed the fact that Rankin was a stranger to the title and had nothing to convey except such interest as he had acquired under the contract of purchase, and that he was in possession in recognition of appellant's title.

SMITH, J., (after stating the facts). Under the facts here stated, Smith's possession of the land could not be adverse to the railroad company until that company had knowledge of the adverse holding, and the statute of limitations would not begin to run until the possession became adverse. The mere fact that the railroad company had no knowledge of Smith's possession is not controlling. If the possession had in fact been adverse for the nine years of his occupancy before the suit was brought, then his title would have been perfected by his possession, and this would be true whether the railroad company had actual knowledge of this possession or not. On the other hand, actual knowledge of Smith's possession would not have set the statute of limitations in motion unless it was also known that the possession was in hostility to the railroad company. Smith's quitclaim deed

from Rankin could convey no greater right than Rankin had, and this was the right to receive a deed upon the payment of the purchase money and the performance of the terms of the bond for title. Smith took with notice of all imperfections in his grantor's title. *Gaines* v. *Summers,* 50 Ark. 322; *Haskell* v. *State,* 31 Ark. 91; *Miller* v. *Fraley,* 23 Ark. 736.

His possession was that of his grantor and as such was subordinate to appellant's title. *Lewis* v. *Boskin,* 27 Ark. 61; *Shall* v. *Biscoe,* 18 Ark. 142; *Moore* v. *Anders,* 14 Ark. 628.

In the case of *Perry* v. *Arkadelphia Lumber Co.,* 83 Ark. 374, the court quoted with approval the following language from the case of *Tillar* v. *Clayton,* 76 Ark. 405: "The statute of limitations does not run against a vendor in favor of a vendee, holding under a contract for sale and purchase; nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner until there be an open and explicit disavowal and disclaimer of holding under that title and assertion of title brought home to the other party." There are many cases to the same effect.

We are also of the opinion that the appellant's right to maintain this suit is not barred by laches. "Mere delay is not always laches and laches in the assertion of a right is not always sufficient to defeat it. The laches must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise." *William Seldens, Exr.,* v. *Kennedy,* 7 A. & E. Cases, 879. *Davis* v. *Harrell,* 101 Ark. 235, and cases cited. Here the law charged appellee with the knowledge of the bond for title because it was in the chain of his title. *Gaines* v. *Summers, supra; Stephens* v. *Shannon,* 43 Ark. 464. And even though appellant had actual knowledge of Smith's possession, it had the right to presume this possession was in subordination to its title until knowledge to the contrary was brought home to it, and the continued tax payments

by appellant necessarily indicated it had not abandoned its claim against the land.

The decree of the chancellor is therefore reversed and the cause is remanded with directions to enter a decree for the amount of the purchase money due appellant with the interest thereon, and taxes paid by it with interest on each payment from the date it was made, with directions to sell said lands if said sums are not paid within a reasonable time to be fixed by the court.

SMITH v. STATE.

Opinion delivered March 31, 1913.

APPEAL AND ERROR—EVIDENCE—EXCLUSION OF ENTIRE TESTIMONY OF WITNESS.—Where portions of the testimony of a witness are incompetent as hearsay, and other portions are clearly admissible, and no objection was made to any of the evidence until the conclusion of the examination of the witness when the court, on motion of the prosecuting attorney, excluded all the testimony; *held*, the defendant was entitled to the benefit of the competent testimony, and it was error to exclude the whole testimony.

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

Appellant pro se.

Wm. L. Moose, Attorney General, and *John P. Streepey*, Assistant, for appellee.

SMITH, J. The defendant was convicted at the September term, 1912, of the Union Circuit Court for criminal trespass, alleged to have been committed by cutting down and destroying certain cypress trees of the value of $250, standing and growing on certain land there described, the property of the American Timber Company, a corporation whose assets were then in the hands of one C. H. Murphy as receiver under the appointment of the chancery court of that county. The defendant was convicted and his punishment fixed at one month in the penitentiary by the verdict of the jury, and from the judgment of the court pronounced thereon, this ap-

peal is prosecuted. The proof appears to have been sufficient to warrant the verdict and we will consider only the exceptions saved to the action of the court during the progress of the trial. These exceptions relate chiefly to the court's action in admitting and excluding evidence and in its charge to the jury. Appellant points out no specific objection to any instruction; in fact, he relies for a reversal chiefly on the insufficiency of the evidence to sustain a conviction, and the exceptions saved to the court's action in admitting and excluding evidence. Upon a consideration of all the objections to the evidence, urged by the appellant, we are of opinion that only one is of sufficient importance to call for a reversal of the cause, or a discussion of its merits. Appellant was found in possession of certain logs which probably came from the lands of the timber company; in fact, the proof to that effect is convincing and practically undisputed as to certain logs found mingled with those of appellant and which were branded with his brand. In explanation of this circumstance, appellant testified that his employee inadvertently and without directions branded these logs when he should not have done so. The logs were found in the river in April, 1911. Appellant admitted that he had been getting out logs to raft in the preceding winter, but stated that he had cut them from a section of land on which he had the right to cut and that he cut them in the winter of 1910, and before Christmas of that year. In support of this defense, a witness, R. Harrison, was called who testified in part as follows:

Q. Do you know about the occasion of Mr. Smith getting some timber from down there at Henderson Bend and Beth Shanty?

A. Yes, sir.

Q. Do you know when Mr. Smith was cutting timber that he hauled there?

A. Yes, sir; I was in the bottom hunting at different times in there—that is, where they claim he got this timber.

Q. They claim he got this timber on sections 33 and 28. You may state whether or not you know where the stumps were—where these blocks were cut off of?

A. I did not see any of the stumps in there.

Q. You know the location of 33 and 28?

A. Yes, sir.

Q. Do you know when Mr. Smith quit cutting?

A. Yes, sir.

Q. You may state whether or not there was any timber cut in sections 33 and 28 when Mr. Smith quit cutting?

A. No, sir; there was not in there—that is, I was in there a few days after he moved out and there was not any timber cut in there then.

CROSS EXAMINATION.

Q. Mr. Harrison, you and Mr. Smith were partners?

A. No, sir; not partners.

Q. You all got timber together, didn't you?

A. I helped him cut timber, but I did not help him cut that timber. I was not working there and had nothing to do with the timber at all.

Q. What timber did you help him cut?

A. Some out at L'Aiglle Lake.

Q. That was attached, too, wasn't it, or replevied?

A. They said it was.

Q. Do you know whether it was or not?

A. Yes, sir.

Q. Did you hunt all over section 28?

A. Yes, sir; in that part of the country.

Q. I am talking about section 28.

A. Yes, sir.

Q. And section 33?

A. Yes, sir.

Q. And section 21?

A. Yes, sir; in that part of the country.

Q. When were you hunting?

A. Of course, I generally hunted in the fall or the spring.

Q. When was this timber cut?

A. I reckon along in January, I guess. I do not know; I never kept up with the date.

Q. When were you hunting there?

A. Off and on all the time.

Q. How far do you live from there?

A. About six miles; five or six.

Q. And you would go down there squirrel hunting or cattle hunting?

A. Yes, sir.

Q. So you say there was no timber cut there in January?

A. Yes, sir.

Q. Did you go all over each of these forties in these different sections?

A. I do not know whether I did or not, but I was in that part of the country—that is, all in those sections—but I was not hunting any timber.

Q. And you did not notice any timber having been cut in January, 1911, or 1910?

A. In 1911, I guess.

Q. Have you hunted down there since then?

A. Yes, sir.

Q. Didn't you just now state you had not noticed where any stumps were cut?

A. I did not notice where any were fresh cut.

Q. And you never noticed any stumps?

A. No, sir; I did not notice any fresh stumps.

Q. How do you know what sections you were on?

A. That is what they say. Of course, I did not know anything about the land, but it was in that part of the country. I can tell you the exact part of the country I was in, if you want to know.

Q. I want to know how you know it was in sections 28 and 33 and 21?

A. I know it was in that part of the country they said.

RE-DIRECT EXAMINATION.

Q. Do you know where Fish Trap Lake is?

A. Yes, sir.

Q. Which way was it from Fish Trap Lake?

A. Out east.

Q. Which way did you go from Henderson Bend?

A. I was all the way east of Fish Trap Lake, east of Shallow Lake, around Open Brake and Mud Slough, and down to Henderson Bend and Beth Shanty.

Upon motion of the State, all this evidence was excluded because the witness knew only from what he had heard the numbers of the sections on which the timber was alleged to have been cut. This evidence is set out *in extenso* and it thus appears that portions of his testimony was hearsay, while other parts were clearly admissible. No objection was made to any of this evidence until the conclusion of the examination of the witness when the court on the motion of the prosecuting attorney excluded it all. While this evidence may have been of doubtful value, it at least tended to corroborate the testimony of the defendant and he was entitled to its benefit, and we think the action of the court in excluding it was error and requires the reversal of the case.

Other questions raised will not likely arise on another trial of the cause; among these a motion for a new trial on account of newly discovered evidence and a discussion of these questions is accordingly pretermitted.

For the error in excluding the evidence set out above the judgment is reversed and the cause remanded.

COOPER v. VAUGHAN.

Opinion delivered March 31, 1913.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—JURISDICTION OF CIRCUIT COURT.—The circuit court has jurisdiction after the expiration of the term at which a judgment is rendered to vacate the judgment and grant a new trial upon newly discovered evidence under §§ 4431 and 6220 of Kirby's Digest. (Page 506.)

2. APPEAL AND ERROR—ORDER VACATING JUDGMENT.—Kirby's Digest, § 1188, which provides that, "No appeal to the Supreme Court from an order granting a new trial, in any case made on bill of excep-

tions, shall be effectual for any purpose, 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 the appellant," has no application to proceedings to vacate the judgment under Kirby's Digest, § § 4431 and 6220. (Page 507.)

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—NECESSARY ALLEGATIONS.—A petition to set aside a judgment after the expiration of the term at which it was rendered and to grant a new trial must state facts and circumstances sufficient to show that the failure to adduce the alleged newly discovered evidence at the former hearing was through no lack of diligence on the part of the petitioner; that the facts and circumstances came to his knowledge since the former trial; the same must be set out in the petition, and must be sufficient to convince the court that had they been introduced at the former trial, they would probably have changed the result. (Page 507.)

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—FACTS NECESSARY TO BE STATED IN PETITION.—The facts alleged in a petition for a new trial on the grounds of newly discovered evidence, must be competent to prove the issue, not cumulative to those previously relied on, and not merely contradictory or tending to impeach the testimony of witnesses introduced at the former trial; and the petition must state the facts and circumstances under which the discovery of the new evidence relied on, was made. (Page 507.)

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY OF EVIDENCE.—When the testimony of a witness is material, and after verdict and judgment, he swears that he was mistaken, and it appears that the testimony as the witness would later give it would probably change the result of the trial, sufficient grounds for granting a new trial are shown. (Page 509.)

6. NEW TRIAL—DILIGENCE—NEWLY DISCOVERED EVIDENCE.—On an application for a new trial on the ground of newly discovered evidence, the evidence introduced by plaintiff held to be sufficient to show that he used due diligence in the preparation of his case for the former trial. (Page 509.)

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

STATEMENT BY THE COURT.

At the September term, 1911, of the Prairie Circuit Court, appellant recovered a judgment against the appellee in the sum of $1,000. An appeal was taken and the judgment below affirmed by this court.

At the September term, 1912, of the Prairie Circuit

Court the appellee filed his petition asking that the judgment be set aside and a new trial granted him upon the ground of evidence discovered after the term at which the former judgment was rendered and after the decision of the Supreme Court affirming that judgment.

The appellee alleged in his petition that at the former trial W. H. Cooper testified that on or about the first of May, 1908, he was employed by Emmett Vaughan (appellee) to make an estimate of the Myer's Bend land, Vaughan agreeing to pay for his services the sum of $1,000; that while in the employ of Herman Romunder in January, 1908, and at his request, he made an estimate of the Myer's Bend land, knowing at the time that Romunder was on a deal for the same, and that three or four months after this he made the estimate for Mr. Vaughan and turned the same over to him at the time the due bill was executed or just prior thereto, the due-bill being dated the 8th of May, 1908. That Cooper's testimony was corroborated by the deposition of Herman Romunder as to the number of acres of land, date of estimate, etc., he stating that the estimate was received through the office at Des Arc some time in January, 1908. That at the time he received said estimate he was negotiating with Vaughan for the land; that the first estimate he received did not contain any estimate of the lands west of White river, but only the Myer's Bend land; that the first estimate was received about two months prior to the second estimate, the second estimate being received in April or May, but that he thought his correspondence would show; that from a review of the testimony of W. H. Cooper and the deposition of Romunder it would be seen that the testimony of Cooper was based on the deposition of Romunder, and that W. H. Cooper's inspiration of another estimate of this land evidently grew out of the deposition of Herman Romunder; that, on the other hand, petitioner denied that said Cooper was ever employed by him to make an estimate of the timber referred to in Cooper's testimony; that the $1,000 for which Cooper sued him was for an estimate made by

Cooper for Herman Romunder, the said estimate covering 1,900 acres, which included the Myer's Bend land and the land west of White river; that since the judgment of the Supreme Court was rendered Romunder had discovered a letter written by himself to Cooper which showed that he (Romunder) was mistaken in his testimony at the former trial, in which he testified from memory that Cooper was in his employ in January, 1908, and made an estimate of the timber for him at that time, and that Romunder would now testify that Cooper only made one estimate of the timber, and that said estimate was made in May, 1908, and that said estimate embraced 1,900 acres of land, 761 acres of which lay on the east of White river, in Woodruff County, known as the Myer's Bend land, the balance of the land lying west of the river, in Prairie County, Arkansas.

The petitioner further set up that Romunder had discovered an expense account, dated June 1, 1908, showing that on May 1 and 2, 1908, W. H. Cooper had incurred expense for estimating timber on Raft creek (being the name of the place west of White river where the lands were estimated), said expense account being signed and O. K.'d by W. H. Cooper. He had also discovered the original estimate of the timber, headed "Myer's Bend Estimate," and "This Side of Bayou Des Arc," said estimate embracing 1,900 acres of land, consisting of the Myer's Bend land and the land west of White river, signed by W. H. Cooper; that he had also discovered a letter from Cooper, dated May 10, 1908, making corrections in the estimate sent the preceding day.

The petition further alleged that Cooper testified on the former trial that the due-bill executed by Emmett Vaughan to him was for an estimate of nothing but the Myer's Bend land, and that this land was the only land he estimated for Vaughan.

The petition set up a memorandum executed by Cooper at the time the due-bill was executed, which reads as follows: "I agree that the due-bill given me this date

by E. Vaughan for $1,000 to be void if sale of land fails to go through."

The petitioner alleged that the newly discovered evidence, above set forth, would show that the estimate was made for Romunder and not for Vaughan, and was for the entire 1,900 acres of land; that the testimony shows that only the Myer's Bend land of 761 acres had been sold.

The petition further alleged as follows:

"That the newly discovered evidence that has come to light since the verdict is material, and that in the former trial of said cause he used due diligence in preparing said cause and that the said Herman Romunder was a nonresident of the State of Arkansas, and that in the taking of the depositions he requested of him to attach all correspondence and other instruments of writing relating to said deal, which the said Romunder promised to do, and that he made repeated demands for said correspondence, but that the said Herman Romunder stated that he could not locate the same, and refused to attach same to his said deposition. That he was unable to procure any of said correspondence until recently and since the verdict or opinion of the Supreme Court. That it was impossible for petitioner to have known what was contained in the correspondence which passed between Herman Romunder and W. H. Cooper, and that he did everything within his power to ascertain the nature and extent of the same and to have the same made a part of his deposition.

"Petitioner further states that the above testimony, in his opinion, would have produced a different result in the trial of said cause, and that if said verdict is permitted to stand it will work an irreparable injury to said petitioner."

The petition concludes with a prayer that the judgment be vacated and that he be granted a new trial, etc.

A general demurrer was filed to the petition, which was overruled. Appellant answered, and among other things, after admitting the former suit and judgment,

he denied that the newly discovered evidence was material; denied that it would have changed the result of the trial; set up that appellee was fully advised by the testimony of appellant in the former trial as to what this cause of action was and the testimony upon which he relied to sustain it; that there was on the first trial of said cause a hung jury, and that the cause was continued from term to term until finally it was tried and a judgment rendered in favor of the defendant (in this case). The answer then set up the following:

"This defendant further states that Herman Romunder, one of the witnesses upon which plaintiff relies for newly discovered evidence, is and was at all times herein mentioned the president of the Buena Vista Veneer Company, an Arkansas corporation, with its offices at Des Arc, and that said Herman Romunder visited Des Arc as often as once a month from and after the 8th day of August, 1910, until the final hearing of said cause; that the said plaintiff was well acquainted with the said Herman Romunder and saw and talked with him during his visits at Des Arc, and being fully advised of the connection of this defendant, both by the pleadings and this defendant's testimony, had ample opportunity and could, with the exercise of diligence, have discovered and ascertained before the trial and judgment the evidence which he now desires to have given by the said Romunder. * * *

"That this defendant denies that the said plaintiff could not have brought this newly discovered evidence forward at the time of the trial; denies that he used due diligence in preparing his cause for trial and in attempting to develop all the facts connected therewith, but avers the facts to be that the said plaintiff was guilty of laches and gross negligence in the preparation of his cause, and that by reasonable diligence the so-called newly discovered evidence could have been produced at the trial.

"And for another and further defense this defendant states that in his complaint so filed as aforesaid he charged and alleged that he had been employed by the

said Emmett Vaughan to estimate the timber on certain lands known as the Myer's Bend land, and in said complaint particularly described, and that for his services so rendered the said Vaughan was to pay him $1,000, when the land should be sold, and as evidence of all which the said Vaughan executed and delivered to this defendant a due-bill for $1,000, and further alleged that he had made the estimate that the land was sold and that the money was due and unpaid.

"That the said Vaughan in his answer denied that he was indebted to the defendant $1,000, or in any other sum; admitted the execution of the due-bill, but alleged that Mr. Romunder, in whose employ the defendant was at the time, was negotiating with said Vaughan for the purchase of certain lands and had instructed this defendant to make an estimate of the timber for him; that this defendant threatened to throw the deal unless the said Vaughan should agree to pay him the said sum of $1,000, and that rather than have the deal fail he gave the due-bill agreeing to pay this defendant the sum of $1,000 when said deal was consummated but that said deal failed to go through.

"The evidence adduced on behalf of this defendant tended to prove the allegations contained in said complaint while the evidence adduced on behalf of the said plaintiff, Vaughan, tended to prove the allegations contained in his answer; the case was fully developed by testimony adduced at the hearing on both sides, so that this defendant said that the so-called newly discovered evidence is merely cumulative of the evidence adduced on behalf of the plaintiff, Vaughan, at the trial, and its effect is to impeach the witnesses of this defendant and to contradict his testimony."

The remainder of the answer is devoted to a denial of allegations in the complaint, and sets up that if the witnesses should testify as it is alleged they would that their testimony would be untrue and not founded upon the facts. And the defendant avers "the fact to be that this defendant was in the employ of the said Buena Vista

Veneer Company in January, 1908; that in January, 1908, he was instructed by the said Romunder to make an estimate of the timber growing on the Myer's Bend land and other lands belonging to the said Emmett Vaughan; that in pursuance of said instructions he made said estimate and delivered it to the office of the Buena Vista Veneer Company, and that said estimate embraced 1,900 acres of land; that in May, 1908, he made an estimate of the timber on Myer's Bend land alone and delivered the same to the said Emmett Vaughan, and that the last estimate was made at the instance and request of the said Emmett Vaughan."

The petition contained allegations of newly discovered evidence of other witnesses, and the answer denied these allegations. The conclusion we have reached as to the alleged newly discovered evidence of the witness Romunder renders it unnecessary to notice these allegations.

It was agreed that only one term of the court had been held since the rendering of the judgment in the case of *Vaughan* v. *Cooper* on the former trial.

Without objection, the testimony on behalf of the plaintiff and the defendant at the former trial of said cause was introduced in evidence. The court also heard the testimony of witnesses on behalf of the plaintiff in the present cause to sustain his application for a new trial, and also the evidence of the defendant, and at the conclusion thereof sustained the motion and entered a judgment setting aside the former judgment of the court and granting the petitioner, appellee, here, a new trial, from which judgment this appeal has been duly prosecuted.

F. E. Brown and *W. A. Leach,* for appellant.

1. Applications for new trials on the ground of newly discovered evidence are received with caution. They are regarded with distrust and disfavor. 28 Ark. 121; 13 *Id.* 360. Due diligence must be shown. 45 Cal. 94; 35 *Id.* 684; 16 *Id.* 180; 28 Ark. 380; 99 *Id.* 523.

2. The evidence must not be merely cumulative. The names of the witnesses and the facts expected to be proved must be set out, and due diligence shown. 26 Ark. 496; 13 *Id.* 105; 11 *Id.* 671; 5 *Id.* 256; 2 *Id.* 133, 346; *Ib.* 33.

3. It must be shown that the evidence is not merely contradictory and tends to impeach one's adversary or his witnesses. 97 Ark. 435; 96 *Id.* 400; 90 *Id.* 435; 72 *Id.* 404; 45 *Id.* 328; 40 *Id.* 445; 36 *Id.* 260.

4. The facts pleaded do not show due diligence. 99 Ark. 523; 85 *Id.* 33; 55 *Id.* 312; 38 *Id.* 515; 28 *Id.* 121; 13 *Id.* 360; 99 *Id.* 407; 63 *Id.* 643; 85 *Id.* 179.

5. The evidence was merely cumulative. 2 Ark. 133; *Ib.* 246; 5 *Id.* 256.

6. The evidence was known prior to the trial. 73 Ark. 377; 37 *Id.* 333.

7. Kirby's Dig., § 1188, does not apply. 89 Ark. 160.

Trimble & Trimble, for appellee.

1. The court has no jurisdiction of the subject-matter. Kirby's Dig., § § 1188-1238; 73 Ark. 617; 77 *Id.* 298.

2. The proof shows due diligence. 101 Ark. 352.

3. The evidence was newly-discovered and material, and not merely cumulative. 14 Enc. Pl. & Pr. 738; 54 Ga. 635; 6 Me. 416; 41 Ark. 231; 11 *Id.* 673; 5 Words & Phrases, 4700.

4. Motions for new trial on the ground of newly discovered evidence are addressed to the sound legal discretion of the court. 41 Ark. 231; 11 *Id.* 673; 15 Enc. Pl. & Pr. 286, par. 4.

WOOD, J., (after stating the facts). 1. This suit was brought under section 6220 of Kirby's Digest, which provides that, "Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear

and answer it on or before the first day of the next term."

The court had jurisdiction after the expiration of the term at which the judgment was rendered to vacate it and grant a new trial upon newly discovered evidence under the authority of section 4431 of Kirby's Digest.

The provision of section 1188 of Kirby's Digest, providing that "no appeal to the Supreme Court from an order granting a new trial, in any case made on bill of exceptions, shall be effectual for any purpose, 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 the appellant," has no application to proceedings to vacate the judgment under sections 4431 and 6220, *supra*. *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160.

2. Under our decisions, the petition to set aside the judgment after the expiration of the term at which it was rendered and to grant a new trial must state facts and circumstances sufficient to show that the failure to adduce the alleged newly discovered evidence at the former hearing was through no lack of diligence on the part of the petitioner. It must also state that the facts and circumstances came to his knowledge since the former trial, and set out the facts, and these facts must be sufficient to convince the court that had they been introduced at the former trial they would probably have changed the result. The facts alleged must be competent to prove the issue, must not be cumulative of those previously relied on, and not merely contradictory or tending only to impeach the testimony of witnesses introduced at the former trial. And the petition must also state the facts and circumstances under which the newly discovered evidence was made. *Merrick* v. *Britton*, 26 Ark. 496; *Minkwitz* v. *Steen*, 36 Ark. 260; *Ward* v. *State*, 85 Ark. 179; *Smith* v. *State*, 90 Ark. 435; *Osborn* v. *State*, 96 Ark. 400; *Russell* v. *State*, 97 Ark 92. See also, by analogy, *Killian* v. *Killian*, 98 Ark. 15; *Stone* v. *Sewer Imp. Dist. No. 1*, 107 Ark. 405.

Tested by the rules announced in the foregoing cases, we are of the opinion that the petition under consideration stated a cause of action.

3. It is stated in substance in the petition that the testimony of W. H. Cooper (appellant) at the former trial showed that he made an estimate for Herman Romunder in January, 1908, of what is known as the Myer's Bend tract of land and that three or four months after this estimate was made he made another estimate for appellee Vaughan for which Vaughan agreed to pay him $1,000, as evidenced by a due-bill executed May 8, 1908, and that the testimony of Romunder given at the former trial corroborated this testimony of Cooper; but that since the former trial and judgment, and since the judgment of the Supreme Court was rendered, witness Romunder had discovered a certain letter written by him to Cooper, dated the 1st of May, 1908, showing that he was mistaken when he testified at the former trial that Cooper was in his employ in January, 1908, and made an estimate of the timber for him at that time, and that Romunder would now swear that W. H. Cooper only made one estimate of the timber and that said estimate was made in May, 1908, and that said estimate embraced not only the land lying east of the river in Woodruff County, known as the Myer's Bend land, but also the land lying west of the river in Prairie County, embracing in all about 1,900 acres.

The petition further alleged that this evidence was newly discovered; that it was material; that petitioner used due diligence in preparing his case, and the reason he gives for not discovering it before is that Romunder was a nonresident of the State; that in the taking of the depositions he requested of him to attach all correspondence and other instruments of writing relating to said deal, which the said Romunder promised to do, and that he made repeated demands for said correspondence, but that the said Romunder stated that he could not locate the same, etc.; that he was unable to procure any of said correspondence until recently; "that it was impossible

for your petitioner to have known what was contained in the correspondence which passed between the said Herman Romunder and the said W. H. Cooper, and that he did everything in his power to ascertain the nature and extent of the same and to have the same made a part of his deposition."

We are of the opinion that the facts set forth in the petition are sufficient to show that the evidence was newly discovered; that it was material testimony, was not merely contradictory of the testimony of other witnesses or of the appellant, and that it was not merely cumulative, and that it is evidence which, if introduced at the former trial, would probably have changed the result, and that facts are stated showing the circumstances under which it was discovered and showing that due diligence was used to obtain it. The complaint was therefore sufficient in regard to the newly discovered evidence to state a cause of action under the rules declared in the above cases.

Without going into details in setting out and discussing the weight of the evidence *pro* and *con,* we are of the opinion that the testimony of Romunder in support of the allegations of the petition fully warranted the finding of the court in setting aside the former judgment and granting the appellee a new trial. The newly discovered evidence of Romunder tended strongly to support the allegations of the petition and was sufficient to warrant the court in finding that if the testimony of Romunder given on the hearing of the petition for a new trial had been adduced at the former trial before the jury that the verdict most likely would have been different. In other words, this testimony tended to show that Romunder was mistaken in his testimony given at the former hearing to the effect that in January, 1908, appellant had made an estimate for him; that, on the contrary, the estimate appellant made for him was in May, 1908. This testimony tended to support the contention of the appellee that appellant had not made an estimate for him (appellee) in May, 1908, for which he had agreed to

pay him (appellant) $1,000, but that the due-bill was executed for an entirely different purpose, and that the consideration for said due-bill wholly failed.

In *Schofield Rolling Mill Co.* v. *State of Georgia,* 54 Ga. 635, the court say: "When a witness for the plaintiff testifies from recollection capable of certain ascertainment by measurement, and after the trial by the jury swears that he was mistaken in the testimony, and the testimony is very material, and probably largely influenced the verdict, and the discrepancy between his testimony and the affidavit is very great, and said information having come to his knowledge since the trial, a new trial on the ground of newly discovered evidence will be granted."

In 29 Cyc., at page 608, this rule is announced: "Where it is clear that a witness was mistaken in giving the only or controlling testimony to a material fact, or that the testimony of witnesses on which the verdict proceeded was founded on particular circumstances which have been clearly falsified, a new trial should be granted."

This doctrine is apposite here to the alleged newly discovered evidence of Romunder. No one can say that the jury was not probably influenced in making their verdict by the testimony of Romunder on the former trial, and the allegations of the petition, supported by his testimony on this application for a new trial show that his former testimony was grounded upon facts about which he was mistaken, and of which, if he had been at the time cognizant, he would have given entirely different testimony.

The most serious question in the case is as to whether the testimony on behalf of appellee was sufficient to show that he had used due diligence in the preparation of his case for the former trial. The testimony of appellee on this question is as follows:

Q. State what you did in preparation of the case?

A. I endeavored in every way I could at the first trial to get the memorandum from Miss Cannie. She

told me at the time that she only kept a copy and she tried to find that but couldn't. Then I tried to get her to get it from the home office in Mishawaka and she couldn't. I tried to get that or any other correspondence but she couldn't get it. Afterwards I went to Mishawaka myself and Mr. Romunder's office in South Bend, and all that I could find was that letter of May 1. I stayed several days and when I went to leave I told them to have Mr. Romunder look through everything and if he could find anything at all to send it down to me. He never did send anything except what he sent with his deposition.

Q. What steps did you take towards procuring these papers with reference to Herman Romunder?

A. I telephoned Mrs. Johnson the day we took the deposition to ask Mr. Romunder to come down to the clerk's office and he refused to do it. Then I told her to tell him that if he didn't we would have a subpoena issued for him and he would have to come any way. We took his testimony, and in taking it Mr. Leach asked him to attach all these exhibits and I thought that he did, but we were never able to find it until recently.

Q. What was the relation at that time between you and Mr. Romunder?

A. Well, we didn't speak. The relations were strained. He would not speak. He did business at my bank until September, 1909, at which time we had a disagreement out of which the strained relations grew. This continued until last November.

Q. As soon as this strained relation was over with and he would speak to you, state what efforts you used to get hold of this testimony?

A. Well, at the time the case had been appealed to the Supreme Court we talked the matter over. I wanted to explain my position in the transaction; to explain any feeling he might have against me in regard to it. We discussed the testimony. I told him at the time that he was wrong and after the case was settled in the Supreme Court, immediately I discovered that I could

get this testimony and I have left no stone unturned to get it. I have spent a good deal of money to get it. I made a trip to Mishawaka.

Q. At the time of the taking of the deposition did you know anything about the correspondence that had passed between Mr. Cooper and Mr. Romunder?

A. No, sir.

Q. Did you know that these exhibits attached to Mr. Romunder's deposition were in existence?

A. No, sir; I did not.

The above was sufficient to show that appellee exercised due diligence to procure the alleged newly discovered testimony.

The judgment is therefore affirmed.

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

Opinion delivered April 7, 1913.

1. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF MASTER TO FURNISH SAFE TOOLS—ASSUMED RISK.—Where plaintiff is a car repairer and is injured by a defective hammer furnished by defendant while in the discharge of his duties, the plaintiff does not assume the risk of any dangers from the use of said hammer, which arose from the negligence of the defendant, unless he was aware of the negligence of the defendant in providing the hammer then being used, and appreciated the dangers arising therefrom, and the servant is not bound to search for dangers except those risks that are patent to ordinary observation. (Page 521.)

2. MASTER AND SERVANT—NEGLIGENCE—DUTY TO FURNISH SAFE TOOLS.—Where defendant furnishes plaintiff with tools with which to perform the duties of his employment, the plaintiff has the right to rely upon the assumption that the defendant has performed the duty devolving upon it not to expose him to an extraordinary danger. (Page 523.)

3. MASTER AND SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.—Where plaintiff was employed to assist a car repairer and was injured by being struck by a hammer used by the car repairer, and the evidence shows that the hammer had a defective striking face, it is a question for the jury whether the plaintiff assumed the risk of the defective condition of the hammer. (Page 524.)

4. MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.—When plaintiff is injured by being struck by a hammer used by a car repairer whom he was helping, it is a question for the jury under all the facts and circumstances adduced in evidence whether an unskilled laborer of ordinary intelligence should have known that the hammer was defective and should have known and appreciated the dangers that he was exposed to by reason thereof. (Page 524.)

5. DAMAGES—PERSONAL INJURY—NOT EXCESSIVE WHEN.—Where plaintiff is injured by the negligence of defendant in furnishing him defective tools with which to work, a verdict of $10,000 damages will not be declared excessive, when plaintiff has for eleven months been confined to his bed, suffered great pain, required the attendance of a physician, and will probably be required to have his leg amputated. (Page 526.)

6. REMOVAL OF CAUSES—WHAT MAY BE CONSIDERED.—In determining whether a cause should be removed to the Federal Court, the State court may look to the allegations of the complaint, when not in conflict with the statements of the petition for removal. (Page 527.)

7. REMOVAL OF CAUSES—WHEN DENIED.—A suit brought in a State court outside of the Federal district in which the plaintiff resides is not removable on the ground of diversity of citizenship on petition of the defendant who is a citizen and resident of another State. *St. Louis & S. F. Rd. Co.* v. *Kitchen*, 98 Ark. 507. (Page 528.)

Appeal from Dallas Circuit Court; *H. W. Wells*, Judge; affirmed.

STATEMENT BY THE COURT.

Harvey Smith was injured while in the service of the Chicago, Rock Island & Pacific Railway Company by being struck on the shin by an eight-pound sledge hammer in the hands of a car repairer whom he was assisting in the work of repairing a defective car. The hammer as alleged in the complaint had an imperfect striking surface and was defective for the use to which it was being put at the time the injury was received. Smith brought this suit against the railway company to recover damages for the injury.

The testimony adduced on behalf of the plaintiff is substantially as follows:

J. J. Dozier testified: I am a car repairer and at the time the plaintiff Smith received the injury com-

plained of and for some time prior thereto was engaged in the service of the defendant railway company at El Dorado, Arkansas. The injury was received by the plaintiff at El Dorado on the 10th day of July, 1911. Some time before that the shed and tool house of the defendant at El Dorado was burned and the handle was burned out of the hammer in question. A new handle was placed in it. The striking face of the hammer was imperfect. It is not straight but is drawn sideways. When hammers are in this condition they do not strike true. I showed this hammer to the foreman before the accident, and he told me that he would get some new hammers in a short time. The hammer in question is an eight-pound hammer and the handle is about twenty-four inches long. At the time the plaintiff was injured there was a scarcity of hammers of this kind in the repair yard, and it was a common custom for me to loan my hammer to another workman in the yard. This was done by direction of the foreman. On the day plaintiff was injured I left the hammer in question with some other tools between the rails on track No. 3 in the yards at El Dorado. It was the only hammer there with the tools. If a turnbuckle in a freight car is so tight that you can not prize it loose, the men sometimes resort to a hammer like this to jar it loose. In those cases, we take a lever, a pinch bar or line bar or something of that sort or a piece of wood small enough, and one man prizes it and the other man goes on the opposite side and strikes, following the turn with a hammer or maul and that moves the buckle in that direction. The emergency which makes that necessity is that the threads get rusty in the buckle or are not in a straight line, which makes the buckle hard to turn. By striking the top side that breaks the rust on the rod. The two men, the one prizing down and the other striking, would be facing each other under the car. The man striking with the hammer, strikes in the direction of the man with the prize.

R. S. Blackman testified: I was a car repairer in the service of the defendant railway company at the time

the plaintiff was injured. At the time he was hurt we were working on a car engaged in taking the slack out where it had gone down. We had jacked up the car and were under it trying to turn the turnbuckle so as to tighten up the truss rods. There were four turnbuckles under this car and we had adjusted two of them before the plaintiff was hurt. The truss rods are of iron and are an inch or an inch and three-quarters in diameter and extend from each end under the center. The turnbuckles are in the middle and are put there for the purpose of tightening the truss rods and keeping them properly aligned. There are screws upon each end of the turnbuckle and you tighten or loosen them according to the way you turn it. I had taken a small hammer and mauled the turnbuckle as heavy as I could pound it but could not loosen it. I did not have a sledge hammer. The foreman had told me that some would be in in a few days, and in the meantime directed me to borrow one from the nearest workman when I needed one. I directed the plaintiff, my helper, to go and get me a sledge hammer. He went out about two car lengths ahead and got the hammer in question and brought it under the car where we were working. He pitched the hammer over to me and I caught it. I directed him to take a piece of timber and put it in the turnbuckle and prize towards himself. I took the hammer and commenced pounding on the turnbuckle. I was striking towards the plaintiff. After I had struck three or four licks, the hammer glanced and struck plaintiff on the lower limb between the knee and the ankle. The plaintiff was in a squatted position and fell back. I asked him if he was hurt and he said yes. The hammer did not leave my hand when it struck him but struck him pretty hard; we were doing the work in the usual manner and I was just as careful as I could be in striking the turnbuckle. I think the slipping of the hammer was caused by the defective condition of its striking face. I examined the hammer after the plaintiff was struck and saw that the face of it was all knocked down and that

its striking surface was defective. I did not notice this until after the accident occurred.

Harvey Smith, the plaintiff, testified: I am twenty-eight years of age and my residence is at El Dorado, Arkansas. I have lived there four years. I had been working for the defendant company a little more than one year before I was injured. This was the first railroad work I had ever done. I worked as fireman on the road some and in the car repair department some. I was helper to a car repairer. Prior to the injury I had been strong and well and had not been sick to amount to anything for ten years. I have no means of support except manual labor. I have not been able to earn anything since I received this injury and have been in bed most of the time. (The trial was had about eleven months after the injury was received.) I suffered great pain after I received the injury. I remained in the hospital three weeks and then by the permission of the physician came home. I stayed at home a month or probably six weeks and then went back to the hospital and remained there about three weeks. The railroad surgeon split my leg and went on the inside of the bone. About two weeks after I was hurt my leg swelled up and became inflamed. Doctor Wharton opened up my leg twice. The first time I did not take any chloroform. The incision was about an inch and three-quarters or two inches long. When I went back to the hospital the second time they operated on my leg on the left side of the bone. They gave me chloroform. My leg pains me nearly all the time. My knee is swelled up, and, while the swelling has gone down some, it pains me to walk on my leg and walking makes it swell.

The plaintiff detailed the manner in which he received his injury practically the same as the witness Blackman. He said they had been instructed to hurry up the job at which they were working when he was injured.

Dr. R. A. Hilton testified: I am a physician and surgeon. I was called to see the plaintiff about the first

of November, 1911, and have been treating his leg ever since that time. When I first saw him his temperature was over one hundred and five. His leg was very much swollen and in an inflamed condition; there was an incision in the leg which had been made by the railroad surgeon. I opened the leg thoroughly and went under the muscles with my finger. There were sacks of pus all through there and under the muscles. I broke them down with my finger. I took a scrape and raked out all the dead bone. There was some pus in the bone. The plaintiff was delirious for a great part of the time at first and I thought it would be necessary to amputate his limb at once. After forty-eight hours he got better and later on got up so he could walk around. The periosteum is the covering of the bone and assists in nutrition. The periosteum of the large bone in plaintiff's leg is very much involved and I believe that the small bone is, too, on account of the fact that there has been so much suppuration of the parts around them. I can't understand how it would be possible for it to be otherwise when you consider the condition of the parts around and about it. The witness was asked, "From your knowledge of this wound and in the treatment of it, what do you think with reference to the involvement of the knee?" and answered, "I think it is very likely that it is involved; it is to the extent that to allow it to go on, is to take chances of losing the limb."

We quote from the testimony of the witness as follows:

Q. From your treatment of this wound, and your observation of it, Doctor Hilton, I will ask you to state what are the probabilities of a cure of his leg, if any, and in what time?

A. Doctor Runyan had a shot at it and didn't cure it, and so did Doctor Wharton and never and I didn't cure it. Taking it for granted that the bone is involved, it would take about ninety days, and he would have a crippled leg forever, and it would be about the same in the event of amputation.

Q. What do you think are the chances of amputation of this leg in the condition it is now?

A. I would be governed largely by the condition after looking into the bone. I believe there is some involvement of the joint, and, if I found that, I would amputate it.

I think that five hundred dollars would be a reasonable fee for the services I have already performed and there is absolutely necessity for further treatment. I think the cost of medicine can not be less than one hundred dollars.

Doctor Wharton testified that the condition of the plaintiff is bad. That the involvement to the bone, if it is extensive enough through and through, would be sufficient to cause him to lose his leg. That the dead bone would have to be taken out, and, if you did not get it all the first time, you would have to operate again. On cross examination he stated that he believed there is an opportunity for the leg to be restored by an operation to the bone tissue. He said, in his opinion, there is an opportunity for the plaintiff's leg to get well.

Dr. W. H. Simmons testified: I made an examination of the plaintiff's leg at the request of the claim department of the railway company on June 5, 1912. The plaintiff was under the influence of morphine when I examined him. I found no broken bone or dead bone, but found decayed bone. I can not say about his chances of complete recovery. That depends entirely upon the treatment and exact condition of the leg, and you can not tell about that condition until you get to the bone. If the dead bone is removed, if there is any there, he has a chance to recover, but, if the bone is entirely involved, it means amputation. I did not examine the bone except through the skin. I discovered nothing which led me to believe that the bone was entirely involved.

The jury returned a verdict in favor of the plaintiff for ten thousand dollars, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

1. Where the instrument used by the servant is simple, and the defect therein is so open and patent as to be observable at a casual glance, he is negligent if he makes use of it blindly and without taking the slight precaution necessary for his own protection, and, if injured, such negligence prevents recovery. The servant, it is true, assumes no abnormal risks of which he had actual or constructive knowledge, but, under the circumstances of this case, it was his duty to observe and know the condition of the hammer because its defects were open and patent. 1 Labatt, Master & Servant, 1138; *Id.* 1159, § 413; 47 N. Y. Supp. 285; 58 Ill. App. 117; 9 Col. 159, 165; 11 Pac. 50; 134 Ind. 156; 33 N. E. 355; 118 N. C. 59; 23 S. E. 925; 11 Ind. App. 110; 38 N. E. 547; 79 Tex. 104; 14 S. W. 918; 178 Mass. 242; 15 Ind. App. 353, 356; 43 N. E. 273; 44 N. E. 59; 151 Ill. 472; 38 N. E. 241; 76 Wis. 136-143; 44 N. W. 752; 69 N. W. 352; 51 N. W. 350; 53 Ark. 117; 95 Ark. 291; 141 S. W. (Ark.) 1176; 145 S. W. (Ark.) 879.

2. If appellee could have discovered, by the use of ordinary care on his part, the condition the hammer was in, and that it would be dangerous to use it, he assumed the risk of being injured by such condition. The court therefore erred in refusing to modify instruction 2, as requested by appellant. 151 S. W. 1005; 141 S. W. (Ark.) 1176, 1178, 1179.

3. Appellant's petition for removal from the State court into the Federal court should have been granted. 93 Fed. 728.

4. Under the evidence in this case, the verdict is grossly excessive. 89 Ark. 522.

Powell & Taylor and *Patrick McNally,* for appellee.

1. The servant assumes the ordinary risks incident to his employment; but he assumes no risk resulting from the negligence of the master unless he is aware of such negligence and understands and appreciates the danger. That he could by the exercise of ordinary care

have discovered and avoided the danger does not constitute an assumption of risk, where it arose by reason of the negligence of the master. 77 Ark. 367, 374; *Id.* 458; 89 Ark. 424; 92 Ark. 102; 95 Ark. 291; 87 Ark. 396; 101 Ark. 197.

In this case, if appellee was bound to take notice of the defective condition of the hammer, which is not conceded, he is nevertheless relieved from assumption of the risk by the master's promise to furnish new and suitable hammers, which, as he testifies, he thought had been supplied. 86 Ark. 335; *Id.* 516; 88 Ark. 28; 90 Ark. 555; 97 Ark. 553.

2. Appellant's contention that appellee was guilty of contributory negligence because the defect in the hammer was discoverable by an examination or inspection of it, is not tenable. He was not guilty of contributory negligence simply because its defective condition was discoverable by an examination, because on him rested no duty of inspection, and he had the right to rely both on the performance by the master of his duty to exercise ordinary care to furnish safe tools and appliances, and the promise to furnish new hammers. *Supra;* 101 Ark. 197.

3. The petition for removal to the Federal court was properly overruled. 98 Ark. 507; 195 Fed. 832; 199 Fed. 667; *Id.* 291.

4. The verdict is not excessive, when considered in the light of appellee's age, his life expectancy, his earning capacity, his expenses for treatment and his long continued suffering, with the reasonably certain prospect of final loss of the limb. Ramsey's condition, 89 Ark. 522, cited by appellant, was far preferable to appellee's and that case affords no just basis on which to ground a contention for reduction of the judgment. 105 Ark. 533.

HART, J., (after stating the facts). The court gave the following instruction at the request of the plaintiff, which was objected to by the defendant.

"No. 2. You are instructed that at the time of re-

ceiving the injury complained of, the defendant railway company owed to the plaintiff the duty of using ordinary care and diligence in providing for the safety of the plaintiff and his foreman a suitable and safe hammer for the purpose of doing the work in which they were engaged. The plaintiff while doing the work in which he was engaged did not assume the risk of any dangers from the use of said hammer, if furnished by the defendant to the plaintiff for his use in the work in which he was engaged, which arose from the negligence of the defendant unless he was aware of the negligence of the defendant in providing the hammer then being used and appreciated the dangers arising therefrom. If the plaintiff had no knowledge of the defective condition of the hammer, then he had a right to rely upon the assumption that the defendant had performed the duty devolving upon it so as not to expose him to extraordinary danger."

The court also gave the following instruction, among others, at the request of the defendant:

"No. 7. The plaintiff is presumed to know of such defects in the hammer as were plainly to be seen by ordinary observation, and you are instructed that if the injury to plaintiff was caused by a defect in the hammer which could have been discovered by ordinary observation, he can not recover in this case."

It will be observed that in instruction No. 2, given at the request of the plaintiff, the court told the jury that the plaintiff "did not assume the risk of any danger from the use of said hammer which arose from the negligence of the defendant unless he was aware of the negligence of the defendant in providing the hammer and appreciated the dangers arising therefrom." Counsel for the defendant say that they insisted that this instruction should be modified so as to state "or by the exercise of ordinary care on his part could have known," etc., and "by the exercise of ordinary care would have appreciated the dangers arising therefrom." The court did not err in refusing to modify the instruction as re-

quested by counsel for the defendant; for the practical effect of the modification would have been to tell the jury that the plaintiff should have examined the hammer for defects in it before he handed it to Blackman, the car repairer, for use; and this he was not required to do. In the case of *Little Rock, M. R. & T. Ry. Co.* v. *Leverett, Admr.*, 48 Ark. 333, the court said:

"A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery unless he did in fact know of them, or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for dangers, except those risks that are patent to ordinary observation; he has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty towards him." (Citing cases.)

In the case of *Choctaw, Oklahoma & Gulf Railroad Company* v. *Jones*, 77 Ark. 367, the court said:

"In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and where it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them; and if he negligently fails to do so, he will still be held to have assumed them. The decision in the recent case of *Grayson-McLeod Company* v. *Carter*, 76 Ark. 69, rests on that ground as do many other cases found in the reports. But the servant is not presumed to know of risks and dangers caused by the negligence of the master, after he

enters the service, which changes the condition of the service. If he is injured by such negligence, he can not be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on contract, but if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk." (Citing cases.)

Again, in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Birch,* 89 Ark. 424, the court said:

"The contention of learned counsel is that the above quoted instruction given at the instance of the plaintiff is erroneous, because it ignores the question of assumed risk. This instruction was predicated on the theory of negligence on the part of defendant in leaving the car door open so as to expose the switchman to danger. His right of recovery was made to depend entirely upon such negligence on the part of the defendant and the exercise of due care on his own part. He did not assume the risk of danger created by the negligent act of the employer unless he was aware of the danger and appreciated it. The fact that he could, by the exercise of ordinary care, have discovered and avoided the danger did not constitute an assumption of the risk where it arose by reason of negligence of the master, though he might have been guilty of contributory negligence, which would have prevented a recovery. *Choctaw, O. & G. Rd. Co.* v. *Jones,* 77 Ark. 367. In this respect the instruction given at the instance of the defendant was too favorable to it for the jury were therein told, in effect, that, notwithstanding the negligence of the defendant, if the plaintiff knew, or by the exercise of ordinary care and diligence could have known, of the condition of the car, how it was loaded and whether the door was open or not,' then he is deemed to have assumed the risk of the danger. This is not correct, as already stated."

Counsel for the defendant also contend that the court erred in refusing certain instructions requested by them. We need not set out the instructions; for they are open to the same vices as the modification to instruction numbered 2, requested by them, and in the application of the principles above announced, the court did not err in refusing them to the jury.

It is next insisted by counsel that the court erred in not directing a verdict for the defendant, but we are of the opinion that it was a question for the jury whether or not plaintiff assumed the risk of the defective condition of the hammer. The undisputed evidence shows that the hammer had an imperfect striking face and was in a defective condition, when considered with reference to the uses for which it was intended. Blackman, the car repairer, who struck the plaintiff, testified that he was accustomed to handling a sledge hammer and that he struck the turnbuckle properly as he intended to strike it; that if it had been a safe hammer, it would not have slipped and struck the plaintiff. That the hammer was caused to glance and strike the plaintiff because of the defective condition of its face. Hence, the jury was justified in finding from the evidence that the face of the hammer was defective and that its defective condition was the efficient cause of the injury to the plaintiff. Neither can we say, as a question of law, that under all the facts and circumstances adduced in evidence that an unskilled laborer of ordinary intelligence should have known that the hammer was defective and should have known and appreciated the dangers that he was exposed to by reason thereof. There is no hard and fast rule that may be laid down as governing the liability of an employer for a defect in common tools. In view of this condition, we do not undertake to say what state of facts the rule of liability should embrace and what state of facts it should not. We deem it sufficient to say that, while the question of liability of the defendant in the case at bar is an exceedingly close one, yet, under all

the circumstances adduced in evidence it was a question of fact for the jury and not one of law for the court. This is not a case where the servant was permitted to make his own selection of tools to be used by himself alone. On the other hand, a number of servants were engaged in the repair work in the yards at El Dorado. The tools were kept in a tool house and were furnished to the employees by a tool-keeper under the directions of the master. The tool house had been burned down some time prior to the injury to the plaintiff and there was a scarcity of tools, particularly of sledge hammers. Pending the arrival of the new supply the foreman had directed the car repairers when in need of tools not supplied to them to borrow them from the car repairer next to him. Plaintiff was assistant or helper ot Blackman, a car repairer. They had been told to finish the car on which they were working by 12 o'clock, if possible. Blackman, being unable to loosen the turnbuckle on which they were working by pounding on it with an ordinary hammer, directed plaintiff to bring him a sledge hammer. Plaintiff went and got one and handed it to Blackman. They at once commenced working on the turnbuckle in the usual way to loosen it. The plaintiff was prizing towards himself with a lever and Blackman was opposite him, striking the turnbuckle with the hammer. After he had struck the turnbuckle three or four times it slipped and struck the plaintiff below the knee, causing the injury on account of which this suit was brought. Blackman says that he hit the turnbuckle where he intended to hit it and that the hammer glanced and struck the plaintiff because of the defective condition of its face. These are facts the jury were warranted in finding from the evidence. There was no duty imposed upon either plaintiff or Blackman to search for defects in the hammer. It can not be said, as a question of law, that the defect in the face of the hammer was so open and obvious that they could have seen the defect by a glance or by such casual observation as it would be natural for plain-

tiff to have made while carrying the hammer to Blackman or by Blackman to have made after receiving it.

It is next insisted that the verdict is excessive. Counsel cite the case of *Aluminum Company of North America* v. *Ramsey,* 89 Ark. 522, where this court reduced a verdict from twenty thousand dollars to twelve thousand, where plaintiff's leg was amputated; but we do not think that case is authority for a reduction of the verdict here. Each case must largely depend upon its own circumstances. In the Ramsey case the plaintiff's leg was amputated at once and there was no prolonged and unusual suffering. Here an effort was made to save the leg of plaintiff. A period of eleven months elapsed from the time of his injury to the day of the trial. During all this time the plaintiff suffered great pain and was confined to his bed for most of the time. He has been unable to do any work since he received the injury and constantly requires the attendance of a physician. One of the physicians who examined him several months after his injury was received says that he was under the influence of morphine. Presumably this was taken to alleviate his pain. At least the jury had a right to infer that fact. All of the physicians who examined him agree that if the bone is entirely involved his leg will yet have to be amputated. Doctor Hilton, the physician who has attended the plaintiff longest since his injury and who has charge of the case, expressed the opinion that the knee joint was involved and that, if such was the case, amputation would be necessary. It is true that in one part of his testimony he says that he does not know this to be a fact, but when his entire testimony is considered the jury were warranted in finding that, although Doctor Hilton was treating plaintiff with the view to saving his leg, yet his opinion was that amputation of the leg above the knee joint would be necessary. And the jury were warranted in finding from his testimony when considered as a whole that this opinion was not based on conjecture or supposition merely but was based on previous examinations of the leg made by laying it open to the bone

and on his treatment of the leg of the plaintiff after such examination was made. Therefore, we can not say that the verdict was excessive. See *Mo. & North Ark. Rd. Co.* v. *Collins,* 106 Ark. 353.

The plaintiff in his complaint alleged that he was a citizen, resident and inhabitant of Union County, Arkansas, and had been for two years prior to receiving the injury complained of and ever since, and that during all of that period of time he had been and still was a resident, citizen and inhabitant of the Texarkana Division of the Western District of Arkansas. That Dallas County, Arkansas, the county in which suit was brought, is situated in the Western Division of the Eastern District of Arkansas. The defendant in due form filed its petition and bond for removal of the cause to the Federal court, alleging that the amount involved exceeded, exclusive of interest and costs, the sum of three thousand dollars. That the suit was of a civil nature, being an action for damages for a personal injury, and was between citizens and residents of different States in this, towit: That at the time this action was commenced the plaintiff was a citizen and resident of the State of Arkansas and has been ever since and still is a resident and citizen of said State. That the defendant was at the time this suit was commenced and still is a corporation organized and existing under the laws of the State of Illinois. That at the time of the bringing of this action, long before and ever since the defendant has owned and operated a line of railroad through Dallas County, Arkansas, and also through numerous other counties in the Eastern District of Arkansas, and that during all of said time it had agents in Dallas County and other counties of said district upon whom summons could have been had. The question at issue on this point has never been expressly decided by the Supreme Court of the United States, but it has been decided adversely to the defendant's contention in the case of *St. Louis & S. F. Rd. Co.* v. *Kitchen,* 98 Ark. 507, and the opinion in that case is controlling here. There the court said:

"In determining whether a cause should be removed to the Federal court the State court may look to the allegations of the complaint, when not in conflict with the statements of the petition for removal.

"A suit brought in a State court outside of the Federal district in which the plaintiff resides is not removable on the ground of diversity of citizenship on petition of the defendant, who is a citizen and resident of another State."

Therefore, the judgment will be affirmed.

Mr. Justice WOOD thinks the verdict is excessive and that a remittitur of $5,000.00 should be entered. This amount is ample to compensate for the injury sustained. It is manifest from the amount of the verdict in this case that the jury allowed damages as for a permanent injury. According to the doctrine announced by this court in the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 153 S. W. 104, 106 Ark. 177, there was no evidence to warrant this. The doctors themselves were uncertain as to whether the injury would be permanent. The jury should not be allowed to *speculate* concerning this.

THE BUENA VISTA VENEER COMPANY *v.* BROADBENT.

Opinion delivered April 7, 1913.

MASTER AND SERVANT—PATENT DANGER—DUTY TO WARN.—A master is not bound to warn and instruct his servants as to dangers which are patent and obvious; and where the servant is twenty-eight years old, of average intelligence, able-bodied, and had worked about the millyard for a year, an instruction that the master owed the servant a duty to warn him, even if the danger was patent, because of his inexperience, is erroneous.

Appeal from Prairie Circuit Court, Northern District; *Eugene Lankford,* Judge; reversed.

STATEMENT BY THE COURT.

This was an action brought by Dora C. Broadbent, administratrix of the estate of Charles Broadbent, de-

ceased, against the Buena Vista Veneer Company to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought to recover damages for the benefit of the next of kin of the deceased and for his estate.

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

The defendant owned and operated a sawmill and veneering plant in the town of Des Arc. The veneering plant and sawmill were located just below the town on the west bank of White river. The Rock Island railroad runs along the west side of the plant and the yards are between the railroad and the mill property. At the rear of the veneering plant and abutting the east end thereof are four large vats used for heating and steaming the logs out of which veneer is to be cut. The logs are drawn up from the river to the drag saw and from there are put into the vats. After they are sufficiently steamed and heated, they are drawn out of the vats at the end next to the mill and peeled preparatory to being run through the lathe. The vats are about seven feet deep and the water is up to within eighteen inches of the top. The vats are covered for about thirty feet and to within about six feet of the wall of the end adjoining the veneer mill. The open end of the vats are about six feet wide and about seven feet long. The planks which cover the vats become drawn on account of the hot water and they are broken by the action of the logs striking against them as they are being moved towards the end of the vats. The planks in the covering of the vats are renewed as fast as they become broken or defective. The ends of the vats next to the veneer mill are left open so that the logs can be drawn out of the vats into the mill. Charles Broadbent was injured on the 15th day of June, 1912, and was at the time an able-bodied man, twenty-eight years of age and of average intelligence. He had worked in the mill yard in various capacities for most of

the time of the year prior to the time that he received the injuries which resulted in his death. He had not, however, been engaged in the work of dragging logs out of the vat and peeling them until the morning he was injured. On that morning the manager of the mill directed W. S. Carter, a Mr. Newhart and himself to drag the logs out of the vat and to peel them. The water in the vats was so hot that any one working around them could feel the heat. The manager told them to be careful about their work but gave them no other instructions in this respect.

W. S. Carter, in regard to the manner in which the accident occurred, testified substantially as follows: At the direction of Mr. Hall, the manager of the mill, we went over to the middle vat and began work. Hall went with us to show us how to drag the logs up. Mr. Broadbent came around on the vat and Mr. Hall pitched him a hook. Mr. Newhart hooked the first log. Mr. Hall was going to pull the lever to show me how to drag the logs up. Mr. Broadbent went down the steps where the lever was and went around on to the covering of the vat. There was an open space between the cover of the vat and the mill about five feet wide. Broadbent went around back of this open space on to the covering of the vat. I do not know what he was going to do. He walked along the covering of the vat around to the north end of the open space in the vat and started to walk across a plank back to the mill. The plank tilted and he fell into the vat and was scalded. Subsequently he died from the injuries received. A few days before the injuries were received, this particular vat had been cleaned out and repaired and this was its first use afterwards. In some manner not shown in the record a plank about five or six feet long, two inches thick and eight inches wide had been placed across the open space of the vat at the north end with one end resting on the north wall of the vat about six inches from the north wall and the east end resting on the north wall of the vat, partly on and partly off. Broadbent started to walk along this

plank at its east end and that end, being partly on and partly off the wall of the vat, tilted and precipitated him into the boiling water of the vat.

J. T. Hollingsworth testified: At the time Broadbent received his injuries I was engaged in running the bull wheel at the mill. The bull wheel is on the east side of the mill between two veneer cutters and is used to pull up logs from the river. It is nearly between the two sets of vats. In pulling logs from the river we stop them at the drag saw just about thirty feet from where I stand at the bull wheel. The drag saw is east of the vats and right at the end of the two on the south side. When I first saw Mr. Broadbent on the morning of the accident, he was standing on the inside of the mill right up by a post. The next time I saw him was at the corner of the vat where he fell in. He was around there helping to get the logs out and he had stepped on a plank which was not fastened. It was laying about half of it on the north wall of the vat and he had walked out on it and it turned over with him. I saw him when he stepped on the plank and he stepped on the plank on the west end of it; that is the end next to the mill. In hooking the logs it is occasionally necessary to go around the walls of the vat but never to go across the open space. They use hooks from back of the opening and both sides of the opening. Rolling the logs around in the water breaks the planks in two and new planks have to be put in their places. The top of the wall of the vat is about twelve inches wide and the plank from which Broadbent fell was about eight inches wide.

Hollingsworth testified that he could see the ends of the plank and could see that it was only partly on the wall. On the other hand, Carter testified that from where he was the plank appeared to be placed on the north wall of the vat.

There was a verdict for the plaintiff and the defendant has appealed.

Ashley Cockrill, for appellant; *H. M. Armistead, R. R. Lynn* and *Trimble & Trimble,* of Counsel.

1. Where a mature man of ordinary intelligence, working about a vat of hot water, attempts to go across the vat walking on a plank which is obviously insecure, if he falls into the vat and is injured, no recovery can be had, even though he was inexperienced in the particular work he was undertaking to do, because, the danger being obvious, he assumed the risk, and, being so open and apparent, he was guilty of contributory negligence in attempting to do so.

The rule requiring a master to warn an inexperienced servant against patent defects does not apply in this case. 39 Ark. 17, 38; 58 Ark. 217, 228; 73 Ark. 49; 56 Ark. 206, 210; 93 Ark. 153, 155; 76 Ark. 69; 1 Labatt, Master & Servant, § § 238, 247; 82 Ark. 534; 105 Ark. 247; 1 Labatt, Master & Servant, § 394, and cases cited on the subject of risks every adult is presumed to comprehend without special experience. See also 37 N. E. (Mass.) 368; 48 N. E. (Mass.) 757; *Id.* 1079.

2. The court's instructions were inapplicable to the facts in the case, instruction 5 being particularly so because of Broadbent's maturity and general experience and no instructions to him were necessary concerning the danger.

W. A. Leach and *F. E. Brown,* for appellee.

1. A master is bound to exercise ordinary care in furnishing a reasonably safe place for his servant to work on, whether it is of simple character, or dangerously situated, and it is his duty to exercise ordinary care to make reasonable inspection to see that the place is safe. 1 Labatt, Master & Servant, § 7; 92 Ark. 204; *Id.* 305; 91 Ark. 102; 90 Ark. 223; 79 Ark. 437; *Id.* 20; 95 Ark. 529; 91 Ark. 343; *Id.* 389. And if he fails to exercise such care, tested by the circumstances, the character of the employment, the facts in the case and commensurate with its requirements, he is liable. *Supra;* 87 Ark. 321; 83 Ark. 318.

2. The servant does not assume the risk of any dangers arising from the negligence of the master unless he is aware of that negligence and appreciates the danger. He has the right to rely upon the assumption that the master has performed his duty of exercising ordinary care to furnish him a safe tool, appliance or place to work, in the absence of any knowledge on his part to the contrary. *Supra;* 93 Ark. 464; 92 Ark. 102; 90 Ark. 555; 89 Ark. 427; 78 Ark. 379; 70 Ark. 395; 68 Ark. 316; 67 Ark. 209; 26 Cyc. 1197, 1199; *Id.* 1218; *Id.* 1217; 57 Ark. 160; 56 Ark. 232; 71 Ark. 56; 53 Ark. 117; 89 Ark. 424; 77 Ark. 367; 90 Fed. 298; 86 Ark. 507; 83 Ark. 567.

The question whether the risk was one that could be assumed, and whether Broadbent did assume it, was one of fact for the jury to determine. *Supra;* 65 N. W. (Mich.), 592.

3. The question also whether he was guilty of contributory negligence was, under the facts of this case, a question for the jury, and not for the court to settle as a matter of law. 29 Cyc. 645; 89 Ark. 522.

It is only when the facts are undisputed and are such that reasonable minds may draw but one conclusion from them, that the question of negligence is ever considered one of law. 91 Ark. 86; 88 Ark. 20; 87 Ark. 101; 85 Ark. 479. See also 101 Ark. 564; 98 Ark. 228; 97 Ark. 328; 92 Ark. 502; 91 Ark. 88; 17 Mich. 126; 28 Vt. 183; 49 Pa. St. 63.

HART, J., (after stating the facts). It is first insisted by counsel for the defendant that the court erred in giving to the jury, over their objection, instruction numbered 5, and we think they are right in this contention. The instruction is as follows:

"It was the duty of the defendant to exercise ordinary care to furnish the plaintiff with a reasonably safe place in which to perform the duties of his employment and reasonably safe means, instruments and appliances with which to perform his duties, and to exercise ordinary care to maintain them in that condition and also,

if the plaintiff was inexperienced, and, for this reason, did not know of or appreciate the dangers of his immediate employment, if any, and defendant knew or ought to have known this in the exercise of ordinary care on its part, then it was the defendant's duty to instruct him as to both latent and patent dangers, so that the deceased would be enabled to perform his duties in safety to himself. If defendant failed to properly discharge any of these duties to plaintiff, in so far as they are covered by the allegations of negligence in this case, and, by reason of such neglect or failure of defendant, plaintiff was injured while using due care himself, and in the line of his duties and when he had not assumed the risk, then the defendant is liable in this action. If defendant performed his duty to the plaintiff as above indictated, or if plaintiff was himself wanting in ordinary care for his own safety, contributing to his injury, or if the plaintiff had assumed the risk, in either case you should find for the defendant."

The vice of the instruction is that the court in effect told the jury that even if the danger was patent the defendant owed Broadbent the duty of warning him because of his inexperience. Broadbent was twenty-eight years old and of average intelligence. He was a stout, able-bodied man and had worked around the mill yard in various capacities for the most of the time of the year preceding the accident. The fact that the water was hot was apparent to any one walking around the vat. There was no evidence tending to show that any special training or warning was necessary to enable Broadbent to do with safety to himself the act in the performance of which he was injured. A master is not bound to warn and instruct his servant as to dangers which are patent and obvious. *Louisiana & Ark. Ry. Co.* v. *Miles,* 82 Ark. 534; *Railway Co.* v. *Torrey,* 58 Ark. 217.

It is earnestly insisted by counsel that the court erred in not directing a verdict for the defendant, and it must be admitted that this is an exceedingly close question. The only theory upon which the plaintiff can

recover is that the defendant created a deceptive condition and that there was present an element of concealed danger or deceptiveness of the danger of walking on the plank. It is the theory of the plaintiff that the plank appeared to be laid squarely on the top of the north wall, and was apparently intended as a covering to protect the wall. On the other hand, the defendant claims that it was perfectly obvious that the plank was laid loosely along the top of the wall of the vat, and its insecure position was patent to a casual observer. The record shows that Mr. Hall and Mr. Newhart were present when the accident occurred and it might be inferred that they saw it. They were not introduced as witnesses in the case. On a new trial they may be introduced as witnesses, and their testimony may shed further light on how the accident happened. Hollingsworth and Carter differ as to which end of the plank Broadbent walked on when he fell into the vat. Carter says that he went on to the plank from the west end and that the plank appeared to him to be on the north wall of the vat. Hollingsworth says that he walked on the plank from its east end and that the open spaces between the plank and the wall of the vat were visible to him from where he stood. In any event, in view of a new trial of the case, and under the circumstances, we will not under the facts of the present record decide whether there is sufficient testimony to allow the case to go to the jury.

For the error of the court in giving instruction numbered 5, as indicated in the opinion, the judgment must be reversed and the cause will be remanded for a new trial.

CARR v. HARRINGTON.

Opinion delivered April 7, 1913.

1. HOMESTEAD—EXEMPTIONS.—The homestead of a deceased husband and father is not exempt from a lien in favor of the fiduciary of an express trust in which the deceased was trustee, where he held money of the plaintiff in the capacity of a trustee, under § § 3 and

6, article 9, of the Constitution of 1874, and the plaintiff is not required, in order to have a lien against the homestead of deceased, to reduce the claim to judgment before the death of the deceased. (Page 541.)

2. HOMESTEAD—INTEREST OF WIDOW AND CHILDREN.—The widow and children can not claim the homestead exemption unless the husband and father could do so. (Page 541.)

3. TRUSTS—HOW CREATED.—Trusts arise when property has been conferred upon one person and accepted by him for the benefit of the other, and it is essential that the ownership conferred be connected with a right or interest or duty for the benefit of another, and that the property be accepted on those conditions. (Page 543.)

4. TRUSTS—EXPRESS TRUSTS.—A demand which arises out of a contract of bailment or agency in the ordinary course of business, or a transaction which is a mere loan or credit if induced by confidence in the integrity or punctuality of the debtor, does not constitute an express trust; liability under an express trust must spring from a breach of trust, the defalcation or indebtedness must occur and exist while the trustee is acting in a fiduciary character, and must be no mere debt, but a contract which results from the rightful possession of money that belongs to another, and which is being used for his benefit. (Page 544.)

Appeal from Garland Circuit Court; *C. T. Cotham,* Judge; affirmed.

James E. Hogue, for appellant.

1. The court erred in ordering the homestead sold in satisfaction of the two $500 demands, because they were not reduced to judgment during Carr's lifetime. Section 3 of article 9 of the Constitution refers to the homestead rights of a man while he is alive, and is intended to exempt his homestead from the liens of judgments and decrees except such as may be rendered upon a certain class of obligations. This section refers to liens and not to debts.

Section 6 of that article prescribes the rights of a man's widow and minor children to his homestead after his death.

At the time of Carr's death there was no judgment or decree upon any character of debt against him. He could have made any disposition of his homestead he saw fit, without interference from creditors. 43 Ark.

429; 52 Ark. 101; *Id.* 493; 56 Ark. 156; 57 Ark. 242; 86 Ark. 386. And his widow and child succeeded to all his rights in the homestead he owned at the time of his death. Thompson on Homestead Exemptions, § 547; 21 Cyc. 576, 577; 101 Ark. 296.

2. The court erred in holding that Carr was the trustee of an express trust.

An express trust can not be created by a simple declaration or even an intent of one of the parties, but, in order to create such a trust there must be a contract wherein there is a meeting of minds of the contracting parties, sufficient words, a definite subject, a certain or ascertained object and be supported by a consideration. 2 Words & Phrases, 1996; 39 Cyc. 57; 95 Ark. 463; 56 Ark. 585, 591.

J. B. Wood, for appellee.

1. The homestead is not exempt. The provisions of the Constitution of 1874 relied on by appellant do not alter the rule laid down in *Gilbert* v. *Neeley,* 35 Ark. 24. 53 Ark. 303. The lower court having found as a matter of fact that Carr held the money in question as trustee of an express trust, this court will not reverse that finding if there is any evidence legally sufficient to sustain it. 97 Ark. 438; 100 Ark. 166; 74 Ark. 478; 76 Ark. 115.

2. The evidence is sufficient to establish an express trust. Even if the first five hundred dollars items were not the money of appellee at the time the memorandum was made, the endorsement of such memorandum on the back of the deposit slip which was the *indicia* of ownership and the delivery of said slip to appellee would show a completed gift in trust, or declaration of trust, so as to vest all of the beneficial interest in her. 51 Am. St. Rep. 382, and note 390-392; 35 *Id.* 17, and note 26; 34 *Id.* 189. See also 74 Ark. 109; 56 Ark. 555, 560; 2 How. 202; 111 U. S. 676; 39 Am. Rep. 719, and note 722-726.

SMITH, J. Appellant is the widow of J. A. Carr, and upon his death qualified as administratrix of his estate. Carr died on July 17, 1907, leaving his widow and one child, seven years old. Appellee filed four dif-

ferent claims against this estate, amounting to $1,390, all of which were allowed by the probate court, and an appeal to the circuit court was taken, where, upon a trial *de novo,* there was a judgment in appellee's favor for all of the demands, except one for $250. Thereafter appellee filed his petition in the probate court, alleging that the said money was due her from the said J. A. Carr at the time of his death, as trustee of an express trust; that said moneys were held by him in his fiduciary capacity and that her claims and judgment came within the exceptions mentioned in section 3, article 9, of the Constitution; that the personal property of the said Carr and his other land, beside the homestead, were not sufficient to pay appellee's claim. The court heard the petition and found that two items, each for $500, were in the possession of Carr at the time of his death, as trustee of an express trust, and ordered that all of his land, including his homestead, be sold, provided the land, other than the homestead, be sold first, and the homestead reserved from sale in case the other land should prove sufficient. The administratrix appealed from this order to the circuit court, where the cause was heard upon an agreed statement of facts, the material portions of which are as follows:

"The claim of petitioner (appellee) against the estate of J. A. Carr, deceased, as shown by her account, affidavit and exhibits attached to same, which are now on file with the papers of the said estate in the probate court of Garland County, was duly probated against said estate and allowed by the probate court as a claim against said estate. From the order of the probate court allowing same, the administratrix appealed to this court where said claim was tried *de novo* on the ..... day of March, 1911, term, and judgment was given in favor of appellee and said claim was allowed as claim of said estate in the sum of ..... dollars with interest at the rate of 6 per cent per annum from ....., the item in said claim represented by the receipt dated June 18,

1902, for $250 having been disallowed by the circuit court.

"At the trial of the claim before the circuit court the original receipts of the said J. A. Carr, of which the copies attached to the said account are exact and correct copies, were introduced in evidence and found by the court to have been executed by the said J. A. Carr and signed by him. The said original receipts have been lost or misplaced by the attorneys for the said Amanda Harrington and it is agreed that the copies of said receipts, which are a part of the probate records, may be submitted as evidence before this court and returned to the files of the probate court.

"The said J. A. Carr, deceased, was during his life a negro school teacher in the public schools of Hot Springs and all parties interested in this action are negroes; the said Amanda Harrington being about sixty years of age and engaged in the business of renting rooms or a rooming house business; the said J. A. Carr was not engaged in or connected with a banking business and he and the said Amanda Harrington were intimately associated with each other during his lifetime. That said Carr frequently negotiated loans and sold real estate on commission, although he was not a regular or licensed real estate dealer. He was not a lawyer.

"The personal property and the real estate, other than the homestead, described in the petition herein are insufficient to pay plaintiff's claim and it will be necessary in order to pay same, that said homestead be sold. No part of said claim has been paid."

The circuit court found that the said J. A. Carr, at the time of his death, held in his hands, as trustee of an express trust, the sum of $1,000, as evidenced by the following writings:

First, a deposit slip, showing that $500 had been deposited by J. A. Carr in the Security Bank of Hot Springs on the 28th day of October, 1904, with this memorandum on the back of the deposit slip: "Held in trust

for Mrs. Amanda Harrington. (Signed) J. A. Carr, October 3, 1904."

The other read as follows:

"November 14, 1905. Received of Mrs. Amanda Harrington, $500, to be held in trust by me as a deposit. J. A. Carr."

The appeal involves only the two $500 items, and appellant challenges by this appeal the correctness of the court's action in ordering the homestead sold in satisfaction of these demands. Appellant insists that the action of the court was erroneous for two reasons; first, that the demands had not been reduced to judgment in Carr's lifetime; second, that Carr was not the trustee of an express trust.

These propositions, which will be discussed in their order, grow out of the proper construction of sections 3 and 6 of article 9 of the Constitution of the State.

"Section 3. The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity.

"Section 6. If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow

or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

Appellant's position is that the homestead is exempt, except as against certain liens specified in section 3, and that these judgment liens must be fixed in the lifetime of the debtor. The argument made is that section 3 prescribes the homestead rights of a man when he is alive and section 6 prescribes the rights of the widow and minor children after his death, and that if the demands against him are not reduced to judgments in his lifetime, that they can not become liens on his homestead after his death, without regard to their nature.

We do not concur in this view. The phrase, "shall not be subject to the liens of any judgment or decree of any court," was used by the framers of the Constitution rather than the phrase, "shall not be subject to any debts," because debts are not enforceable by the processes of the courts until they have been reduced to judgments or decrees, and there was no necessity to provide an exemption except against the lien of judgments or decrees which could be enforced against the debtor. But that the widow and children can not claim the homestead exemption unless the husband and father could do so, is settled by the previous decisions of this court.

In *Huffstedler* v. *Kibler,* 67 Ark. 241, Chief Justice BUNN, speaking for the court, said:

"In *Gilbert* v. *Neely,* 35 Ark. 24, also cited by appellants, it is said by this court (after discussing the subject of the construction of the homestead provisions in the Constitution of 1868): 'The widow and minor children, if there were minor children, did not, upon the death of the husband and father, succeed to a right more extensive, except as to the condition of occupancy, than he possessed,' citing Thompson on Homesteads, paragraph. 547.

"Now, what was the right of the father in that case,

and what was the right of the father in the lands in the case at bar, as against the privileged debts? The Constitution of 1868, by which the rights of the parties in both cases are fixed, expressly provided that the benefit of the homestead should not be extended to persons indebted for trust funds (article 12, paragraph 3). Alcorn in his lifetime could not have pleaded his homestead as exempt from the payment of these fiduciary or trust debts. Neither could the widow and minor children, if there were such, have claimed the homestead as exempt from the payment of such debts. That is the plain meaning of the decision last cited. The real estate of a decedent is assets in the hands of his administrator to pay his debts, except lands exempted as a homestead, but, in order to make the exception, the lands must be exempt."

In the case of *State* v. *Atkins,* 53 Ark. 306, Chief Justice COCKRILL, for the court, said: "The rights of the parties in that case were governed by the Constitution of 1868, while this case is controlled by the provisions of the Constitution of 1874; but there is nothing in the latter instrument to alter the rule established by the case cited.

"By section 3 of article 9 of the Constitution of 1874 the homestead is not exempt from sale under process issued for the collection of money due in his fiduciary capacity from a trustee of an express trust; and guardians are specially mentioned as such trustees. In that respect the provisions of the latter Constitution are specific in their application to this class of cases. As explained in the former case, the right of the minors to the homestead is a derivative right—they succeed to it as their ancestor possessed it, subject to the liabilities which legally existed against it in his hands. His death does not displace the superior right of the creditor to condemn the homestead for the satisfaction of a debt incurred by violation of a trust, any more than for the satisfaction of the specific liens to which the same provision of the Constitution renders the homestead liable."

We come now to the question of greatest difficulty in the case, and that is, whether or not Carr was the trustee of an express trust. We do not know the details of the relationship between the deceased and the appellee, but we do know from the agreed statement of facts that appellee was an old negro woman and that she reposed great confidence in Carr. We know, too, that he was not a banker or real estate agent, yet it appears that he was engaged in making loans and real estate deals, and it is fairly inferable that he was using appellee's money for this purpose and for her benefit. It is manifest that the transactions between them did not constitute a gift of money nor the loan of money, and, while as stated, we do not know exactly the use intended to be made of this money, it is certain that that use was intended for the benefit of Amanda; and that she should be the beneficiary of its control and management; and the delivery of money by one party and its acceptance by the other, with that purpose, is sufficient to constitute a trust, although we do not know its details. It is a question as to the intention of these parties whether or not an express trust was created, and it is not sufficient that a trust be implied. Here Carr's control of the fund was absolute and the deposit was in his own name, and by his own writing he expressly acknowledged that the money constituted a trust fund and that his possession was that of a trustee.

Trusts arise when property has been conferred upon one person and accepted by him for the benefit of the other. In order to originate a trust, two things are essential; first, that the ownership conferred be connected with a right or interest or duty for the benefit of another; and, second, that the property be accepted on these conditions. Bouvier's Law Dictionary, vol. 2, page 1145, title "Trusts." The recent case of *Fidelity & Guaranty Co.* v. *Smith,* 103 Ark. 145, 147 S. W. 54, defines the meaning of the words "express trusts" as used in the section of the Constitution referred to. It was there said that "such provision has reference only

to the discharge of the duties of an express technical trust or such as is specifically mentioned in said article and was not intended to and does not cover the relation of an ordinary clerk, employee, agent or servant, who has confidence reposed in him for the collection of money." The facts in that case were that a station agent had made default in his settlement with the company and his shortage had been made good by the surety company which executed his indemnity bond, and after having sued the agent and recovered judgment, the surety company sought to subject the agent's homestead to the satisfaction of this judgment upon the ground that the agent's control of the company's money constituted an express trust, and in disposing of that question the court used the last above quoted language. And there are many cases to the same effect in the courts of other States, construing constitutional provisions similar to ours.

The rule appears to be that if a demand arises out of a contract of bailment or agency in the ordinary course of business, or if it was a mere loan or credit, induced by the confidence in the integrity or punctuality of the debtor, the transaction does not constitute an express trust. The existence of liability must spring from some breach of trust, the defalcation or indebtedness must occur and exist while acting in a fiduciary character, and must be no mere debt, but a contract which results from the rightful possession of money that belongs to another, and which is being used for his benefit. Justice BATTLE, speaking for the court, in the case of *Sanders* v. *Sanders*, 56 Ark. 585, said: "The homestead is not, under the Constitution of 1874, exempt from sale under execution or other process issued on judgments rendered against executors, administrators, guardians, receivers, attorneys for moneys collected by them and and other trustees of express trust for moneys due from them in their fiduciary capacity. The cases enumerated in each are cases of special trusts. The persons expressly designated as not coming within the homestead

exemption of the Constitution of 1874 are persons who hold moneys exclusively for the benefit of others, and the relations between whom and those for whom they hold money are purely confidence and trust; and the other trustees of express trust mentioned must mean the same class of trustees. The debts excepted are those contracted by them for such money."

The character of the tranaction intended is indicated by the use of the word "other." Certain trusts are named, towit: executors, administrators, guardians, receivers and attorneys for moneys collected by them, and then the phrase "and other trustees of express trusts for moneys due from them in their fiduciary capacity" is used. The persons above named include the principal relations where one person has the control and management of property for the use and benefit of another, and after naming them specially, and with the evident purpose of including all others, who control another's money under an express agreement to that effect, the Constitution makers added the clause "and other trustees of an express trust."

Upon a consideration of all the evidence in this case, we are of opinion that Carr was the trustee of an express trust within the meaning of the constitutional provision above quoted and the judgment of the circuit court is accordingly affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. MCCONNELL.

Opinion delivered April 7, 1913.

1. EVIDENCE—QUESTION FOR JURY.—In an action for damages for the negligent killing of witness's husband, it is proper to submit the question to the jury, when witness's testimony, while improbable, can not be said to be impossible or contrary to the physical facts. (Page 550.)

2. APPEAL AND ERROR—INCOMPETENT TESTIMONY—ERROR CURED HOW.—When incompetent testimony is admitted over defendant's objections, the error thereby committed may be cured by instructions of the court. (Page 551.)

3. RAILROADS—DISCOVERED PERIL—NEGLIGENCE—BURDEN OF PROOF.—Where a person is killed by a railroad engine, and is himself guilty of contributory negligence, the burden is upon those seeking to recover for the killing to show that the employees in charge of the engine discovered the perilous position of deceased in time to have avoided injuring him and negligently failed to use proper means to do so, and defendant is liable if either the fireman or the engineer discovered deceased's peril in time to have avoided injuring him. (Page 551.)

4. RAILROADS—DISCOVERED PERIL—DUTY OF RAILWAY EMPLOYEES.—Where a person was killed by a railway engine, although he was himself guilty of contributory negligence, if his perilous position is discovered by the fireman in time to have avoided the injury, and the latter fails to communicate his discovery to the engineer, and his failure was the proximate cause of the injury, the defendant railroad company is liable. (Page 552.)

5. RAILROADS—DISCOVERED PERIL—BEHAVIOR OF DECEASED.—Where deceased is killed by a railway engine while crossing a bridge in company with his wife, an instruction that, if, after the discovery by him of his danger, he attempted to save his wife, and in so doing, the emergency considered, he acted as an ordinarily prudent man would have done under the circumstances, he was guilty of no negligence that could be called the proximate cause of his death, is not erroneous, where the court told the jury in other instructions that there could be no recovery unless the negligence of defendant's servants, after discovering the peril of deceased, was the proximate cause of his death. (Page 553.)

Appeal from Pulaski Circuit Court; *Guy Fulk*, Judge; affirmed.

S. H. West and *Bridges & Wooldridge*, for appellant.

Appellant owed deceased no duty further than not to injure him after his peril was actually discovered by the trainmen, and if, by the exercise of ordinary care after discovering his peril, they could not have prevented the injury, appellant is not liable. On this issue the burden of proof was on the plaintiff. It is not a question of whether the trainmen had been keeping a lookout in time to have prevented the injury, but whether they saw him in time to have done so. 152 Fed. 686; 173 Fed. 753; 174 Fed. 597.

There can be no recovery for an injury, where the

negligence of the injured party is one of the proximate causes directly contributing to the result, even though the negligence of the defendant also contributed thereto. 144 Fed. 47; 155 Fed. 22; 150 U. S. 248. See also 76 Ark. 14; 82 Ark. 525; 83 Ark. 301; 93 Ark. 24; 97 Ark. 564; 99 Ark. 584; 101 Ark. 532; 96 Ark. 366; 181 Fed. 95; 167 Fed. 675.

The fireman and engineer were positive that they did not see these parties on the trestle, and the testimony of Mrs. Zeisler as to the fireman seeing her is both unreasonable and contrary to the physical facts. There was, therefore, no substantial testimony to sustain the verdict. *Supra;* 79 Ark. 608; 76 S. W. (Mo.), 684, 688; 190 Fed. 316; 128 S. W. 890; 141 Ill. App. 174; 1 C. Rob. 252; 145 N. Y. 540; 40 N. E. 246; 64 App. Div. 95; 71 N. Y. S. 721; 137 Mo. App. 47, 119 S. W. 328; 37 Ore. 74, 60 Pac. 907; 121 Mo. App. 92; 51 La. Ann. 178, 24 So. 771; 85 Ia. 167, 52 N. W. 119; 108 Wis. 57; 129 Fed. 715, 721; 15 Cal. 638, 645.

Asa Gracie and *Mehaffy, Reid & Mehaffy,* for appellee.

Counsel review the testimony and contend that the evidence is sufficient to sustain the verdict, and that it is legally sufficient to sustain the finding that the engine could have been stopped or slackened in time to have avoided injuring the deceased.

SMITH, J. The complaint in this cause alleged that on Saturday night, April 30, 1910, about 8 o'clock, Fred Zeisler, to compensate whose death this suit is brought, with his wife, together with another gentleman and his wife, were walking in an easterly direction towards Rob Roy, Ark., across defendant's railroad bridge, which spans Plum Bayou, when one of defendant's engines negligently, carelessly, wrongfully and wilfully and without giving any warning or notice whatever, ran against and over the deceased, Fred Zeisler, wounding him, from which injuries, caused by the negligence of the defendant, he died in a short while. The administrator sues

for damages in the sum of $5,000 for pain and suffering and for $25,000 to compensate the loss of contributions to deceased's next of kin. The complaint further alleged that defendant was having a bridge constructed across the Arkansas river near Plum bayou by the Missouri Valley Bridge & Iron Company; and that deceased had been employed by the bridge company on this bridge; and that he and other employees were accustomed to use the bridge over the bayou when crossing it; and that this custom was known to and acquiesced in by the railroad company; and that the operatives of the engine which struck the deceased knew of this custom at the time, and the complaint further alleged that the engineer not only knew that pedestrians crossed the bridge at all hours, but that the engineer actually knew of the presence of the deceased and his companions on the bridge in time to have avoided injuring them after discovering their peril and that the engine was being run at that time at a dangerous rate of speed, and that it was not equipped with the proper headlight as required by the law.

The answer denied all the material allegations of the complaint and denied that defendant had knowledge of any custom of pedestrians to cross the bridge or that there was any such custom. It alleged that deceased and his companions were trespassers upon the bridge and that the railroad company was not only under no obligation to be aware of their presence but that the operatives of the train were not aware of their presence. Defendant denied that the engine was being run at a dangerous rate of speed or that it was guilty of any negligence in failing to have the engine equipped with a 1,500 candle power headlight as required by law. It alleged that deceased was guilty of the grossest negligence in being upon its bridge and it plead this negligence in bar of plaintiff's right to recover.

At the trial the plaintiff abandoned the allegations in regard to the failure of the railroad company to equip its engine with the proper headlight and did not rely

on any license to be upon its bridge, growing out of the custom of pedestrians to use it for passage across the bayou, but undertook to show that the train crew had discovered the deceased and his companions upon the bridge in time to have avoided injuring them by the exercise of ordinary care after discovering their perilous position. The case was tried upon the issue of discovered peril.

The trestle across the bayou was 330 feet long and was something more than twenty feet high. Deceased was about one-third of the way across the trestle at the time he was struck and his wife was the only party who escaped injury. As soon as deceased saw that the engine was about to strike them, he began to assist his wife to a place out of danger. She testified that he picked her up and let her swing to the trestle; that she swung down below the trestle to the ties; and that the engine struck him and knocked him off, inflicting injuries from which he died after suffering greatly for half an hour. The other man was slightly injured and his wife was killed.

The right to recover rests upon the evidence of Mrs. Zeisler, and, while her story does appear to be improbable, we can not say that it is impossible or contrary to any physical fact, and her statement, which was weighed by the jury, made a question of discovered peril, which was properly submitted to the jury. It appears that the engine was being used for ditching and construction purposes and that at the time of the injury it was being returned to Pine Bluff for repairs, although its air equipment was in first-class order, and it was equipped with only a 150-candle power electric headlight. Mrs. Zeisler testified that when the engine came upon the trestle she saw the fireman standing at his window, looking straight ahead, and she is not only positive that she saw the fireman, but she is also positive that he was looking towards her as the engine came upon the trestle, at a distance of about 225 to 250 feet. The railroad track for some distance east of the trestle was straight and

level, and the fireman and the engineer both testified that about 200 yards from the trestle they had checked the speed of the engine on account of two cows crossing the track just ahead of the engine. The engine, however, was not stopped as the cows got out of the way, but its speed was reduced to about fifteen miles per hour and immediately the engine increased its speed until at the time it crossed the bridge it was going at the rate of about eighteen or twenty miles per hour. The evidence is conflicting as to the speed of the train and as to the distance within which it might have been stopped, and there is also a conflict as to how far in advance of the engine its headlight casts its light, while Mrs. Zeisler testified that the headlight was not burning. The men upon the engine all deny that they saw the deceased or that they could have seen him with the light which they had in time to have avoided striking him, considering the speed at which they were traveling.

The engineer testified that he crossed the bridge at 7:51 p. m., and that it was too dark to have seen without the headlight and he and the fireman testified that there were no lights upon the engine which would have enabled Mrs. Zeisler to see the fireman standing at his window. This injury occurred at twilight, and Mrs. Zeisler testified there were lights inside the cab of the engine, which enabled her to see the fireman as he looked ahead out of his window, and we can not say that her story is a physical impossibility or contrary to any law of nature. *St. Louis S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. Besides there were contradictions in the evidence of the engineer and fireman which must have materially affected the value of their evidence before the jury.

Appellant complains of the action of the court in permitting Mrs. Zeisler to say that she and her husband and their companions had gone upon the trestle for the purpose of going to the postoffice to get the mail and to make the following answers:

Q. And you had to cross it in order to get to the postoffice to get your mail?

A. Yes, sir.

Q. There was no other way by which you could go to the postoffice to get your mail?

A. No, sir.

These questions and answers were improper and should have been excluded, but any error in their admission was cured by the instructions of the court which told the jury as a matter of law that deceased was guilty of contributory negligence and that there could be no recovery unless his peril was discovered in time to have avoided the injury by the exercise of ordinary care. The instruction upon that question, given at the request of defendant, is as follows:

"3. You are instructed that from the proof in this case, Fred Zeisler was, at the time of the injury, a trespasser upon the trestle of defendant. The undisputed proof shows that said trestle was constructed solely for the running of the cars and trains of defendant, and the fact that persons did walk upon it, however frequently, would not change its character and convert it into a highway for footmen. The court further instructs you that the said Fred Zeisler was, at the time of the injury, in a place of danger, and in so being was guilty of contributory negligence, and the plaintiff can not recover damages on account of his death, unless you believe from the evidence that the trainmen either injured the said deceased wantonly, maliciously or intentionally, or failed to exercise ordinary care to prevent the injury after discovering his peril, or were guilty of negligence in avoiding injuring him after discovering his peril.

"It is not sufficient, the court tells you, to show that the trainmen in charge of the train, could have by the use of ordinary care, discovered the peril of said Fred Zeisler, but it must be shown from the evidence that they did actually discover his peril in time to avoid his injury, and the burden of proof is upon the plaintiff, before he can recover, to show that the engineer or fireman upon

the train of defendant causing the injury, discovered the said Fred Zeisler upon the trestle and his perilous condition in time to avoid injuring him, and wilfully and recklessly injured him or failed to exercise ordinary care."

Defendant asked a number of other instructions to the effect that the jury must find that the engineer was actually aware of the danger of the deceased in time to have avoided injuring him by the exercise of ordinary care after discovering his peril, but these instructions were modified by the court, and, as given, told the jury that the defendant would be liable if either the engineer or the fireman discovered the deceased's peril in time to avoid injuring him. The modification was proper for the defendant is as much responsible for the negligence of its fireman as it is for that of its engineer. *St. Louis, I. M. & S. Ry. Co.* v. *Watson,* 97 Ark. 564.

It is true, the fireman could have avoided the injury only by communicating his discovery to the engineer, but he should have done this, and if he negligently failed to do so, and his failure was the proximate cause of the injury, the defendant is liable.

Defendant complains of instruction No. 4, given at the request of plaintiff:

"The jury are instructed that in the face of sudden, unexpected and deadly danger, a person is not expected or required to be cool and collected, and to act with perfect prudence and deliberate judgment; in such case he is only required to use such degree of prudence and judgment as ordinarily careful and prudent men would be likely to exercise under the same or similar circumstances. And if the jury believe from the evidence that the deceased used ordinary care and prudence to avoid the accident when he became aware of his danger, he lost his own life in an effort to rescue his wife from danger, and in so doing he used such care as men of ordinary prudence under like circumstances would be likely to use to avoid or escape injury, then his negligence, if any, did not contribute to the injury."

This instruction, if it stood alone, might be said to be misleading and erroneous, but it should be read in connection with all the other instructions and these other instructions told the jury in various ways that there could be no recovery, unless they found that the negligence of defendant's servants after discovering deceased's peril was the proximate cause of the injury, and this instruction contains nothing to the contrary. Read in the light of all the instructions, the substance and general purport of which is stated above, we understand this instruction to mean that the right of recovery is not dependent upon deceased's conduct after he discovered his own peril if he was himself thereafter guilty of no negligent act, which was the proximate cause of his injury. In other words, that although he might have saved himself by abandoning his wife, yet his attempt to save her as well as himself would not be such negligence as could be called the proximate cause of his injury, if considering the emergency under which he acted, an ordinarily prudent man would have done the same thing.

There was no specific objection to this instruction, and given the interpretation which we think it should have, it was a proper instruction under the facts in proof. Here deceased's companion left his own wife to her fate and saved himself and deceased might have pursued the same course and have escaped with his own life, and this instruction told the jury that if deceased's attempt to save his wife cost his own life, and that action was taken in the face of sudden and unexpected peril, under such circumstances that an ordinarily prudent person similarly situated might have done the same thing, then his action in so doing was not the proximate cause of his injury. The instruction is not happily framed, but we think it contains no reversible error.

Other exceptions were saved at the trial and have been discussed by counsel and considered by the court, but we do not consider it necessary to discuss them here.

The judgment of the court below is affirmed.

KIRBY, J., dissents.

EXCELSIOR WHITE LIME COMPANY v. RIEFF.

Opinion delivered April 7, 1913.

1. REFERENCE—MASTER APPOINTED WHEN.—When the transactions between litigants have been complicated and the chancellor has refused to refer the matter, but stated an account himself, and it does not appear that his findings are supported by a preponderance of the testimony, in order that no injustice be done the parties, the cause will be reversed and remanded with directions to the chancellor to refer the record to a master to state an account. (Page 559.)
2. RECEIVERS—FEES—COSTS.—Where R, manager of defendant company, brought suit for unpaid salary and prayed for a receiver, who was appointed, and defendant answered, and asked an accounting, charging misappropriation of its funds by R, and the court found that no salary was due R, and that R had not misappropriated the company's funds, all costs will be assessed against R, and it appearing that there was no justification for the suit or appointment of a receiver, R will be charged with payment of the receiver's fees. (Page 560.)
3. RECEIVERS—FEES.—A receiver is entitled to his fees although there was no authority or justification for the suit or his appointment, and the receiver's fee will be ordered paid out of the funds in his hands, belonging to defendant company, but the defendant will have judgment over against the plaintiff for the amount of same. (Page 560.)
4. RECEIVERS—WHEN APPOINTED—DISCRETION OF CHANCELLOR—NOTICE TO ADVERSE INTERESTS.—The right to the appointment of a receiver is not an absolute one, and while the chancellor must exercise his discretion in determining whether the appointment shall be made, that discretion should be exercised only when a *prima facie* showing has in good faith been made by the party asking that it be done, and only in exceptional cases should it be done without giving notice to the adverse interests. (Page 561.)

Appeal from Washington Chancery Court; *T. H. Humphries,* Chancellor; reversed.

B. R. Davidson, for appellant.

1. Appellee was a trustee and a strict accounting was required at his hands. 121 Ala. 131; 41 Ark. 264; 32 Pa. St. 495; 25 Ark. 219; 97 *Id.* 228; 28 A. & E. Enc. L. 1076.

2. The burden was on appellee to show a proper disbursement of the funds in his hands. 96 Ark. 299; 193

Pa. St. 294; 28 A. & E. Enc. L. 1095. He was bound to keep clean and accurate accounts. Perry on Trusts, vol. 2, § 821; 28 A. & E. Enc. L. 1095.

3. Under the evidence the court erred in its findings, in stating the account and in requiring appellant to pay the expenses and fees of the receiver. Appellee is not a creditor and there was no necessity for a receiver.

H. L. Pearson, for appellee.

1. The court did narrowly scrutinize all the transactions of appellee as a trustee. 41 Ark. 264. The findings of the chancellor are sustained by the evidence and should not be reversed. 73 Ark. 377; 65 *Id.* 116; 70 *Id.* 136; 74 *Id.* 336.

2. A receiver was properly appointed. Kirby's Dig., § 954.

3. The costs were in the sound discretion of the court. 66 Ark. 709.

SMITH, J. This action was brought in the Washington Chancery Court against the appellant on the 15th day of August, 1911. The complaint alleged that the defendant was a corporation, organized under the laws of this State and engaged in the manufacture and sale of lime near Prairie Grove in that county. The complaint set out the names of the stockholders and the amount of stock owned by each; and alleged that appellee was the owner of $5,000 of the total capital stock of $25,000. The complaint further alleged that the assets of the corporation amounted to $2,276.05, and that its liability, including the capital stock, was $26,597.08. The plaintiff alleged that the corporation was indebted to him for work and labor in the sum of $420, and that W. H. Hays, as president of the corporation, was dissipating the assets of said corporation; and that said corporation was insolvent; and there was a prayer for judgment for the sum sued for; and the appointment of a receiver; and that the affairs of the corporation be wound up, and for general relief. The court appointed a receiver on the day the complaint was filed, who qualified and entered

upon the discharge of his duties, and no complaint appears to have been made as to his administration of the assets of this corporation; and he made a final report, which was approved, and he was discharged after having a fee fixed for his services by the court, which was ordered to be paid out of the assets of the corporation, which he had collected. He appears to have been allowed a fee of $30 for his services and $10 for his expenses and appellant insists for the reasons hereinafter stated that the court erred in not assessing the costs of the receivership against the appellee.

On the 12th day of September, 1911, the appellant, by its board of directors, filed its answer to the complaint in which each and all of the stockholders of the said corporation joined, denying specifically each and every material allegation of the complaint, save and except that the assets as listed therein were assets; and alleged by way of cross bill that there were other assets not listed; and that appellee had had full management and control of the assets and affairs of the corporation from September, 1908, to July 25, 1911; and during that time had dissipated and wrongfully converted to his own use the assets and funds of said appellant corporation in a large amount for which he had not accounted; and that appellee was a debtor of said appellant corporation and not a creditor; and prayed for an accounting of appellee's administration of its affairs and property, including all payments to himself and all services, for which payments have been made or are claimed; and that the complaint be dismissed for want of equity.

It appears that appellee, the plaintiff below, was secretary and treasurer and general manager, and it was for his services as such that the suit was brought. He appears to have had almost entire and complete control of the affairs of the corporation. He superintended the manufacture of the lime and all operations incident thereto, including its sale, and he collected and disbursed its entire income, checks against its funds being signed only by himself. He claimed to have had employment in

the capacity of secretary at a fixed salary of $20 per month and later that he was elected manager at an additional salary of $50 per month, making a total compensation of $70 per month; and he alleged and testified that six months' salary at that price was due him. The concern appears to have done a very extensive business and appellee handled a large sum of money and had a great many transactions in the name of the appellant corporation. The record in this case is an exceedingly voluminous one and a great many items are in controversy between the parties, and appellant insists that it should have judgment over against appellee for the sum of $4,183.30. Appellant claims that appellee collected a larger sum than he charged himself with; and that he has not properly accounted for the money which he admits he received. Appellee owned a tract of timbered land, located near the kiln, and furnished appellant with a considerable quantity of wood, but both the quantity of this wood and the price thereof is in dispute. The parties also disagree as to the quantity of the lime which was manufactured and the price for which it was sold; they also disagree as to the quantity of lime purchased in the name of the appellant from another corporation also engaged in the lime business and the disposition of the lime so purchased. At the time of the institution of this suit, the books of the corporation showed a number of accounts due it by its customers, but there is more or less controversy about each of these accounts in regard to the amount due by each of these customers and the disposition of the payments made by them on their accounts to the appellant, during the time appellee was in sole control of its affairs. There was also kept by appellant an account under the head of labor and sundries and many items charged thereon are questioned, and this is true also of the supplies bought in the name of the appellant and used by it in its operations. In fact, appellant questions a great many items on the books of the corporation which appellee kept, and it contends that appellee has not given that strict and satisfactory

account which the law requires of him. The evidence is not only very voluminous, but is very conflicting, and the court below undertook to state the account between the parties without referring the cause to a master. The court found that there was nothing due appellee on account of labor or salary at the beginning of this action; and that he was not at any time a creditor of the company, which the court found to be a solvent and going concern and which therefore ought not to be dissolved. The court further found that the appellee had satisfactorily accounted for the funds and property which had come into his hands; and that he was not indebted to appellant in any sum and the cross bill was accordingly dismissed. After fixing the receiver's fee and ordering that it be paid out of the funds in his hands, belonging to the appellant, the court dismissed plaintiff's bill and directed that he pay all costs of the action, except the receiver's compensation and expenses. Both parties saved their exceptions to the court's findings of fact and conclusions of law and its judgment, and each prayed an appeal to the Supreme Court, but the defendant alone perfected an appeal.

Considering the volume of business done by the appellant under the management of the appellee, it must be said that he kept its rather intricate accounts in a very unskilful manner and it will be a very difficult matter, if the record before us fairly indicates the condition of his accounts, to ever know with entire certainty the exact state of accounts between these parties. It appears to us that the chancellor's finding that nothing was due appellee at the time of the institution of this suit is supported by a clear preponderance of the evidence; in fact, we think that he was overpaid on account of salary. This is upon the theory that the evidence shows his total salary was not $70, as claimed by him, and that he should never have credited himself with that amount of salary. The court found the facts to be that appellee had accounted for all the funds and property of defendant which had come into his hands by virtue of his employ-

ment, but we think the finding that appellee owes appellant nothing is contrary to the preponderance of the evidence. We have nothing before us which shows the chancellor's finding upon any of the items and we do not know what sum he allowed appellee for his services in holding that these accounts exactly balanced, but we do know that his finding of fact that neither is indebted to the other is contrary to the contentions of both parties and it would not be possible for this court to strike a balance between these parties, except by going through this entire record and determining item by item what credit each should have, and then striking a balance. If we had a report of a master with the exceptions of the parties thereto, we could know what items are in dispute, but we are favored with nothing of this kind, and the chancellor has made only the general finding that neither was indebted to the other. In regard to cases such as this, Judge EAKIN, speaking for the court, said in the case of *Bryan* v. *Morgan*, 35 Ark. 115: "It was not erroneous in the chancellor to refuse a reference to the master to take and state the account, but it was not good practice. The chancellor may himself take an account, announce the result and decree accordingly. But this practice should be confined to simple and obvious cases in order to save expense to litigants. In complicated transactions, justice can not be well done without a reference." After spending much time on this record, the court has concluded that an injustice might be done one or the other of these litigants in attempting to state an account and strike a balance between them under the conditions of this record and it has accordingly determined and therefore orders that the cause be reversed and remanded with directions to the chancellor to refer this record to a master to state this account; and that in stating this account, he charge the appellee with any excess of salary paid him and also with any funds not affirmatively shown to have been properly accounted for. The judgment of the court assessing all of the costs against the appellee is affirmed, and in addition he will

also be charged with the fees and expense of the receivership. This is done because we are convinced that there was no authority or justification for this suit or the appointment of the receiver. The court's action, however, in directing that the receiver be paid out of the funds in his hands, belonging to the appellant is affirmed, but the appellant will have judgment over against appellee for this sum.

Under the allegations of the complaint in this cause the appointment of the receiver by the court was a proper thing to do, if some *prima facie* showing of their truth had been made but these allegations have not been sustained by the proof. However, that fact is no reason why the receiver should not have his compensation or should be delayed in its collection. It is frequently necessary and indispensable that a court of chancery in the exercise of its jurisdiction should have the aid of a receiver, appointed by it for that purpose, and these courts must have the right, in the exercise of their discretion, to fix the compensation of these officers, and the source of the compensation should not depend on the hazard of the termination of the litigation. 2 Beach, Eq. Prac., § 1013.

We do not tax the costs of the receivership against appellee solely because he failed to show that the corporation was indebted to him in some sum, but we do so because it appears that he was not a creditor, and that the corporation was not insolvent and that its assets were not being dissipated. High in his work on Receivers lays the rule down as follows:

"If however, the appointment of the receiver was proper in the first instance, even though plaintiffs do not ultimately prevail in the suit, it is within the discretion of the court to allow the receiver payment for his services and expenses out of the proceeds of the litigation, and an appellate court will not interfere with the exercise of such discretion when it has not been abused."

Here the receiver was appointed on the day the complaint was filed and if any showing was made aside from

the recitals of the complaint it does not appear, and must have been *ex parte* and without notice. The right to have a receiver appointed is not an absolute one, and while the chancellor must exercise his discretion in determining whether the appointment should be made, that discretion should be exercised only where a *prima facie* showing has in good faith been made by the party asking that it be done, and only in exceptional cases, should it be done without giving notice to the adverse interests. But when a litigant has caused the expenses of a receivership to be incurred under the circumstances here detailed, it is proper that he be charged with that cost and it is here so ordered.

The decree of the chancery court is therefore reversed for further proceedings in accordance with the directions herein contained.

GAMBLE v. PHILLIPS.

Opinion delivered April 14, 1913.

1. TAXATION—TAX SALE—REDEMPTION.—The right of redemption from tax sale does not exist except as permitted by statute. (Page 562.)
2. HOMESTEAD—REDEMPTION BY MINOR FROM TAX SALE.—The homestead estate is a sufficient interest to enable a minor to redeem the entire estate from a tax sale. (Page 563.)
3. TAXATION—TAX SALE—REDEMPTION—MINOR.—Kirby's Digest, § 7095, gives minors two years after reaching majority to redeem their lands sold during their minority for taxes, by Kirby's Digest, § 3756, the plaintiff, a female, became of full age when she was eighteen years old. *Held*, a bill brought by plaintiff more than two years after reaching her majority is barred, and Kirby's Digest, § 5075, which provides that when any person entitled to bring an action is at the time of its accrual under twenty-one years of age, he may bring such bill within three years thereafter, is not applicable. (Page 563.)

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

S. H. Mann and *J. W. Morrow,* for appellant.

1. Plaintiff's right to redeem was barred. Kirby's Digest, § 7095; 52 Ark. 532; 59 *Id.* 144.

2. Kirby's Digest, § 5075, does not apply and does not extend her time to redeem. 63 Ark. 397; 80 *Id.* 411; 71 *Id.* 135; 84 *Id.* 329.

W. W. Hughes and *Wm. L. Moose,* for appellee.

1. The period of redemption is extended by Kirby's Digest, § 5075; 53 Ark. 418; 71 *Id.* 135; 81 *Id.* 440; 95 *Id.* 76; 87 *Id.* 428.

HART, J. This was a bill to redeem land sold for taxes filed by Salina Phillips against John W. Gamble. The complaint alleges that the plaintiff, Salina Phillips, was the daughter of C. C. Wyatt, who on January 4, 1894, died owning and occupying as his homestead a forty-acre tract of land situated in St. Francis County, Arkansas. That the land was duly sold for the nonpayment of taxes on June 12, 1899, to A. B. Ferrell, and a tax deed was made to the purchaser on the 3d day of March, 1902. That Ferrell conveyed the land so purchased by him to John T. Young and John T. Young conveyed the same to the defendant, John W. Gamble. The answer specifically denies that the plaintiff has any right to redeem and asks that the complaint be dismissed for want of equity. There is no controversy about the facts, and the proof establishes that the land was the homestead of C. C. Wyatt at the time of his death in January, 1894, and that the plaintiff at the time of filing her complaint was twenty years and seven months old.

The chancellor entered a decree in favor of the plaintiff and the defendant has appealed.

The right of redemption from tax sales does not exist except as permitted by statute. Therefore, in the case of *Smith* v. *Macon,* 20 Ark. 17, the court held that, under the revenue system of this State as it then existed, infants had no longer time than other persons to redeem their land sold for taxes. By a section of the revenue act of 1873, which is section 7095 of Kirby's Digest, minors are given two years after reaching majority to

redeem their lands sold during their minority for taxes. And this right is a privilege to defeat the tax deed by its assertion at any time within two years after reaching majority. *Hodges* v. *Harkleroad,* 74 Ark. 343; *Smith* v. *Thornton,* 74 Ark. 572.

In the case of *Cowley* v. *Spradlin,* 77 Ark. 190, the court held that the homestead estate is a sufficient interest to enable a minor to redeem the entire estate from a tax sale and that a minor had only the privilege of redeeming "from and after the sale" until the expiration of two years after he had reached his majority. The plaintiff was a female and became of full age when she was eighteen years old. Section 3756, Kirby's Digest. As we have already seen, her right to redeem comes from the statute exclusively and can be asserted only in the manner there prescribed.

The undisputed facts show that the plaintiff did not attempt to exercise her right to redeem until more than two years after reaching her majority. And it follows that her bill to redeem was not filed in time.

Counsel for the plaintiff contend that her right to redeem was extended to three years by section 5075 of Kirby's Digest, which reads as follows:

"If any person entitled to bring any action, under any law of this State, be, at the time of the accrual of the cause of action, under twenty-one years of age, or insane or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three years next after full age, or such disability may be removed."

We do not think that this section of the statute has any application whatever to plaintiff's right of redemption from the tax sale. The reasoning of the court in the case of *Sparks* v. *Farris,* 71 Ark. 117, leads to the conclusion that in suits to redeem from tax sales, the statutes, having relevance to the right or privilege of redemption alone, are applicable.

As we have already seen, section 7095 of Kirby's Digest is a part of the revenue system of the State and

was passed by the Legislature in the exercise of its power to levy and collect taxes. The section, by prescribing the terms on which and the time during which minors might redeem their lands when sold for taxes, necessarily excludes any terms or period of time not therein contained. The right to redeem is wholly statutory and we can not read into the statute any other statutes which are not a part of the revenue system, and which we can not find that the Legislature intended to be a part of it.

It follows that the decree must be reversed and the cause remanded with directions to the chancellor to dismiss the complaint for want of equity.

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

Opinion delivered April 14, 1913.

MASTER AND SERVANT—ASSUMED RISK.—Where plaintiff is directed to hang a door on a railway freight car, and plaintiff has had experience as a car repairer, and, while working on the same, the door fell and injured plaintiff, he will be held to have assumed the risk of his employment, because of his failure to hang the door properly.

Appeal from Union Circuit Court; *Geo. W. Hays*, Judge; reversed.

STATEMENT OF FACTS.

The appellee was in the employ of appellant as a carpenter on what is known as the "rip-track" in the yards of appellant in the city of El Dorado. He received an injury by a car door jumping the track and severely crushing his hand. He alleged in his complaint that the appellant was negligent in not exercising ordinary care to furnish him with reasonably safe means and instruments with which to work. The appellant answered, denying the material allegations of the complaint, and setting up that it was the duty of the appellee to correct the defect or have the same corrected before putting the

hinges on the door, and that it was the duty of the appellee when he hung the door to see that the hinges would properly work before attempting to close the door. It therefore charged that the appellee's injury was the result of a risk assumed by him under his contract of employment.

The facts stated most strongly for the appellee are substantially as follows: Appellee had instructions from his foreman to fix a certain car door to a car which was then on the rip-track. The foreman told him that he would find a certain pair of hinges at the blacksmith shop, which had been laid out for him to place on the door. Appellee got the hinges or hangers and put them on the door and told his foreman he had the door ready, and the foreman gave him orders to get some negroes and put it up. The foreman told appellee that there was no slide to be had to place on the bottom of the door, and that instead of placing a slide on the bottom of the door to cut off about two inches of the same. The negroes were employed by the appellee to assist him. He was not their boss. They were coemployees with him, acting under the direction of the foreman. After the negroes had hung up the door appellee was trying to shove same up from the bottom with a crowbar, when the door fell and mashed his hand. There was a door track at the bottom of the door on the car, but no slide, and the foreman therefore directed the appellee to cut off the door so it would go behind the track. Appellee, in closing the door, had a crowbar attempting to force it behind the track. The hangers were already made when appellee went to get them. He had nothing to do but to put on the hangers or hinges that were furnished him. If the hinges had been made sufficient size and a slide had been placed on the lower track of the car there would have been no necessity for appellee using the crowbar, and there would have been no occasion for the door jumping the track. When appellee put the hangers on the door it was 75 or 100 yards away from the car on which he was to hang it, and he had not noticed the

slide. He had been working for appellant about eighteen months, as car repairer, when the accident happened. He had put about a dozen hangers on different doors. Knew that they put different sorts of hangers on different sorts of slides. He didn't look at the slide to see whether the hangers would work on it or not. The hangers were proper for slides where there were no bolt heads, or where the bolt heads were below the point where the hangers came to, so the slide would not catch the hanger. If the blacksmith had been asked to open up the hangers so they would go over the bolt heads he would have done it. If appellee had looked at the slide he could have seen that the hangers would not go over the bolt heads, but he had not worked any on the car and paid no attention to the door slide. The blacksmith was there to do anything appellee should tell him to do with reference to those hangers or anything else. The blacksmith was under the direction of the car repairers, such as appellee, and would change the hangers or fix them as appellee told him to do. There was no one working with appellee at the time he got hurt. He pulled the door himself and that caused it to fall. It would not have fallen if appellee had not touched it. No one pointed out the hinges that appellee was to use, but he was told that they were at the blacksmith shop and went and found them there. The negroes hung the door under the direction of appellee, putting it right where he told them.

The appellant asked a peremptory instruction, which the court refused, and the court gave, at the request of appellee, prayers for instructions which submitted to the jury the question as to whether or not appellant was negligent in failing to exercise ordinary care to furnish appellee a safe place and safe appliances, to which appellant duly excepted. Judgment was rendered in favor of the appellee for $250, and appellant duly prosecutes this appeal.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

1. There is no evidence to support the verdict, and the peremptory instruction for defendant should have been given.

2. The court erred in its charge to the jury, and the error was not cured by a correct instruction given for defendant. 100 Ark. 433; 96 *Id.* 311.

Mahony & Mahony, for appellee.

There is no error in the court's charge. 98 Ark. 257; 87 *Id.* 280; 96 *Id.* 314.

WOOD, J., (after stating the facts). The instruction which submitted to the jury the issue as to whether or not appellant had failed to exercise ordinary care was abstract and prejudicial. There was no testimony to warrant the court in submitting any such issue to the jury.

Under the undisputed evidence, the court also should have granted appellant's prayer for instruction No. 3, to the effect that it was the duty of the appellee to see that the appliances with which he was working were safe and suitable and that his injury resulted from his failure to perform that duty, and therefore he could not recover.

It clearly appears, from the undisputed evidence, that the injury to appellee was caused because the hinges or hangers were not suitable to work on the door and on the door slide where they were placed. Appellee testified that if the hinges had been made of sufficient size there would have been no necessity for his using the crowbar in the manner he did, which caused the door to fall and injure him. This defect in the size of the hinges was the proximate cause of the appellee's injury, and it was the duty of appellee under his contract of employment to see that the hangers or hinges properly fit the runners, otherwise he could not properly hang the door, and that was a part of his duty. He was an experienced car repairer, and, as he says, had probably put hangers on a dozen doors. The blacksmith who made the hangers was under appellee's direction as a car re-

pairer and would have changed the hangers or fixed them as appellee should direct.

The undisputed facts bring the case clearly within the rule announced by this court in the recent case of *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Baker,* 100 Ark. 156-164, where the court, quoting from the case of *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, said: "If appellant deputed to Thrasher the duty of making the wire rope secure, and he neglected to perform this duty, he assumed the risk of injury from his negligence in failing to discharge the duty imposed on him, and the master is not liable to him for the injury resulting."

For the error in refusing to give appellant's prayer for a peremptory instruction the judgment is reversed, and the cause is dismissed.

GREENWOOD v. STATE.

Opinion delivered April 21, 1913.

1. CRIMINAL LAW—CONFESSION—APPEAL—CONCLUSIVENESS OF FINDINGS OF COURT.—Where a trial judge finds that the testimony of defendant is not true and admitted his confession in evidence, his finding will be held conclusive on appeal, unless it appears that the trial court abused its discretion, and that the confession is fairly traceable to prohibited influences. (Page 577.)
2. CRIMINAL LAW—CONFESSION.—A confession of guilt, to be admissible, must be free from the taint of official inducement proceeding from either defendant's hope or fear; and a confession to be admissible must be voluntary and made in the absence of threat of injury or promise of reward, and made in the absence of any influence which might swerve him from the truth. (Page 577.)
3. CRIMINAL LAW—VOLUNTARY CONFESSION.—Where a confession is obtained from defendant by persistent questioning by officers, but without deception, threat, hope of reward or inducement of any kind, it is admissible as a voluntary confession. (Page 578.)
4. TRIAL—CRIMINAL LAW—PRACTICE.—Where the prosecution offers in evidence a confession of the defendant, the approved practice is to withdraw the jury while the court hears evidence to determine whether or not the confession is admissible. (Page 579.)

5. TRIAL—CRIMINAL LAW—HARMLESS ERROR.—When the confession of the defendant is admitted in evidence, the error of the court, in failing to withdraw the jury while it heard evidence to determine whether to admit the confession, is harmless. (Page 579.)

6. CRIMINAL LAW—CONFESSION—CORROBORATION.—In order to sustain a conviction for murder on a confession, unless made in open court, or accompanied with other proof that such offense was committed, there must be independent evidence to establish that the crime was actually committed by some one. (Page 581.)

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

STATEMENT BY THE COURT.

Elijah Greenwood was indicted for the crime of murder in the first degree charged to have been committed by killing Alice Turner. The testimony on the part of the State is substantially as follows:

On the 29th day of November, 1912, some boys were hunting near Sweet Home, in Pulaski County, Arkansas, and, as they say, between 1 and 2 o'clock in the daytime they found the body of Alice Turner, who had been recently killed. Her body had been dragged from a path through a fence and from six to eight feet into the woods. A physician examined her body and found a gunshot wound right in the middle of the back of her skull, just above the neck. Her skin and hair around the wound were powder-burned and the entire charge was inside the skull. The physician said that death was probably instantaneous. He exhibited some gun wads that he took from her skull and stated that they were the same size as a twelve-gauge gun wad. The body was still warm when it was examined. A deputy sheriff picked up an empty gun shell which was lying near the body. It was a twelve-guage shell and was marked "new chief." There were signs of a struggle in the path and a considerable amount of blood was found there. The husband of the deceased testified that she had eighty-six dollars which she was accustomed to carrying in a purse in her corset. Her money and purse were missing when her body was found. He said he was noti-

fied of her death between 12 and 1 o'clock in the day time. The daughter of the deceased testified that her mother left home between 10 and 11 o'clock in the morning to go over to Mrs. Pearson's about half a mile distance. Her body was found in about three hundred yards of Pearson's house.

W. A. Pearson testified: On the 29th day of November, 1912, my wife and I went over to the depot near our house and took the train for Little Rock about 10:30 o'clock in the morning. Our purpose in going there was to make a payment on a lot which we had bought from the Southern Trust Company. We made the payment and transacted some other business and got back home about 4 o'clock in the afternoon. When I got home my back door was broken open, my shotgun was gone and also a ten-pound bucket of lard, which had never been opened. My gun had my name on it. I also missed three gun shells.

The testimony of the wife of W. A. Pearson was substantially the same, and other witnesses testified that they saw them take the train about 10:30 o'clock in the morning on the day that Alice Turner was killed and that neither of them had a gun. An accountant for the Southern Trust Company testified that Pearson came into the Southern Trust Company and paid $46.50 on the day in question. The daughter of the deceased testified that they can hear the train stop and when it goes through from their house. That her mother did not leave home on the day she was killed until after the 10 o'clock train for Little Rock had gone by.

J. G. Shooks testified: I run a sawmill about three or four miles from the place where Alice Turner was killed. I remember the day she was killed, and on that morning about 9 or 10 o'clock I met the defendant, and straight through from the house at which I met him to the scene of the killing was about a mile and a half or two miles.

W. F. Hobbs, deputy sheriff, testified that he was born and raised in that neighborhood and that from the

house Shooks was talking about where he met the defendant to where the killing occurred was about half a mile straight through. A second-hand store keeper at Sixth and Center streets, in the city of Little Rock, testified that he bought a shotgun from the defendant about 2 o'clock in the afternoon of the day that Alice Turner was killed. That he was not acquainted with the defendant but the defendant gave his name as W. A. Pearson and that name was on the gun. That the defendant limped a little when he went out. That the defendant was accompanied by another man. (Here W. A. Pearson is presented to the witness and witness testified that he was not the man who was with the defendant.) That the defendant at the time had a rabbit with him. The gun is exhibited to the witness who identifies it. Another witness for the State testified that about 2 o'clock p. m. on the day of the killing the defendant sold a rabbit to a bartender in his presence. After having proved by the officers that the defendant voluntarily and of his own free will made confessions, W. H. Hobbs, one of the officers who was investigating the crime, testified:

Down at the city hall the negro said: "Mr. Hobbs, I will tell you everything; I have known you longer than any of the rest of the people here; I had rather tell you." He got down on his knees in front of me, and put his hands on my knee. I was sitting on a little stool. I said, "All right, commence." This is his language, as far as I can remember: "I went in Pearson's house, broke open the back door, went in and got a shotgun, and picked up some shells, I don't remember how many. I come out of the house, and come on down the path and met the Turner woman; I spoke to her. We sat down on the root of a little tree, where the rain had washed the dirt off the root. She had a lunch; I helped her eat her lunch. I then made a proposition to her, and offered her $1; I asked her for some, and she told me that she did not have to do it that cheap; that she had plenty of money, and she pulled out and showed me some money. I grabbed a $10 bill. We got to scuffling over the money,

and I made up my mind to get it all. I grabbed it all, and stepped off and shot her. She hollored, 'Oh, Lordy, you shot me.' I broke and run; went through the woods, across the pike, went out by a spring, what we used to call Neuly Spring, down there at Lindsay's Park. Walked up the railroad track to Abeles mill, at the foot of Seventeenth street, and walked from there to Sixth and Center, and sold the gun to a pawnbroker."

He said he stopped at Sixth and Center, and bought a rabbit out of a wagon, stepped in and sold the gun to a pawnbroker and went from there down to Second and Scott, and sold the rabbit to a negro porter in a saloon there. He said that he got $51; he said he took the money home, and put it in the corner of the house, behind a table leg, in the kitchen, and set a quart bottle up against it. He said it was in a tobacco sack. I asked him if the money was there then, and he said it was. We went down in an automobile and found the table exactly like he said, and a quart bottle sitting by the table leg in the corner, but the money was not there. The statement he made to me was without promises, threats, coercion, and made by him voluntarily. I was sitting on one of the stools that we used for our Bertillion measurements, and he was sitting on the small one. He got down off the stool, on his knees, and volunteered, saying, "I will tell you everything." His brother was arrested at the time, and he told us his brother was innocent; that there was no one on earth knew anything about it except himself. He said he had started to the mill that morning, and met the owner of the mill, and worked about fifteen minutes, when the mill broke down.

A written confession of the defendant to substantially the same effect was also introduced in evidence. The defendant for himself testified:

I was arrested Tuesday night, on the 3d of December, about 7:30. They carried me down to the courthouse, but did not ask me any questions that night. Wednesday morning they took me over to the courthouse and questioned me until about noon about the killing of

Mrs. Turner. I did not know anything about it, more than I heard from the folks that come to the inquest. I come to town the night I was arrested to see Scipio Jones, to have him find out about a warrant that I understood they had for me for carrying a pistol. I was in town on the day of the killing from about 10 or 11 o'clock until 2 o'clock that evening. On Friday morning I started to Mr. Shooks' mill, where I had been working. I met him on the road, and asked him if the mill was running today. He told me that the mill was going to run, but that he had no place for me; I turned around and come back home, and brought my bucket back in which I had my dinner; I had a shotgun besides; I stayed around home until 10 o'clock, then came on down and caught the train at Sweet Home at 10:05. After I got to Little Rock I went down to the labor office, at Markham and Main, and inquired what kind of work the labor agent had. I went on down to Cumberland street, between Second and Markham, and stayed around town a considerable while; then I went out to Eleventh and Broadway, where my sister used to live, but she had moved; I came on down to Sixth and Center, where I bought a rabbit out of a wagon for a dime; I walked in the saloon, and was getting a drink, when Pearson walked in; he claimed that he had no money; that he had been paying off some debts. He had a breech-loader gun in his hand, and wanted to sell it to me for $2. I offered him a dollar for it, and he said that he would not take it; I told him that he ought to be able to get a dollar for it, and he told me that if I would get a dollar for it he would give me a quarter, and all I wanted to drink. He showed me his name engraved on the barrel. He went in with me in the pawnbroker's office, and I told the boy we wanted $1.50 for it. He asked whose gun it was, and I told him W. A. Pearson's gun. He said that he would give $1 for it, and that when we came back next Saturday we could get it back again by giving $1.50 for it. Pearson bought me some beer, and give me a quarter, and I left and crossed over to Mr. Dan Lazarus', where

I sold the rabbit for 15 cents. I went down to the different places, trying to buy some meat, and finally bought some stockings down at Mr. Baum's. I saw some women that I come up on the train with, and told them that I was going back on the wagon, if I could find Luther. I come on down home in Luther's wagon. I did not buy any groceries that day. I got $3.70 on Saturday from Mr. Shooks for working down at the mill, and bought seventy-five cents' worth of meat from Smith & Estes, a twenty-four-pound sack of meal, fifteen cents worth of sugar, a dime can of coffee, a ten-pound bucket of lard, a dime box of snuff and forty cents worth of feed. I had three brown shells and one blue shell down at the house. The coat and pencil you have there belongs to me. Those are my overalls. The blood on my overalls was caused by a chicken I killed Saturday morning for breakfast. I do not know where W. A. Pearson or Jim Turner lives.

In rebuttal, the State introduced testimony as follows:

Frank Cloar testified: I run a store at Sweet Home. On the day of the killing I was in Little Rock, and about 1 o'clock P. M. on that day on my way home I met the defendant walking towards Little Rock. He had a gun in one hand and a rabbit in the other.

Mrs. Anna Willis testified: On the day Alice Turner was killed I came up to Little Rock from Sweet Home on the 10 o'clock train. We went to the station a good while before the train came. I saw all the people that got on the train, and defendant was not there.

L. Faust testified: There is a spring near where Alice Turner was killed called Martley Spring. About 11:30 o'clock A. M. on the morning of the killing, while unloading logs from a wagon, I saw a man come from that direction. He had a pair of overalls on and was running with a bucket and a gun in his hand. About 12:30 o'clock P. M. I heard a commotion of hunters and learned that Alice Turner had been killed. The man I saw running was running directly away from where the

body was found and going in the direction of Sweet Home pike. He limped a little.

Emma Hampton testified: On the morning that Alice Turner was killed I saw her pass my house between 11 and 12 o'clock going over towards Pearson's house. I was helping my father, L. Faust, unload a wagon. He called my attention to a colored man who seemed to be running. The man was coming from the direction from where the body was found. I did not pay any attention to him and do not know whether he had a gun and a bucket in his hand or not.

C. N. McCracken testified: On the day Alice Turner was killed I met the defendant about 1 o'clock P. M. between Sweet Home and Little Rock. He was about a mile and a half from Martley Cut and I judge about two and one-half miles from Main street. He had a gun and rabbit in his hand and was going towards Little Rock.

Two loaded gun shells were found in the defendant's house and they were of the same size and brand as the empty shell that was found near the body of the deceased and contain the same size shot as were taken from the head of the deceased. A pair of overalls was, also, found there which were sprinkled with blood. Other facts will be stated in the opinion.

The jury returned a verdict of guilty of murder in the first degree, and from the judgment rendered the defendant has duly prosecuted an appeal to this court.

L. J. Brown and *M. B. Rose,* for appellant.

The confession was not voluntary. Extrajudicial confessions are at best weak testimony. 4 Blackstone's Com. 357; Best's Principles of Evidence, American Ed., 555, § 573. And when the confession is obtained under such circumstances of inhuman cruelty and malice as are shown in this case, such a confession is utterly inadmissible. The participants in such inquisition could not be expected to confess their guilt, but there is much in the evidence and in the attending circumstances tending to establish that the confession was forced.

Moreover, the court erred in hearing the testimony

relative to the manner of obtaining the confession in the presence of the jury, since under the circumstances it tended to mislead and confuse them as to the real issue in the case.

The court's instruction as to confession was misleading. The "other proof" referred to in the statute, means other conclusive proof by positive and direct evidence and not mere disconnected circumstances. 77 Ark. 128; 74 Ark. 398; 50 Ark. 305; 72 Ark. 585; 70 Ark. 24; 69 Ark. 599; 66 Ark. 53; 1 Bishop, Crim. Proc., § 1227; 42 Law Ed. (U. S.), 549.

Wm. L. Moose, Attorney General, and *John P. Streepey,* Assistant, for appellee.

That the confession was freely and voluntarily made is clearly established by the evidence. The trial court heard the testimony of all the parties who were present when it was made and was in a position to observe them when they testified and to judge of the truthfulness of their statements. His discretion in admitting it in evidence will not be interfered with unless it is shown to have been abused. 93 Ark. 159; 94 Ark. 344; 99 Ark. 453.

HART, J. The principal ground relied upon for a reversal by the defendant is that the confession of the defendant was not voluntarily made, and this is the most serious question in the case. The defendant himself testified that the officers who had him in custody stripped him naked and commenced questioning him. That they threw him across the box that he was sitting on and then whipped him. That they cursed him, blindfolded him, put a wire on his thumb and then shocked him with an electric battery for twenty minutes. That one of the officers then took a rubber hose about the size of a gun barrel and struck him across the head and knocked him over in the corner. That they then kicked him around, knocked him down and beat him severely and that it was under these circumstances he made the confession. His brother to some extent corroborated his testimony in this respect. It was shown on the part of the State that

several officers had access to him and were investigating the crime with which he was charged. These officers were put under the rule and each one positively and explicitly denied that they cursed him, abused him, beat him or in any wise mistreated or threatened him. They say that they used no profane or abusive language in his presence and that they did not threaten or mistreat him in any way. That they held out no inducement whatever either of hope or fear to make him confess the crime with which he was charged. This proof was made by the State before the confession was introduced in evidence and also after the defendant had testified to the abuse and mistreatment of himself. The officers specifically denied the statements made by him and reiterated that they had neither by threats nor by promise of reward or benefit induced the defendant to make the confession.

The trial judge found that the testimony of the defendant was not true and admitted his confession in evidence, and his finding is conclusive on appeal unless we should find that the trial court abused its discretion and that the confession is fairly traceable to prohibited influences. *Smith* v. *State,* 74 Ark. 397. In regard to the admissibility of confessions by the defendant in the case of *Young* v. *State,* 50 Ark. 501, the court said:

"The well established rule is, 'that confessions of guilt, to be admissible, must be free from the taint of official inducement proceeding either from the flattery of hope or the torture of fear.' The object of this rule is not to conceal crime, but to protect the accused from the effects of a false confession induced by the hope of gaining, thereby, relief or some temporal advantage. A confession made in the absence of any threat of temporal injury or promise of a temporal reward or advantage, in respect to the charge against him in the absence of such influence as might swerve him from the truth—would be voluntary and admissible as evidence against the accused. Under such circumstances it would be unreasonable for him to make admissions calculated to bring upon himself the consequences of crime, unless they were true."

The evidence shows that the defendant was arrested on Tuesday night following the day that Alice Turner was killed. His brother was also arrested charged with complicity in the crime. The defendant was placed in jail and was not questioned by the officers the night he was arrested. The next morning they took him out of jail and carried him to the city hall, where they informed him of the evidence they had against him. They questioned him as to his whereabouts on the day of the killing and finally he made the confession testified to by Hobbs, one of the officers. He was not cautioned or warned by the officers that any statements he might make would be used in evidence against him. It would extend the opinion to an unreasonable length to set out in detail all the evidence in regard to the confession. It is sufficient to say that according to the testimony of the officers they held out no inducement to him. They did not threaten him in any way and did not hold out any hope of reward or benefit to him that might accrue if he should make a confession. But it is fairly inferrable from all the evidence which we have carefully read and considered that the confession was obtained by persistent questioning on the part of the officers. As we have already seen, the defendant was entitled to stand mute if he so chose and to have no confessions used against him save a voluntary statement and not one extorted by fear or induced by promises. Was he deprived of this right? A careful consideration of the evidence leads us to the conclusion that the trial court was warranted in finding that the officers held out no inducement to him. No deception was used to influence the defendant to make his statement. No hope of reward or benefit was held out to him. No threat of any kind was made against him. No inducement was held out to the defendant that would naturally convey to his mind that he would gain some advantage if he confessed. They did urge him to tell the truth, but in the same connection said, "It will be better for your conscience if you just come up and tell everything that happened, you will feel better." This

negatives the idea that they intended to convey to his mind that he would receive any temporal benefit by making a confession. Such a statement would not naturally convey to his mind that he would gain some advantage if he confessed. In the case of *Austin* v. *State,* 14 Ark. 555, the court quoted with approval the statement of Mr. Greenleaf to the effect that a confession is admissible, though it is elicited by questions whether put to a prisoner by an officer or by private persons and that the form of the question is immaterial to the admissibility even though it assumes the prisoner's guilt. In 12 Cyc., page 463, it is said that the fact that a voluntary confession is made without the accused having been cautioned or warned that it might be used against him does not render it incompetent unless a statute invalidates a confession made where the accused is not first cautioned. To the same effect is Underhill on Criminal Evidence, (2 ed.), section 130; Wharton's Criminal Evidence (10 ed.), vol. 2, par. 676-c. In the application of these principles of law to the facts under which the confession in the instant case was made, we do not think the trial court erred in holding that the confession was voluntary. In so holding we do not wish to be understood as approving of all that was said and done by the officers with relation to the defendant. While the law does not require that the defendant should be cautioned as to his right to remain silent and of the fact that statements made by him will be used against him, it is always better that the officers give such warning in order to avoid suspicion of improper inducement.

Counsel for the defendant also urge that the judgment should be reversed because the jury was not withdrawn when the court heard the evidence that led to the confession to determine whether it was admissible in evidence. The approved practice is to withdraw the jury while such evidence is being heard before the court. The reason is this: that in the event the court does not admit the confession in evidence, the defendant may not be prejudiced by the hearing of the proceeding before the

court. In the instant case the confession was admitted in evidence and no prejudice could result to the defendant.

In respect to the confessions made by the defendant the court instructed the jury as follows:

"A confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed by some one. The confession of a defendant, if accompanied with proof that the crime was committed by some one, will warrant a conviction, if you believe it.

"A confession, in order to be admissible or to be considered, must be made voluntarily; that is, without anybody holding out any hope of reward or leniency, or fear of punishment for not doing it. If that is done, it is competent for the jury to consider it and give it such weight as they see fit. You have a right to consider all the circumstances surrounding the party at the time the confession is made, and give to it such weight as you think proper under all the circumstances."

"If you are satisfied of this man's guilt beyond a reasonable doubt, it is your duty to convict him. If you have a reasonable doubt of his guilt, it is your duty to acquit him. This you alone can determine."

Counsel for the defendant contend that the court erred in giving this instruction in regard to the confession and cite as authority for their position the case of *Hubbard* v. *State,* 77 Ark. 126, but we can not agree with their contention in this respect. There the jury were told that they could convict the defendant if they were satisfied beyond a reasonable doubt by the confession alone, or in connection with the other testimony in the case that the defendant was guilty of the crime charged. The court said that the confession alone is insufficient to sustain a conviction and that there must be other proof of the commission of the offense. Kirby's Digest, § 2385, is as follows:

"A confession of a defendant unless made in open

court will not warrant a conviction unless accompanied with other proof that such offense was committed."

In the case of *Melton* v. *State,* 43 Ark. 367, the court held that the confession of a prisoner accompanied with proof that the offense was actually committed by some one will warrant his conviction. That is to say, under our statute to warrant a conviction upon an extrajudicial confession of the accused, there must be independent evidence to establish that the crime has been actually perpetrated by some one. In the instant case there was independent testimony which showed that the deceased had been killed by some one and the circumstances independent of the confession strongly pointed to the defendant as the person guilty of the crime. This phase of the case was embodied in the instruction complained of, and the court did not err in giving it to the jury.

We have carefully examined the instructions given by the court. They were full and explicit, covering every phase of the case, and were fair to the defendant. The evidence was amply sufficient to sustain the verdict, and the judgment must be affirmed.

LESS v. GRICE.

Opinion delivered April 7, 1913.

1. FRAUDULENT SALE—NOTICE OF PURCHASER.—An embarrassed and insolvent debtor transferred a stock of goods to his brother for a wholly inadequate consideration, and the transfer stripped the debtor of all his property that could be reached by his creditors. *Held,* the purchaser ought, under the circumstances, to have known of the seller's financial condition but neglected every opportunity to ascertain it, and that the circumstances within the purchaser's knowledge were sufficient to put a man of common sagacity upon notice of the intention of the seller, and he will be charged with such notice and can not be a *bona fide* purchaser of the stock of goods. (Page 587.)

2. FRAUDULENT SALE—RIGHTS OF CREDITORS—CHANGE IN FORM OF PROPERTY.—Property purchased from an insolvent debtor by his brother in bad faith will be subjected to the payment of the claims of creditors, and where the purchaser has changed the form of the

property by exchanging it for land, the land is but a substitution for the property fraudulently conveyed, which will stand in the place thereof, and be liable in the same manner to the creditors. (Page 588.)

3. APPEAL AND ERROR—FINDINGS OF CHANCELLOR.—When the findings of the chancellor are against the preponderance of the testimony, the decree will be reversed. (Page 588.)

Appeal from Mississippi Chancery Court, Chickasawba District; *Sam Costen,* Special Chancellor; reversed.

STATEMENT BY THE COURT.

Appellants for themselves and others, creditors of W. C. Grice, filed a creditors' bill, alleging that he was indebted to them in certain specified amounts and other creditors in various sums; had been engaged in the mercantile business in Dell, Mississippi County, Arkansas; was insolvent, owed many debts and had no property, except the stock of goods, which was valued at $1,000; that his debts amounted to $1,200, or more, and that his creditors, pressing him for payment of their claims, on June 20, 1910, for the purpose of defrauding them and his other creditors, W. C. Grice, fraudulently sold and transferred to G. J. Grice, his brother, the stock of goods, who took possession thereof, under the pretended sale and transfer knowing of the insolvency of his brother and without paying any consideration for said goods. That immediately thereafter proceedings were begun to set aside the fraudulent transfer, but before the goods could be attached the said G. J. Grice, knowing of the pendency of the proceedings, and to further cheat and delay said creditors, traded the stock of goods obtained from his brother, W. C. Grice, to William and Alice Hosmer, for eighty acres of land, describing it, which was conveyed by them to him, and that they knew of the fraud practiced by W. C. and G. J. Grice, and were parties to it. Prayer was made for the sale of the goods and the exchange of the lands to be declared void, and the goods held subject to the payment of the debts and a lien fixed against the land for the balance. W. C.

Grice filed no answer. His brother, G. J. Grice, answered, denying any knowledge as to the indebtedness of W. C. Grice; admitted the purchase of the goods; alleged that it was made in good faith and for a consideration of $1,458 and further admitted the sale and transfer of the goods to Hosmer and his wife in exchange for the eighty acres of land. Hosmer and wife filed separate answers, alleging that she purchased the stock of goods from G. J. Grice in good faith and without any knowledge of any indebtedness against it, and that the consideration paid for the goods was still owned by G. J. Grice.

The testimony shows that W. C. Grice purchased the stock of goods on credit; that it was inventoried and the inventory showed a value of between $1,900 and $2,000 and some of the goods were sold on the basis of 50 per cent of the cost price, $1,107.68, at fifty cents, $538.84, the selling price, and $919.16, at $1, $1,458, in all, and paid a small amount on the purchase price thereof. That he bought bills of goods from the creditors bringing this creditors' bill, and was indebted to them in the amount claimed and certain other creditors, also, in different amounts for new goods, and that he had not paid any part of said indebtedness, since he sold the stock of goods to his brother. That he owed Richardson, from whom he bought the stock of goods, $300. That others were on the note with him and he paid that note and $232 to Richardson and sold him a team for $250 and then owed him some. He only had a team, a cow and a couple of yearlings and a few hogs when he purchased the stock of goods. He sold the stock thereafter, in June, to his brother, who he said was in business about a month before he traded the stock of goods to the Hosmers for the land. He said further that his brother did not assume any of the debts which he owed, except for the house and lot, which did not go in with the stock of goods; that they did not owe any notes jointly, that his brother was not security for him at all; that he owed from $900 to $1,200 at the time of the trans-

fer and had something like $500 worth of debts due him. That he did not have $10 when he went out of business.

G. J. Grice admitted the purchase of the stock of goods, claimed there was an inventory made of it showing a valuation of between $1,900 and $2,000; that he got some of them at 50 per cent of the cost price and that he paid therefor what his brother owed him and $300 in money and agreed to turn over a crop to him at $15 an acre and the team, worth $300; that he did not assume any debts of his brother's and did not know he owed any debts; that he made no inquiry as to the condition of the business; did not ask to be shown the books and did not ask his brother whether he owed any debts at all or not. That it did not occur to him to find out.

These brothers lived within a quarter of a mile of each other and were on friendly terms; each knew of the financial condition of the other and G. J. Grice said he knew his brother bought some goods after he bought the business from Richardson, but he didn't know how much. That he was in the store from thirty to sixty days and sold the stock of goods or exchanged it for the land he valued at $2,400. This witness said his brother did not suggest the trade to him; that he had talked with Bonds about buying him out and his brother heard of this and said, "If you want to buy a business out, let me sell out to you." He didn't know anything about what kind of business his brother had been doing, whether it was cash or credit, nor did he make any examination of the books to see nor any inquiry as to how much his brother owed, and did answer that there was a desk fenced off where he kept his bills and that he had seen papers hanging there that looked like bills, but he made no examination of them.

W. B. Barton testified that he was employed by Johnson, Berger & Co. to try to collect its account against W. C. Grice, and went to see him a day or so before the transfer from G. J. Grice to the Hosmers; that he also knew of the claim of E. Less; that Grice told him he had sold out to his brother and that he only

got a wagon and team and the crop; that his brother was on a note for him and assumed the payment of that note and that paid for the store. That he did not have a dollar to pay him and could not pay one cent. That he told him there was no inventory of the goods made "just a lumping trade; just traded it for the crop and the team and his assuming the note." This witness also said he talked with G. J. Grice, who stated no inventory was taken and that he just made a lumping trade of the stock. He talked to him about the claims of the appellants and was told he had nothing to do with that, that he had bought the stock of goods and paid for it and that he would have to see his brother about that. He also stated he knew his brother owed some accounts, but that he did not assume them. He admitted he knew his brother owed Johnson, Berger & Co. G. J. Grice stated he did not know Barton and denied he told him he paid for the goods, as stated, and that no inventory was taken or that he stated he knew his brother owed some notes and the account to Johnson, Berger & Co., or any of them.

The decree recites a finding of indebtedness of the amount claimed by appellants and for other creditors, in all $1,428.20, at the time of the transfer of the stock of goods; that the sale was for a valuable and adequate consideration as to G. J. Grice, in good faith and not fraudulent, and that the exchange of the stock of goods to the Hosmers was likewise in good faith, and not fraudulent; dismissed the complaint, for want of equity, against G. J. Grice, and rendered judgment for appellants against W. C. Grice for the sum of their debts, from which judgment they appealed.

Gordon Frierson and *Lamb & Caraway,* for appellants.

1. Appellee G. J. Grice did not purchase in good faith and was not an innocent purchaser for value. 50 Ark. 314, 320; 55 *Id.* 579; 86 *Id.* 230; 51 Tenn. 476; 50 Ark. 42, 46; 45 *Id.* 523; 75 Ark. 393.

2. The sale was a fraud on creditors, and the land should be held for their benefit. Cases *supra.*

Appellee pro se.

1. W. C. Grice had the right to prefer creditors. 67 Ark. 100; 63 *Id.* 22; 76 *Id.* 393. G. J. Grice did not participate in the fraud.

2. The consideration was adequate and he was an innocent purchaser. 45 Ark. 523.

3. Appellee was not placed upon inquiry; nor was the conveyance fraudulent. 100 Ark. 370; *Ib.* 555; 99 *Id.* 128; 97 *Id.* 537; 77 *Id.* 305; 75 *Id.* 521.

KIRBY, J., (after stating the facts). The testimony shows a sudden and hasty transfer of the stock of goods, first from W. C. Grice to his brother, without any investigation on the part of the purchaser to ascertain the condition of the business, or the indebtedness of the seller for the stock he was selling, for a totally inadequate consideration, and the transfer thereafter immediately upon his ascertaining that the creditors of his brother, W. C. Grice, were about to proceed against the stock of goods for the payment of their debt, to the Hosmers, for the lands described, which are admitted to be worth $2,400. This brother, who made such an exceptionally good trade of so sorry a stock of goods for the land, denied that he assumed any of the debts of his brother upon the purchase of the stock, except for the house and lot, which was not included in the sale of the stock of goods, and the brother selling denied that his brother was on any note with him which was reckoned in the payment of the stock of goods in the selling of it; and notwithstanding they were living near together, and the families very friendly, and had been all along, and each knew the financial condition of the other, and that neither had any property of any material value as compared with the stock of goods being bought and sold, their testimony discloses that it was almost by accident that one discovered that the other desired to purchase a stock of goods, and the one desiring to buy that his

brother had a stock of goods for sale, and they had such implicit confidence in each other that no question was made as to the condition of the business, the amount of indebtedness, nor the exact amount that one was to pay the other therefor, and the one to whom the transfer of the stock of goods was made, immediately upon the appearance of the collector for appellant creditors in the town and talk of the proceeding to subject the stock of goods to the payment of their debts, traded it for the tract of land.

The brother who purchased the stock of goods and took possession of it knew that he was divesting W. C. Grice, appellants' debtor of all his tangible assets. His recollection as to the amount he paid therefor is hazy and unsatisfactory; does not correspond with that of the seller of the goods, and he made no effort whatever to discover the condition of the business, nor the amount of the seller's indebtedness. The circumstances within his knowledge were sufficient to put a man of common sagacity on inquiry and with the use of any diligence to lead him to the discovery of the fraudulent purpose of the debtor, and he should be charged with notice of such intention.

In *Dyer* v. *Taylor*, 50 Ark. 314, the court said: "To avoid a sale actual notice to the purchaser of the fraudulent intent of the vendor is not necessary. If the facts and circumstances within his knowledge are sufficient to put a man of common sagacity upon inquiry, and with the use of reasonable diligence to lead him to the discovery of the fraudulent purpose of the vendor, and he neglects to make the inquiry, he will be charged with notice of the fraudulent intent. No purchaser put upon inquiry has a right to remain wilfully ignorant of facts within his reach. It is not sufficient for his protection that he is a purchaser for value; he must also be an innocent purchaser. By aiding a debtor to convert his property into money, or promissory notes, which can be easily concealed from his creditors, and placed beyond their reach, with notice, actual or constructive, that he is doing

so to defraud his creditors, he participates in the fraud of the debtor, by assisting him in carrying out his fraudulent purpose." See also *Adler* v. *Hathcock,* 55 Ark. 579.

Moreover, this was a transfer of a stock of goods by an embarrassed and insolvent debtor to his brother, who ought, under the circumstances, to have known his financial condition and neglected every opportunity to ascertain it, for a wholly inadequate consideration and the transfer stripped the debtor of all his property that could be reached by his creditors, and certainly shows a lack of good faith upon his part in the purchase of it, and he can not be a *bona fide* holder thereof. *Wilkes* v. *Vaughan,* 73 Ark. 179; *McConnell* v. *Hopkins,* 86 Ark. 225.

We are of the opinion that the chancellor's finding is against the preponderance of the testimony. The creditors who filed this bill were entitled to have the stock of goods, which was fraudulently transferred by the debtor to his brother, who did not purchase it in good faith and become a *bona fide* holder thereof, subjected to the payment of their debts. The change of the form and character of the property by the fraudulent grantee by exchanging it for the land was but a substitution of the land for the property fraudulently conveyed which will stand in the place thereof and be liable in the same manner to the complaining creditors. 1 Moore, Fraudulent Conveyances, 171; *Bryant-Brown Shoe Co.* v. *Block,* 52 Ark. 458; 12 S. W. 1073.

The decree is reversed and the cause remanded with directions to render judgment for the amounts sued for by E. Less and Johnson, Berger & Co. and to fix the same as a lien against the tract of land purchased of the Hosmers by G. J. Grice, and if said judgment is not paid within a reasonable time to order said lands sold and the proceeds thereof applied to the satisfaction of the said judgment.

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

Opinion delivered April 14, 1913.

1. RAILROADS—NOTICE TO DRAIN ROADBED.—Under section 6648 of Kirby's Digest, which provides that twenty days' notice shall be given to the officer, agent or employee of a railroad company, of a violation of Kirby's Digest, § § 6646, 6647, providing a penalty for failure to drain its roadbed within 200 yards of a farmhouse or residence, before a cause of action shall accrue, *held*, written notice served upon the station agent nearest the location of the place to be drained twenty days before suit was brought was sufficient compliance with the statute. (Page 592.)
2. RAILROADS—LIABILITY FOR FAILURE TO DRAIN ROADBED.—Kirby's Digest, § § 6647 and 6648, provide a penalty against a railroad company, which shall "knowingly and wilfully" neglect to drain its roadbed within 200 yards of a residence or farmhouse. *Held*, the statute means the neglect must exist not only with knowledge, but with the intention that it be done; and where a railroad company permits water to stand on its roadbed for two years, it will be held to know the condition of its roadbed, and if it permits the water to stand after twenty days' notice to drain, it will be held to have acted wilfully, with the intention to let the water remain. (Page 592.)
3. APPEAL AND ERROR—EVIDENCE—NEGLIGENCE—QUESTION FOR JURY.—Under section 6647, of Kirby's Digest, fixing a penalty against a railway company for "knowingly and wilfully" permitting water to remain on its roadbed within 200 yards of a residence or farmhouse after twenty days' notice to drain the same, and the testimony is in conflict as to whether it could have been drained before the notice was given, or during the running of the twenty days, under all the circumstances a question is made for the jury, and it was error to withdraw the case. (Page 593.)

Appeal from Clark Circuit Court; *Guy Fulk*, Judge on Exchange; reversed.

STATEMENT BY THE COURT.

Appellants brought suit against the railroad company for the penalty provided by the statute, section 6646 (as amended in 1907), 6648, Kirby's Digest, for its failure to drain a pond of water on its right-of-way within 200 yards of his residence. The complaint alleged that the pond was created by the construction of the cul-

vert and roadbed and that the railroad company for more than twenty days after service of notice upon it of its violation of the statute, as required, had failed and refused to drain said pond. The answer denied that notice was served, as alleged, but admitted service upon its agent; denied all the facts alleged in the complaint and alleged that during the months of April and May, 1912, the season was rainy, very rainy, and that the right-of-way near the plaintiffs' residence and about the pond was so wet and boggy that the same could not be drained until the weather became dry about the first of June, and, as soon as it was possible to do so, the pond was drained and the water removed.

The testimony shows that the railroad company in the construction of the culvert through its roadbed made a depression on its right-of-way within 130 yards of the residence of appellants that filled with water and that had stood there a long time. It attempted to remedy the condition by the construction of a culvert in 1910, but made it worse, by digging out the ground lower than the culvert. The plaintiffs had served upon the station agent of the defendant at Arkadelphia, the station nearest his residence, a written notice, demanding that the pond of water be drained within twenty days after the service of the notice and of their intention to claim the penalty provided by law in the event it was not done.

The company drained the pond, beginning work June 2 and finishing June 5, 1912. Its division engineer having the work in charge testified that during April and May it was very wet and it was not possible to use scrapers in the work of draining and that it could not be done at a reasonable expense without their use. The roadmaster testified that his attention was called to the pond shortly after the notice was served and that he got the teams as quickly as he could get them and did the work. That he had been down there before and tried to get teams but could not procure any. That the weather conditions were responsible, chiefly for the delay, but they probably could have gotten started earlier in the work if

they had been able to get teams anywhere near the locality.

The court instructed a verdict for the defendant, and from the judgment thereon the plaintiffs prosecute this appeal.

John H. Crawford, for appellant.

Appellee was liable under sections 6647-8, Kirby's Digest. Due notice was given. 36 Cyc. 1103; 114 Wis. 169; 58 L. R. A. 93; 118 S. W. 41; 72 Ark. 195; 69 *Id.* 529; 59 *Id.* 244; 73 *Id.* 543; 182 U. S. 452; 95 Ark. 331. It was error to direct a verdict.

E. B. Kinsworthy and *W. G. Riddick,* for appellee.

1. Appellee's failure was not wilful. 80 Ark. 499; 96 U. S. 699; 155 *Id.* 438; 169 Fed. 69.

2. The statute should be strictly construed. 36 Cyc. 1180; 72 Ark. 367; 64 *Id.* 284.

3. The delay was not either wilful or intentional. The work was done at the earliest possible moment.

KIRBY, J., (after stating the facts). The undisputed testimony shows that because of the extreme wet weather the pond could not have been drained during the twenty days after the notice was served upon the agent of the railroad company, unless at an unreasonable expense and that the work could have been begun sooner than it was if the company had been able to procure teams in the vicinity of the pond. The law makes it (section 6646, Kirby's Digest, and Act 250 of the Acts of 1907) the duty of the railroad companies to drain their respective roadbeds, where water is caused to stand by reason of the construction of the road, within 200 yards of a farmhouse or residence or railroad station, by the construction of ditches or drains of sufficient capacity to carry off all the water rapidly.

Section 6647 provides: "Any railroad company, or corporation, or any officer or agent or employee of any such railroad company or corporation, who shall knowingly or wilfully violate the provisions of this act, shall be liable to pay a penalty of not less than fifty dollars

for each and every offense, and costs of suit, including a reasonable attorney's fee, to be taxed by the court where the same is heard on original action, by appeal, or otherwise, to be recovered by suit at law by the party aggrieved in any court of competent jurisdiction."

Section 6648. "Twenty days' notice shall be given to the officer, agent or employee, as the case may be, of any violation of this act, before a cause of action shall accrue."

The written notice was served upon the station agent of the railway company nearest the location of the pond twenty days before the suit was brought and this was a sufficient compliance with the statute requiring notice to be given "before a cause of action shall accrue." *St. L. & S. F. Rd. Co.* v. *Hale,* 82 Ark. 175. The statute only denounces a penalty against the railroad corporation, or its employees, "who shall knowingly and wilfully violate the provisions of this act," and provides that twenty days' notice shall be given to the company of the violation of the statute "before a cause of action shall accrue."

The words "wilfully and intentionally," as used in another penalty statute (Kirby's Digest, § 1899), making it a misdemeanor to destroy telephone lines and providing that persons guilty of such offenses shall pay to the owners double the amount of all damages sustained thereby, has been construed by this court. In *Ry.* v. *Batesville & W. T. Co.,* 80 Ark. 504, the court said: "This is a criminal statute, and the words mean more than a mere doing voluntarily or knowingly the act in question. The use of the term 'wilful,' and in this case almost its synonym 'intentional,' in a criminal or penal statute 'implies knowledge and a preference to do wrong.' They mean in such statutes, 'not merely voluntarily, but with a bad purpose.' 'An evil intent without justifiable excuse.' 'Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit to do it.' " Citing *Felton* v. *U. S.,* 96 U. S. 699;

Evans v. *U. S.*, 153 U. S. 586; *Potter* v. *U. S.*, 155 U. S. 438; *Spurr* v. *U. S.*, 174 U. S. 728.

This statute does not say "wilfully and intentionally," but "knowingly and wilfully," meaning that the act must be done, not only with the knowledge of the company, but with the intention that it shall be done. There may be a different shade of meaning of the word "wilfully" when connected and used with "knowingly," but these words have been construed together in statutes as quoted above by our court.

It was not the intention of the Legislature to denounce a penalty against the railroad company for mere failure to drain a pond caused by the construction of its roadbed, or it would not have used both words "knowingly and wilfully."

If any other meaning whatever is to be given to the expression "knowingly and wilfully" it must mean not only that the provisions of the law are knowingly violated, but with the intention and purpose that the condition created shall remain as it is.

It was the evident purpose of this act to protect the health of the citizens of the State, residing along and near the right-of-way of railroad companies, by requiring the draining of all pools and ponds resulting from the construction of the road bed, and it should receive a liberal construction on that account. It is true, it is a penal statute, but no penalty accrues, or can be recovered, until after twenty days' notice is given of the violation of the act. The railroad company knows the constructions of its roadbed and the condition of its right-of-way. It knows when construction is finished whether water will be likely to accumulate and stand along the right-of-way in violation of this law, which it also knows, and if it permits it to do so and such condition exists it is necessarily knowingly done. If it then fails within the twenty days after the notice to remove the nuisance and provide the proper drainage it can be said it has done so wilfully and with the intention that the condition

shall remain as it is and the water shall not be drained off and the nuisance abated.

The condition complained of by appellants had existed for two years before the notice was given, and was remedied in three days after the work was begun.

The testimony is in conflict as to whether or not the pond could have been drained any time before it was done after notice and also as to whether or not it could have been done during the running of the twenty days' notice and under all the circumstances made a question for the jury to determine, whether the railroad company knowingly and wilfully violated the provisions of the statute, within the meaning of its terms. The court erred in directing a verdict.

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

HOWARD v. GRANT.

Opinion delivered April 14, 1913.

1. DESCENT AND DISTRIBUTION—MERGER OF LEGAL AND EQUITABLE ESTATE.—When the equitable and legal estates in land unite in the same person the equitable title is merged in the legal estate which descends according to the rules of law, the legal title alone determining the course of descent and succession. (Page 599.)
2. DESCENT AND DISTRIBUTION—BOND FOT TITLE—ANCESTRAL ESTATE.—Where one G purchased school lands under a bond for title therefor, and died before the payment of the purchase money, but the purchase money was paid by his legal representative, and a deed made to his heirs, consisting of only one child, a daughter, the heir inherited the equitable estate from her father, and the entire amount of the purchase money being paid by G's legal representative, the heir succeeded also to the legal title to the land. *Held*, also, the estate taken by the daughter was ancestral, and she and her heirs took the estate to the exclusion of her brothers and sisters of the half-blood. Act February 3, 1843, sections 201 and 2657, Kirby's Digest; Act of January 9, 1845; Act of January 15, 1857. (Page 600.)

Appeal from Jackson Chancery Court; *Geo. T. Humphries*, Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellants brought suit in equity for the possession of certain lands and to cancel certain deeds and a will as a cloud upon their title. James Green purchased the lands in controversy, a part of the school lands of the State, on December 28, 1844, executed his promissory note for $80 in payment therefor, due ten years after date, and obtained a certificate of purchase for said land. He died seven years thereafter, having paid the interest, but not the principal of the note, and leaving surviving him Eliza Green, his widow, and three children, two of whom died in infancy, without issue, and James, commonly called Jessie. On December 29, 1852, his widow, Eliza Green, married Lovein Howard, and of this marriage seven children were born, all dying in infancy without issue except these appellants. On January 21, 1857, six years after the death of James Green, Lovein Howard, the husband of his widow, paid the purchase money due on the land, surrendered the James Green certificate of purchase and a deed was executed by the State to the heirs of James Green, who, at the date thereof, consisted solely of Jessie Green, then about five years old, and living with her mother and step-father, which she continued to do until her marriage to Lowry Grant, at the age of about twenty. The receipts of the Commissioner of School Lands for the James Green certificate of purchase and the purchase money for the land are as follows:

"January 21, 1857. Received of Lovein Howard, James Green's certificate of purchase, he having paid the interest and principal. I am to procure a patent from the Governor in the name of James Green, deceased. Joseph Carl, Common School Commissioner."

"January 21, 1857. Received of Lovein Howard as agent of Eliza Howard, legal representative of James Green, deceased, ninety-one dollars fifty-three cents in full interest and principal for the purchase of Lot No. 15, being the southwest quarter of the southeast quarter; sold to him by Shelly Smith, as School Commissioner of

township 12, range 3 west, December 28, 1855, being a part of the sixteenth section. Joseph Carl, Common School Commissioner."

"Jacksonport, March 24, 1845. Received of J. Green twenty-eight dollars and eighty cents interest in full on lot No. 15 of section 16, township 12, range 3 west. Shelly Smith, Commissioner."

The note given by Green for the purchase money was also in evidence, bearing four different endorsements of receipt of payment of different amounts and interest on the back, signed by the School Commissioner. The deed from the State, conveying the land recites:

"And whereas, it appears from said transcript that the heirs of said James Green have become and are purchasers of southwest quarter of southeast quarter of section 16, township 12, range 3 west, and that full payment has been made by the said heirs of James Green, etc."

The chancellor found that the estate was ancestral, that appellants were not of the blood of the ancestor from whom it came, and dismissed their complaint for want of equity. From his decree this appeal comes.

John W. & Joseph M. Stayton and *Ira J. Mack,* for appellants.

Where one acquires the equitable title to land by descent and the legal title by deed from one outside of the blood, he takes the land, not by descent, but by purchase, and the title so acquired is a new acquisition and not an ancestral estate. 31 Ark. Law Rep. 136.

The evidence is not sufficient to show that balance of the purchase money was paid by James Green's estate, and that the estate was, therefore, ancestral. The receipt reciting that "Lovein Howard as agent of Eliza Howard, legal representative of James Green, deceased," had paid off the note, is not sufficient to establish an administration nor the fact that this money came from assets of James Green's estate before distribution. 2 Mackey, 70, 80; 125 N. Y. 411; 100 Mich. 214-216. See

also on the proposition that the land was a new acquisition in Jessie Green, 82 Pac. 585; 6 N. E. (Ind.), 910; 18 O. St. 311; 94 Ind. 482; 28 Ind. 74; 89 N. E. 509; 15 R. I. 204.

Jos. W. Phillips, for appellee.

Under the law then in force, the certificate of purchase received by James Green had the effect of a bond for title. English's Dig., p. 923, § 15. See also Rev. Stat., ch. 4, p. 92, § 161; Kirby's Dig., § 201. Under the law, no person could acquire title to school lands except the purchaser or some person to whom he assigned the right, or the heirs of the purchaser.

The deed was executed to the heirs of James Green; they take in succession. Jessie Green took legal title to the land by inheritance, with all the rights and incumbrances as if it had regularly descended, subject to her mother's right of dower. Gould's Dig., p. 998, § 58; 44 Ark. 452; 18 Law. Ed. (U. S.), 925; Rev. Stat. (Ark.), 336, § 1; *Id.* 339, § 18; Kirby's Dig., § § 2645, 2657. She took by virtue of being of the blood of James Green and not otherwise. 15 Ark. 586. And the estate is ancestral.

KIRBY, J., (after stating the facts). Appellants contend that the land was a new acquisition and not an ancestral estate and to be owners thereof, as half brothers of Jessie Green, the sole surviving heir of James Green, when the deed from the State conveying the land to the heirs of James Green was made. Appellees claim the land under certain deeds and a will and that the lands are an ancestral estate and appellants, not being of the blood of the ancestor from whom the estate came are without right or title thereto.

At the time James Green purchased the land in controversy, executed his promissory note for the purchase money and received the certificate of purchase therefor on December 28, 1844, the laws relating to such certificate provided:

"The certificate of purchase mentioned in the preceding sections shall have the force and effect of a bond

for the conveyance of the lands therein mentioned and shall entitle the purchaser and his heirs and assigns on payment of the purchase money named in the certificate with all interest which may then be due on account of said purchase, to a deed from said commissioner for the land described in said certificate." Act February 3, 1843, English's Digest, page 923, § 15.

Another statute provided: "If any person die, having purchased lands and tenements in his lifetime and not having completed the payment nor devised such lands and tenements, nor provided for the payment thereof by will, and the completion of such payment would be beneficial to the estate, and not injurious to creditors, the executor or administrator may, by order of the court of probate, complete such payment out of the assets in his hands, and such lands and tenements shall be disposed of as other real estate." Rev. Stat., chap. 4, § 161; Kirby's Digest, § 201.

Another ,statute was passed on January 9, 1845 legalizing and confirming all sales of sixteenth section school lands theretofore made and the deed to the heirs of James Green was made under the authority of the following act, approved January 15, 1857:

"From and after the passage of this act, if any person or persons, who shall have purchased any portion of the sixteenth section of school lands, from the Common School Commissioner, of any of the counties of this State, and executed note with good security therefor, and received a bond for title from such commissioner, shall die before the payment is fully made, in that event, if the executor, administrator, or guardian, or legal representative, of such deceased person, shall pay, or cause to be paid, the balance, if any, that shall be due to the School Commissioner on said purchase, and upon the certificate of the Common School Commissioner of the proper county, that the whole of the purchase money, with all interest due thereon had been fully paid, the Governor of this State shall forthwith execute a patent deed, as is now required by law, to the heirs at law of

such deceased person; which land, thus conveyed to the said heirs, shall stand charged with the amount of money, necessarily advanced to the school fund, in order to procure title, and shall, in other respects, be chargeable with the rights and incumbrances, that would have attached had it descended regularly to the same heirs."

Under this last act the balance of the purchase money for these lands was paid by Lovein Howard, then husband of the widow of James Green, and the deed executed to the heirs of James Green, Jessie Green, at the time, being the sole heir. The receipt for the purchase money reads, "Received of Lovein Howard, as agent of Eliza Howard, legal representative of James Green, deceased," etc. And the State's deed to the heirs of James Green recites that it appears that they have become purchasers of the lands and "that full payment has been made by the said heirs of James Green."

Appellants contend that this recital of the deed shows the payment of the purchase money by the heirs, and the estate became a new acquisition in Jessie Green upon the deed from the State within the doctrine announced in *Hill* v. *Heard,* 148 S. W. 254, 104 Ark. 23, and descended to them as her half-brothers upon the death of Jessie Green and the termination of the husband's curtesy interest.

Unquestionably, the minor child or children inherited the father's equitable title or interest to these lands upon his death and the legal title thereto was afterwards conveyed by the State to the heirs of James Green, Jessie Green being the only one surviving at the date of this conveyance. It is no longer questioned that when the equitable and legal estates in land unite in the same person the equitable title is merged in the legal estate which descends according to the rules of law, the legal title only determining the course of descent and succession. *Hill* v. *Heard, supra.* In that case, the father had purchased lands and gone into possession under a bond for title and died before the payment of the major part of the purchase money which was paid by the mother

out of her separate property and the deed afterwards taken conveying the lands to the son and heir and this court held that the two estates came by different rights, the equitable by inheritance and the legal estate by purchase; that the equitable was merged into the legal, which determined the course of descent or succession, and that the legal estate being acquired by purchase the estate was not ancestral, but a new acquisition and descended upon the death of the owners to the brothers and sisters of the half-blood.

In the instant case, the ancestor purchased these lands of the State and took a certificate of purchase, which was in effect a bond for title, or contract for conveyance upon the payment of the purchase money, and died in possession without the payment thereof. The purchase money was afterwards paid, the receipt therefor by the school commissioner showing the person paid it as agent of Eliza Green, "legal representative of James Green, deceased," and the deed was executed to the heirs of James Green, under authority of the law in such cases above set forth. This same law provides that land thus conveyed shall stand charged with the amount of money necessarily advanced under its provisions in order to procure the title and shall in other respects "be chargeable with the rights and encumbrances that would have attached had it descended regularly to the heirs."

It was the evident purpose of the law to devolve upon the heirs of the person purchasing school lands under a bond for title therefor and dying before the payment of the purchase money, upon the conveyance thereof to his heirs, after payment of the purchase money for same by his legal representative, the same rights they would have inherited from such person if the purchase money had been paid in his lifetime and the deed conveying the lands made, and in the same way, subject only to the charge for the balance of the purchase money so remaining unpaid at his death and afterwards paid by his legal representatives.

The recital of the State's deed means no more than that the purchase money was received in accordance with the statute, and, as stated in the school commissioner's receipt, from the legal representative of James Green, deceased. Jessie Green inherited the equitable estate of the father, and the entire purchase money being paid by his legal representative, succeeded to the legal title thereof, on account of being his heir and under the law and the entire estate came to her on the part of the father. Section 2657, Kirby's Digest; *Hill* v. *Heard, supra.*

The estate being ancestral, and appellants not being of the blood of the person from whom it came, nor in line of succession on that account, acquired no title whatever upon the death of Jessie Green.

Having reached this conclusion, it becomes unnecessary to determine the rights of appellees, since appellants must recover, if at all, upon the strength of their own title, and, having none, necessarily their suit must fail.

The decree is affirmed.

COX WHOLESALE GROCERY COMPANY *v.* THE NATIONAL BANK OF PITTSBURG, KANSAS.

Opinion delivered April 14, 1913.

1. BILLS AND NOTES—EFFECT OF DEPOSIT OF DRAFT IN BANK.—Where a bank receives upon deposit a draft endorsed without restriction, and gives credit for it to the depositor as cash in a checking account, the bank becomes the absolute owner of the draft so deposited. (Page 604.)
2. EVIDENCE—STATEMENT BY DRAWER OF DRAFT.—After S drew a draft and deposited it with a bank, and the bank gave him credit therefor, any statement or acknowledgement made by S would not be competent against the bank. (Page 604.)

Appeal from Polk Circuit Court; *J. T. Cowling,* Judge; affirmed.

Wright Prickett and *J. I. Alley,* for appellant.

1. The bank was only the *prima facie* owner of the draft. 55 Am. Dec. 292; 22 Hun. 335.

2. The letters of Scott and the cashier were admissible to show the true ownership of the draft. Jones on Ev. (2 ed.), p. 312, § 248; 1 Greenl. Ev., § 180; 1 L. R. A. 224; 56 Hun. 501; 10 N. Y. Supp. 561; 33 Ark. 370.

3. If there is any evidence, the court should not take the case from the jury. 37 Ark. 164, 239, 580; 35 *Id.* 146; 36 *Id.* 451; 34 *Id.* 460, 743; 75 *Id.* 409; 63 *Id.* 94; 38 Cyc. 1532-3; 8 L. R. A. (N. S.), 1062; 149 S. W. 1188.

W. M. Pipkin and *John L. Kirkpatrick,* for appellee.

1. When a draft is endorsed to a bank, the endorsee becomes the owner and entitled to the proceeds. 14 S. E. 891; 55 *Id.* 681; 71 *Id.* 660; 123 Ala. 612; 41 W. Va. 37; 103 Iowa, 581.

2. The letters of Scott and the cashier were inadmissible in evidence. 16 Cyc. 1214; 23 *Id.* 740.

3. The court properly directed a verdict, as there was no evidence for a jury to pass upon.

McCULLOCH, C. J. Appellant, a corporation doing business at Mena, Arkansas, instituted this action in the circuit court of Polk County against the Pittsburg Elevator Company, a corporation of Pittsburg, Kansas, and A. L. Scott, a resident of that place, to recover damages alleged to have been sustained by reason of the damaged condition of a carload of grain purchased by appellant from said defendants.

At the commencement of the action a writ of garnishment was sued out and served upon the Farmers' & Merchants' Bank, of Mena, Arkansas., to impound a sum of money in that bank alleged to be the property of said defendants. Appellee, the National Bank of Pittsburg, Kansas, intervened, claiming the fund as its property. The Farmers' & Merchants' Bank answered as garnishee, alleging that it had on hand the sum of $393.60, paid by the Goff Wholesale Grocery Company, of Mena, Arkansas, on a draft drawn by defendant, A. L. Scott,

and the garnishee offered to pay said money into court or subject to the order of the court.

Judgment by default was rendered in appellant's favor against the defendants for the amount of damages claimed, and on trial of the issue between the intervenor and appellant the court gave a peremptory instruction in favor of the former. From the judgment in favor of the intervenor an appeal has been prosecuted.

Defendant A. L. Scott, who was president of his codefendant, the Pittsburg Elevator Company, drew a draft for the sum of $393.60, with bill of lading attached, covering the shipment of grain, on the Goff Wholesale Grocery Company, and endorsed said draft for deposit and credit to the intervenor, the National Bank of Pittsburg. There were other drafts drawn by Scott, endorsed by him and deposited with the intervenor at the same time, all of them being credited to the checking account of the Pittsburg Elevator Company. Intervenor forwarded this draft, with others, to the Southwest National Bank, of Kansas City, with customary endorsement, and that bank, in turn, forwarded the draft for collection to the Farmers' & Merchants' Bank, of Mena, where the same was paid by the Goff Wholesale Grocery Company. The garnishment was served on the Farmers' & Merchants' Bank while the money was in its hands and before remittance thereof could be made to the bank which sent the draft for collection.

The facts above stated are undisputed, and the court gave a peremptory instruction to the jury to return a verdict in favor of the intervenor.

We are of the opinion that the instruction was correct, for under that state of facts the intervenor was the owner of the draft and the funds paid thereon.

"When a check is taken to a bank," said the court in *Burton* v. *United States,* 196 U. S. 283, "and the bank receives it and places the amount to the credit of a customer, the relation of creditor and debtor between them subsists, and not that of principal and agent."

We approved this doctrine in the recent case of *Southern Sand & Material Company* v. *Peoples Savings Bank & Trust Company,* 101 Ark. 266.

Other cases on the subject are referred to in the decision of the Supreme Court of the United States cited above.

In *Taft* v. *Bank,* 172 Mass. 363, the court said:

"So when, without more, a bank receives upon deposit a check endorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with and indicates a sale, in which, as with money so deposited, the check becomes the absolute property of the banker."

Such is the state of the case now before us, and there is nothing in the record to contradict the fact that the bank became the owner of the check, and the only liability of the drawer was upon his endorsement in case the check was not paid.

Of course, it would have been competent to prove that, notwithstanding the endorsement, the check was delivered merely for collection; but there is no proof to that effect in this record.

It is urged that a certain letter written by the cashier of the National Bank of Pittsburg immediately after the garnishment was some evidence tending to show an acknowledgment that the money was the property of the drawer of the draft and not of the bank. It is unnecessary to encumber this opinion with a copy of the letter, for we have carefully considered its language and find nothing in the slightest degree tending to show an acknowledgement that the money belonged to the drawer of the draft.

It is also insisted that the court erred in excluding a letter written by Scott, drawer of the draft, to the bank at Mena tending to show that he (Scott) owned the draft. Any statement or acknowledgement made by Scott after he had drawn the draft and endorsed it to the bank would not be competent against the latter.

Our conclusion is that the court was correct in giv-

ing the peremptory instruction and the judgment is therefore affirmed.

BROWNE v. CARNLEY.

Opinion delivered April 14, 1913.

HUSBAND AND WIFE—USE OF WIFE'S MONEY BY HUSBAND—CREDITORS OF HUSBAND.—Where a wife turned over her money to her husband and permitted him to use it as his own for his own purposes, and he acquired property with it and enjoyed a basis of credit on the faith of the property thus acquired, she can not, in a court of equity, be permitted to assert ownership of the property to the detriment of a creditor who has been deceived by the false basis of credit.

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

S. J. Hunt, M. Danaher and *Palmer Danaher,* for appellant.

The presumption is that a voluntary alienation of property by an embarrassed debtor is fraudulent as against existing creditors. And when such alienation is by an embarrassed debtor to his wife during the pendency of a suit against him and immediately before the suit is to be tried, the transaction is not only a badge of fraud, but almost positive proof of it. 50 Ark. 42; 20 Cyc. 444; *Id.* 451.

Where the wife permits her husband to use her money for years as his own and to invest it in real estate in his own name, will not be permitted to assert ownership in the property as against creditors who in good faith have extended him credit in reliance upon his ownership. *Supra;* 116 Mo. 169; 37 W. Va. 396; 62 Ark. 32; 67 Ark. 105; 86 Ark. 486; 36 Ark. 525; 84 Ark. 222.

B. L. Herring, for appellee.

Mrs. Carnley's demand for one-third of the purchase money for the homestead and for the timber lands sold by her husband, as a consideration for the relinquishment of her homestead and dower rights was reasonable,

and she was within her legal rights in receiving the same. 46 Ark. 542, 548; 56 Ark. 241, 244. In lending her husband money and taking his notes for same and in taking a conveyance of property from him in satisfaction of his indebtedness to her, she committed no fraud upon appellant, and the transaction is valid. 20 Cyc. 528 "B;" 124 S. W. (Tex.), 712, 714.

McCULLOCH, C. J. In July, 1909, G. B. Browne obtained a judgment for recovery of the sum of $1,901, in the circuit court of Cleveland County, against H. M. L. Carnley, husband of appellee, M. J. E. Carnley, said judgment being rendered on a bond executed by H. M. L. Carnley, and others, to appellant in an action instituted by the latter in the circuit court of Bradley County on January 30, 1905, against W. H. Harry for unlawful detainer of certain lands. The venue of that case was changed to Cleveland County, and the case was tried there, resulting, as before stated, in a judgment in appellant's favor. Appellant sued out an execution on said judgment and delivered the same to the sheriff of Bradley County, who proceeded to levy same on certain lands situated in that county as the property of H. M. L. Carnley. Mrs. Carnley instituted this action in the chancery court of Bradley County against appellant to restrain him from causing said lands to be sold under the execution. In her original complaint she alleged, in substance, that her husband, H. M. L. Carnley, bought the lands in controversy with her money and she asked that he be declared a trustee holding the legal title for her benefit. In an amended complaint filed later she alleged that her husband was indebted to her in the sum of $4,451.60 for borrowed money and conveyed said lands to her on June 25, 1909, in satisfaction of said debt. Appellant filed an answer to the original and amended complaints, denying the allegations of each and alleging that said conveyance was executed by H. M. L. Carnley to his wife with fraudulent intent to cheat, hinder and delay appellant in enforcing liability on said bond.

Mrs. Carnley testified at length as to the transac-

tions with her husband concerning the acquisition and sale of property and division of proceeds. She stated that the first property she owned was forty acres of land which she had purchased for the sum of $15, and afterward sold for the sum of $428.40, the money being paid over to her. She states further that her husband had title to 480 acres of timber land in which she claimed a third interest on account of having worked in acquiring it. Half of the land was sold for the sum of $2,521.60, and she claimed one-third of that sum and testified that it was paid over to her when the sale was made. Then she says she was to receive, and did receive, one-third of the price of the homestead, the title being in her husband's name. That sum was $1,500. She also stated that she and her husband had $5,000 in cash, and that one-third of that belonged to her. This was prior to the year 1904, during which year they moved to Moro Bay, in Bradley County, where her husband embarked in the mercantile business. She testified that she kept the funds, at least her portion of them, with her in a trunk, and from time to time turned the same over to her husband to invest in his business and the purchase of lands. After stating that the funds turned over to her amounted to $4,451.60, she was asked, "Who handled and controlled this money, yourself or your husband?" to which she replied, "I had control of it when I wanted to, but I allowed my husband to invest it for me from time to time, but in each case, as far as I can recall, my husband consulted me with reference to each investment of my money." It does not appear that any property was purchased in her name, but what she meant by investment was that her husband used the money in his mercantile business and in buying property for himself. In other parts of her testimony she states that she lent the money to her husband and took his notes therefor. Her husband conducted the mercantile business at Moro Bay with his son for several years, and then moved to Hermitage, Arkansas, where the mercantile business was continued. She testified that she let him have about

$3,500 with which to buy property and build a storehouse after they moved to Hermitage. About the time H. M. L. Carnley executed to his wife the deed in question, he transferred his bank stock and all of his interest in the stock of merchandise to his son, which completely denuded him of all property. The son testified that the reason his father transferred the property to him was that while his father managed the business at Moro Bay a heavy loss was sustained and the transfer was made to him to compensate for the loss.

Now, it appears from the above statement that Mrs. Carnley claims to have accumulated the sum of $4,451.60 in money, all of which accrued from the sale of her husband's lands, except the sum of $428.40 from the sale of the small tract which she owned; that her interest in the fund was asserted and recognized on account of the fact that she had by her own labor assisted her husband in acquiring the lands and that she should be compensated for that as well as her homestead interest; that she turned the money over to her husband in various sums from time to time and allowed him to use it in his business and in purchasing the property in controversy, and other property, the title to which was taken in his own name. In some parts of her testimony she stated that she turned the money over to him to invest for her; in other parts she stated that she loaned him the money and afterwards took his notes for some of it. She does not make a very satisfactory and convincing statement as to the particular times or dates when she turned the money over to him, nor the amounts, but in a general way she testified that he owed her the sum of $4,451.60 which she had turned over to him from time to time. It appears from her statement that she did not take her husband's notes for any of the money until about a year before the deed to her was executed, though she had been letting him have money for several years before that time.

In one place she says that she had his note for $2,000 and the note, dated July 20, 1908, is exhibited in the rec-

ord; in another place she says the note was for the sum of $2,500; and in still another place she says that there were two notes aggregating $2,500. She exhibited a note for $800, dated August 1, 1908. Upon the whole, her testimony is far from convincing that she turned the money over under any distinct obligation of her husband to repay it. It is evident from her own statement of the facts that, even if the money was turned over by her as she claimed, she permitted her husband to use it as his own and for his own purposes, and that he enjoyed a basis of credit on the faith of the property thus acquired. Under those circumstances she can not in a court of equity be permitted to reap the benefit to the detriment of a creditor who had been deceived by his false basis of credit.

In a somewhat similar case Judge RIDDICK, speaking for the court, said:

"It is no doubt just and right for a husband to return such funds, however stale the claim may be, if he can do so without infringing upon the rights of his creditors; but an insolvent debtor is not allowed to turn over his property to his wife, and let his creditors go unpaid, under the pretense of settling a shadowy claim for money of his wife which he received and spent many years before. As it would often be impossible for the creditor to dispute such ancient claims, to allow them to be set up in that way against the creditors would furnish an easy way for an insolvent debtor to shield his property from his creditors, while at the same time retaining all the essential benefits of the same to himself and family. For this reason when a wife allows her husband to use her money as his own for a long period of time, and thus to purchase property with it in his own name, and to obtain credit on the faith of his being the owner of it, she will not be allowed to claim such property as against his creditors." *Davis* v. *Yonge,* 74 Ark. 161.

Other cases announcing the same principle are: *Driggs* v. *Norwood,* 50 Ark. 42; *George Taylor Commission Co.* v. *Bell,* 62 Ark. 26; *Morris* v. *Fletcher,* 67 Ark.

105; *Roberts* v. *Bodman-Pettit Lumber Co.,* 84 Ark. 227; *Goodrich* v. *Bagnell Timber Co.,* 105 Ark. 90; *Haycock* v. *Tarver,* 107 Ark. 458. The doctrine of those cases applies with peculiar force in the present one, for the testimony shows that during the pendency of the case of *Browne* v. *Harry* appellant relied upon the solvency of H. M. L. Carnley as a surety on the bond. When the bond was executed appellant caused the record to be examined, and when he ascertained that he (Carnley) owned real estate and was in the mercantile business, and apparently being in prosperous circumstances, he accepted him as a bondsman and took no steps to have the bond renewed while the cause was pending for a period of something like five years. His attorneys, who lived in another county, relied upon appellant's examination of the record in determining that Carnley was solvent and constituted a good bondsman in the case.

Leaving out of the case entirely the suspicious circumstances that no written evidence of the alleged indebtedness of Carnley to his wife have been brought into the record, except the two notes executed about a year before the judgment was rendered and while the cause was pending, and also the further circumstance that the deed in controversy was not executed until a few days before the rendition of the judgment, we have the undisputed facts from the lips of Mrs. Carnley herself that she permitted her husband to use this money at will and, as before stated, she can not be permitted to take advantage of creditors who have been misled to their prejudice. The learned chancellor was, we think, in error in upholding the conveyance and in restraining appellant from enforcing his judgment. The decree is therefore reversed and the cause remanded with directions to dismiss the complaint of Mrs. Carnley for want of equity.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY v. GARRIGAN.

Opinion delivered April 21, 1913.

1. TELEPHONE COMPANIES—REFUSAL OF SERVICE—DISCRIMINATION—NEGLIGENCE—QUESTION FOR JURY.—In an action against a telephone company to recover a statutory penalty for alleged discrimination in failing or refusing to furnish telephone service, evidence held sufficient to warrant submission to jury of question whether defendant company was guilty of discrimination or mere negligence. (Page 613.)
2. TELEPHONE COMPANIES—FAILURE TO FURNISH SERVICE—PENALTY.—The statute which inflicts a penalty upon a telephone company for failure to furnish service to its subscribers, inflicts the penalty only for wilful discrimination and not for negligence in merely failing to furnish service, temporarily. (Page 614.)

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; reversed.

Walter J. Terry and *A. P. Wozencraft,* for appellant.

Before a person can recover a penalty under the statute, he must show a wilful and intentional discrimination or refusal of service. Acts 1885, p. 176; 76 Ark. 124; 100 Ark. 546.

Danaher & Danaher, and *Dan W. Jones,* for appellee.

The testimony shows a wilful discrimination or refusal of service.

A telephone company can not refuse service to a subscriber until he pays a debt contracted for services rendered in the past. 94 Ark. 533; 29 Ark. Law Rep. 757.

McCULLOCH, C. J. This is an action instituted by P. H. Garrigan against the Southwestern Telegraph & Telephone Company to recover the sum of $100.00 as statutory penalty for alleged discrimination in failing or refusing to furnish telephone service for a period of one day.

Defendant appeals from a judgment of the court rendered upon an instructed verdict.

The question presented, therefore, is whether the undisputed facts establish discrimination against the

plaintiff so as to warrant the recovery of the statutory penalty.

The plaintiff resides in the city of Little Rock, and has been one of defendant's subscribers for several years, having a telephone in his residence.

The alleged discrimination occurred on July 19, 1912, and, according to the undisputed evidence, the plaintiff had paid his bill for that month's service. He and his daughter testified as witnesses in the case, and their testimony tended to establish the fact that they had endeavored to use the telephone, but that they were denied service by the operator on the ground that the bill for service had not been paid. Plaintiff, himself, testified that when he called up, the operator said, "You can't talk over this 'phone; you will have to go to some place else. Your 'phone is discontinued." His daughter testified that when she called the central office, the operator informed her that she could not have the service because her father owed for a back bill. The connection was restored the next morning, and thereafter the service was furnished as usual.

Defendant introduced as witnesses several of its various employees, including the district traffic chief and his assistant, and the one who served as chief operator on the occasion named. It appears from the testimony of those witnesses, that there are two methods of discontinuing service. One is, where there is a temporary discontinuance at the request of the subscriber. This condition is indicated to the operator by placing a white peg or plug in the multiple on the switchboard in the central office, and it is notice to the operator that service with that telephone is discontinued at the request of the subscriber. A daily record is kept of the condition of the service with reference to each 'phone, and a temporary discontinuance is indicated on the record by the letter "W" placed opposite the number of the telephone. Only in extreme emergency is the operator permitted to allow that telephone to be called. Where the telephone is disconnected on account of failure to pay a

bill, the condition is indicated to the operator by placing a metal guard over the signal lamp on the switchboard. When that condition is indicated, it is the duty of the operator, when a call is received from that number, to connect it with the cashier's office. Men in what is termed the plant department have charge of putting guards over the signal lamps, but the white plugs or pegs are put in by the operators, who constitute what is termed the traffic department. When an operator begins work for the first time she is instructed about those different signals and their meaning.

The evidence adduced by the defendant in this case shows that when the effort was made by plaintiff and members of his family to use the telephone on July 19, there was a white plug, indicating temporary discontinuance at the request of the subscriber. In fact, there is no dispute about this, and the evidence further shows that there was a "W" on the record, indicating the temporary discontinuance. It is also undisputed that this was a mistake on the part of somebody connected with the operation of the telephones, as the plaintiff had not requested its discontinuance. There is no explanation given in the testimony as to how the mistake was made in putting in the white plug, indicating the discontinuance of plaintiff's telephone; but it is conceded that this occurred through a mistake on the part of some one. Defendant's witnesses contend that the mistake was discovered by a physician calling up and insisting on connection with plaintiff's telephone. That is disputed by the plaintiff. In this state of the proof, it was not proper to take the case away from the jury by a peremptory instruction. The statute which imposes the penalty is directed against discrimination only, and not for mere negligence in temporarily failing to give service. *Yancey* v. *Batesville Telephone Co.*, 81 Ark. 486; *Southwestern Telegraph & Telephone Co.* v. *Murphy*, 100 Ark. 548.

According to the defendant's evidence, there is nothing in this case except a mistake on the part of the employees which caused a temporary discontinuance of

plaintiff's telephone service for a period of one day, and that as soon as the error was called to the attention of those in charge of the office, it was corrected and the service was restored. If the jury accepted the statements of defendant's witnesses as the facts of the case, and believed that there was no wilful or unjustifiable refusal to furnish service as indicated by the testimony adduced by the plaintiff, then the verdict should have been for the defendant.

In *Southwestern Telegraph & Telephone Co.* v. *Murphy, supra,* we said:

"The manifest purpose of the statute is to inflict a penalty on a telephone company, not for negligence or inattention in failing to repair its instrumentalities for supplying service, but for wilful refusal to furnish telephone connections and facilities without discrimination or partiality to all applicants who comply or offer to comply with the rules. The statute forbids discrimination, and mere neglect or inattention in repairing instruments does not constitute that."

For the error, therefore, in giving the peremptory instruction, the judgment is reversed and the cause is remanded for a new trial.

ELLISON v. SMITH.

Opinion delivered April 21, 1913.

1. DEEDS—FRAUDULENT PROCUREMENT—EVIDENCE.—Under the evidence in the case, the findings of the chancellor that deeds executed by plaintiff to defendants in partition and settlement of the estate of their father, were procured by the fraud of defendants, and would not be declared binding by a court of equity, were not against the preponderance of the evidence. (Page 625.)
2. DESCENT AND DISTRIBUTION—FAMILY SETTLEMENTS.—Family settlements, when fairly made, will be set aside only for strong reasons, but when a settlement is conclusively shown to be unfair and unequal, it will not be upheld. (Page 625.)
3. APPEAL AND ERROR—DECREE—WAIVER AS TO FORM.—When appellants request the court to make its decree in a certain form, they will be held to have waived any objections as to the form of the decree. (Page 626.)

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

STATEMENT BY THE COURT.

This is a suit by appellees to cancel certain deeds which the appellees allege were executed by the appellee, Lou Smith, to the appellants herein through the wrongful, fraudulent connivance, collusion and misrepresentations of the appellants. The appellants denied the allegations of fraud, deceit and misrepresentations set up in the complaint, and averred that the deeds were executed in pursuance of a family settlement made between appellants and appellee, Lou Smith.

John W. Ellison was the father of the appellants and Lou Smith, the appellee. He was the owner of considerable real estate in his lifetime, and personal property. He died in May, 1908.

Appellee, Lou Smith, testified that after the death of her first husband, she, at the request of her father, returned to his home and assisted him and her mother in keeping house. Her mother was old and in bad health, and her father persuaded her to return to his home and promised her that if she would do so, he would see that she was well paid. She agreed to do so, and he moved her on the 13th day of December, 1903. She did the household work and also did work in the field. Her mother took to her bed the 1st of April, 1904, and was sick until the 9th day of July, 1904, when she died. Appellee waited on her mother while she was sick, doing all the work about the house. When her mother died, her father, two brothers, and herself and little girl were left at the old home place. They all lived there together, she doing the housework of the family. On the 12th of August, 1906, her brother, Elijah, got married, leaving the rest of them in the family. In February, 1909, her brother, John, got married, leaving her father, herself and little girl at home. She then remained with her father until the 22d day of May, 1908, when he died. She stayed with the family from the time she first went there

after the death of her first husband until after her father's death, a period of about five years.

She details certain articles of personal property owned by her father at the time of his death and their value. Her father died suddenly. He frequently told her before his death that he wanted the boys to have their farms if they could, and he wanted certain lands, consisting of eighty acres, divided between the four children. The home place consisted of 166 acres. The personal property he wanted her to have. He told her what he wanted each one of them to receive.

Several years prior to her father's death, her brother, Dan, cleared, fenced and cultivated each year the lands that he now has. Her father paid the taxes on it. John tended a part of what he now has, and her father paid the taxes on it. Her brothers, John and Dan, got all that they made on the land that they worked. Her brother, Lige, remained with her father and worked the bottom lands that he now owns. Her father never conveyed any of his lands to the children before his death. He intended, however, for her brothers to have certain tracts of land that he designated and allowed them to cultivate as their own, but made them no deeds. He promised to let his son, John, have a certain tract of land and took a note for $350. He never executed to John a deed to that, and didn't intend for him to keep it. It was to go back to his estate if the note was not paid off.

Her testimony, after much detail, tends to show that her father intended to make an equal division as far as possible of the lands to her brothers, except the home place, six acres, and the tract adjoining it of 160 acres, which he intended for her to have, and as this was not equal in value to the portions that he expected her brothers to receive, she was to have all of the personal property to make her part of the estate equal with theirs, and to compensate her for the work that she had done in waiting on him and her mother before they died. She explained to her brothers after her father died just

how he wanted them to do, and her brothers told her it was all right.

Her testimony shows that at the time of her father's death, she didn't know exactly how much money her father had. There was $220 in the house that was divided among the children. Her father often told her that he had as much as $1,000 buried. She received $220. She didn't know how much her brothers received; supposed they got one-fourth each.

Appellee sold, upon the advice of her attorney, a fourth interest in the lands that were her father's at the time of his death, as she was advised, for the purpose of enabling her to bring this suit. Some time after the death of her father, she and her brothers had a settlement in which she executed deeds to them, and they in turn executed deeds to her, in which their wives did not join, conveying to her forty acres of land as her share in the settlement. She didn't remember that the draftsman of the deeds read same over to her. She left the matter of the deeds to the lands all to her brothers. She denied that they stated that if she wanted any more lands that they would deed it to her. She had bought seventeen acres of land from her brother, John, after her father's death, and when the settlement was made, she got a deed to that piece of land and paid him for it when the money was divided.

After the settlement was made, Lige, her brother, came and offered her $50.00, and she refused to take it. She states that she didn't call on her brothers for a division of the money before the settlement was made, in which the reciprocal deeds were executed because she thought at the time she signed the deeds she was going to get the money, or she never would have signed them. She told the boys at the time the deeds were executed, that she was to have all of the personal property. She stated that her brother, John, stated to the other boys as follows: "Now, boys, I feel that Lou ain't got her part, and I think we ought to give her $20.00," and the other

boys objected, and he says, "I am going to give her $20.00." John gave her the $20.00.

It was shown that the forty acres of land deeded to her was worth about $200. When the draftsman wrote out the deeds she was around the house and in the kitchen and in the room where he was part of the time, but didn't pay any attention to what he was doing. He did most of the writing in one room when she was in the other part of the house.

On behalf of the appellants, there was testimony introduced tending to show that within two or three days after the division of the land, appellee stated to a witness that they had divided up everything satisfactorily. She stated that she got the home place, six acres, and one forty of timber land, and in the same conversation the witness asked her, "Is that all the land you got?" and she said, "Yes," that she didn't want it, that she would get her part in other stuff. She didn't state what the other stuff would be, and the witness didn't ask her.

It was shown that John W. Ellison, Sr., in his lifetime, had stated to a certain witness that he had given John and Dan their lands, and that he intended Lige, at his death, to have his. He didn't describe the land by numbers. He didn't tell witness what he had given to his daughter. Said that he intended for her to have a living as long as she lived and stayed with him. Another witness testified that John W. Ellison told him in 1908 that he had given all of his land to his boys. Stated that he had given the lower field to Elijah and the rest of the land to the other boys. He died about a month after this conversation.

The witness who wrote the deeds at the time the division was made testified that he was informed by A. D. Ellison that he and his brothers and sister Lou had agreed to divide their lands, and wanted witness to come up and write their deeds for them, and after some investigation as to the character of the deeds that should be written, he went there "and found Lou and the three boys there expecting him." He asked them if they were

ready for him to go to work, and they said they were, and he sat down at the table and wrote the deeds. They told him what they wanted on each one's deed. Lou's (Mrs. Smith's) was the last deed he wrote. After reading them over to them, they all signed their deeds. Three signed one and the other three the other all the way through. After he had written the deeds, and while he was writing the acknowledgments to the deeds, they were all in the other room. About the time he finished writing the deeds, they came back. John and Dan had decided to deed to Mrs. Smith more land. The land they were going to deed to her was timber land. John asked Lou which forty it was she wanted, and she told him she didn't know. They decided among themselves what forty it was. He wrote her a separate deed to that forty in addition to the separate deed to the home place, six acres. After witness put down that forty, John asked Lou if she wanted any more land, and Lou told him no, that was all she wanted; it would be plenty, and it was getting late, and after that they signed up. He read the deeds over to them, to see if he had the description correct, in the presence of all of them, and the numbers in each deed showing what each one got. The plaintiff and the defendants, on that occasion, were all seemingly in good humor. Witness heard of nothing only good feeling, and he heard of no dissatisfaction at all.

The first deed conveying land to Lou Smith described a six-acre and a seventeen-acre tract. The boys called off that seventeen acres in the deed. They told what to write in the deed, and he wrote it as they told him. Witness thought when he wrote the deed that the seventeen-acre tract he was putting in the deed belonged to the estate, but he had heard since then that it belonged to one of the boys; they didn't tell him at that time.

Appellant, John W. Ellison, testified substantially as follows: He and his father had an understanding as to how his father wanted the lands divided at his death. He designated the tracts that he wanted each one to have and wanted them to divide it up equally amongst them,

so as to make all their shares equal. When the deeds were written, they took the old deeds and put them before the draftsman and pointed out the land that each one was to get. They divided the personal property equally. After the funeral expenses were paid, there was $980.00 left; $245 apiece. His sister, Mrs. Smith, accepted her part without objection. Witness stated that his father told him that he wanted the money he had buried "divided amongst each one of them; he wanted it divided equally." There were some notes when witness's father died, and, "When we collected the money we just divided it equally amongst us four, as father had requested. After we divided up, I just said to the boys, 'She ain't got nobody to work for her, and a widow. I am willing to give her $20.00 here, and you boys can, if you want to, make her a present of it,' and they said they would help her later on if she needed it. I just handed her a $20.00 gold piece. One day we boys were talking about it, and they said they didn't know what they would do about it, but they said they would help her if she needed it, and they said she had never handled much money, and she might accidentally run through with it, and they said they would rather it was used to a good advantage."

Witness further testified that his sister "signed up everything of her own free will." It was eighteen months after the deeds were made before witness knew that she was dissatisfied with the settlement. She never offered any suggstion to witness as to the settlement; never expressed any dissatisfaction. The land that witness's father intended him to have, after he gave it to witness, he (witness) went to work on it. He cleared and fenced and tried to improve it all he could. Cleared about thirty acres and had fenced about fifty acres. It had been about thirteen years since witness commenced clearing on it. He commenced clearing on it after his father told him that he was giving witness the land. He entered upon the land and commenced improvements in pursuance with the gift his father had made. He used the proceeds of the crops in building on it and for improvements as far

as it would go. Witness had occupied the land ever since his father gave it to him as his own. Witness entered other lands as an additional farm homestead. Witness's father had deeded to him sixty acres of land in order that he might make an additional farm homestead. He was to pay his father $250 for that land. He executed his note for that sum. The note to his father was after he made the homestead entry. At the time he made the note to his father, his father said, "Understand, I don't aim for you to pay for this land. I ain't made Dan no deed to his land, and if I was to make you out a deed to it, he might not like it." He says, "That will be all right about it, and you need not be uneasy about it." The sixty acres called for in the note was actually conveyed to witness by the other heirs, and he holds the title by their conveyances.

In reference to the division, witness testified that after his father's death, they met at the old home place for a division of the property. Witness described what took place as follows: "The best way I see to come at that is, we met down there to find out what each one was going to get and so after we get agreed on it and she wanted everything in the house, and we wanted some things for a keepsake, you know, and we couldn't agree on it that way, so then, we met again after everything got settled, and she agreed that just what was in the house she would take and let us have what was outdoors. So we went ahead and fixed it up that way, and she was to get the house place and what was in the house, and when the deeds was wrote, we gave her a forty-acre tract of land, and then offered her more, and said, is that all she wanted, and, of course, we were at the end of our row then."

The testimony of the other appellants substantially corroborated that of John W. Ellison as to the division of the property, showing that it was the intention of their father that each should have certain tracts of land, which he designated before his death for them to take.

The chancellor made, among others, the following

findings of fact: That the lands claimed by the appellants as their share of their deceased father's estate was of the value of $4,000; that the father's intentions were to give the appellants the land as claimed by them respectively, but that the gifts were never perfected. "There was no gift *in presenti* of the lands to defendants. There was no advancement of these lands. In the division of the estate of the deceased father, these lands were not considered and were taken by defendants respectively as absolute gifts from the father and not as advancements, and were in no way accounted for in said division, and that the remainder of the estate was divided approximately equally among themselves and the plaintiff in this case, and that such division resulted in an unequal and unjust distribution of said estate.

That the plaintiff, having admitted that the father's intentions were for the defendants to have these lands respectively, upon her receiving the household goods, the money and other personal property, the house place of six acres, the home place of 160 acres and the value of one-fourth of thirty-one acres sold to Elijah for $200, that the defendants would be entitled to have their title to said lands, respectively, quieted and confirmed in them, but having failed to so elect, the values thereof must be put in hotch-pot and the estate divided equally between the four children, share and share alike. That plaintiff informed defendants from time to time, and at the time the deeds of partition were executed, that she desired to carry out strictly the expressed intentions of the father as to the division of the estate; "that the defendants knew of her understanding and claim as to what she expected to receive as her share of the estate; that they did not inform her that the estate would be so divided; that in their deeds they gave themselves all the lands their father intended them to have, and gave the plaintiff a deed to the house place, containing six acres, of the value of approximately $150.00, and divided the balance equally between the four. At the time when these deeds were being prepared, and when they were executed, plain-

tiff believed she was to have her share out of the estate, and this fact was known to the defendants at the time. That she informed them she didn't care for lands; that they could divide it to suit themselves and give her just what they pleased. * * * There was no dispute between the parties at the time of the partition of the land. There was nothing calling for an amicable or family settlement; nothing to compromise. The division was to be made in accordance with the expressed wish of the father, and there was no dispute between them as to what these wishes were; that these deeds were executed to the defendants upon the express understanding of the wishes of the father that she was to have her share out of the money; that the defendants knew her contention and permitted her to execute the deeds under this impression; that there was fraud and imposition practiced upon the plaintiff in permitting plaintiff to execute such deeds to them and their accepting the same when they knew that plaintiff was laboring under the impression that she was to have her part of the estate out of the money. That it was five months and one day after the execution of the deeds until she found out she was not to get her full share of the estate; that she is not estopped by said deeds from bringing this suit. * * * That there was no amicable or family settlement of the estate that was binding in equity or good conscience upon the plaintiff, their minds having never agreed. That plaintiff, believing she was to get her share in money, and the defendants knowing this belief on her part, accepted the deeds in consideration thereof, and that they are bound to carry out their implied contract, or else their deeds should be declared void as to plaintiff. That all gifts of the personal property by the father to plaintiff, and defendants were not intended as advancements, or that the same should be accounted for, and that all such claims should be dismissed for want of equity; that the intentions of the father that plaintiff should have her share of his estate out of certain property can not now be enforced because the property was never delivered to her in his life-

time. That the deed from plaintiff to her husband was without consideration and is void. That the claim of plaintiff for her services rendered her father has not been sustained, and should be dismissed for want of equity.

The defendants, while objecting and excepting to the findings of the court, requested the court, upon these findings, to find the value of all the property, both real and personal, of the estate of said John W. Ellison at the time of his death; that the partition of the lands and deeds thereto, as made by them respectively to each other, be permitted to remain good and valid conveyances and to confirm in them respectively their titles, and to declare the amounts remaining due by each, and the amounts due respectively by defendants to plaintiff. The court rendered judgment in accordance with this request, in favor of the appellee, Mrs. Lou Smith, and declared the same a lien upon the respective interests of the appellants in the real estate coming to them respectively under the division made, and ordered the same sold to satisfy these judgments unless same were paid on or before a certain date. From the findings and decree, this appeal has been duly prosecuted.

Pole McPhetridge, for appellants.

1. Courts approve of family settlements, where fairly made without fraud or undue influence. 15 Ark. 51, 275; 41 *Id.* 270; 64 *Id.* 19; 84 *Id.* 610; 98 *Id.* 93; 14 Cyc. 131.

2. Fraud must be proven. None was shown. 11 Ark. 378; 12 *Id.* 296; 43 *Id.* 454; 30 *Id.* 686; 19 *Id.* 522.

Gibson Witt, for appellee.

The chancellor's findings are conclusive unless against the clear preponderance of the testimony. 67 Ark. 134, 287; 68 *Id.* 314; 71 *Id.* 216; 92 *Id.* 359; 93 *Id.* 277. The findings are fully sustained by the evidence. 19 Cyc. 455.

WOOD, J. (after stating the facts). Without discussing the testimony in detail, which is set forth in the state-

ment, it is sufficient to say that we are of the opinion that the findings of the chancellor are not clearly against the preponderance of the evidence. The testimony of the appellee, Mrs. Smith, to the effect that it was the intention of her father that his children should share equally in his estate at his death is corroborated by the testimony of appellant's witness, Bates, in which he stated that on the next day following the execution of the deeds, or a short time thereafter, she came to his store, and in answer to a question by him if that was all the lands she got in the division, she replied that she didn't care for the lands as she was to get "her part of the estate out of other stuff."

The testimony is ample to show that there was no reason for any discrimination upon the part of the father of these litigants in favor of the appellants. On the contrary, the evidence shows that appellee, Mrs. Smith, was held in the highest affection by her father, and she, by her loyal services and loving devotion to her father and mother during their old age and severe illness for several years prior to their death, proved that she was worthy of her father's love and confidence. It is unreasonable to believe that her father, imbued with natural impulses, would, in a division of his estate, discriminate against a widowed daughter in favor of his sons. We are of the opinion that he did not do so, and that the finding of the chancellor that the execution of the deeds, under the circumstances in evidence, was such a fraud as no court of equity could declare binding upon her, was correct.

While family settlements, when fairly made, require strong reasons to prevent their enforcement, a settlement such as is indicated by the evidence in this record, could not be approved because it shows conclusively that it is very unfair and unequal, and was obtained from the appellee, Mrs. Smith, through the imposition of those whom she had the right to expect would treat her with the utmost fairness and impartiality.

The issue as to what were the intentions of the ancestor of these children in the division of his property and as to whether these intentions were honestly carried out in the settlement which they had among themselves are only of fact and no good purpose could be promoted by discussing further the evidence. The court was correct in its conclusions that there was no completed gift of the lands in controversy, and in the absence of the settlement which these brothers and sister attempted to make the law would give to them an equal share in his estate. The preponderance of the evidence shows that it was the purpose of John W. Ellison to divide his estate among his children equally, but that he desired that each of them should have certain portions of the property, which he designated, and that his daughter, the appellee, Mrs. Smith, should be made equal in the distribution of his estate by receiving personal property, in addition to her realty, that would make the portion coming to her equal to that received by her brothers.

The appellants have waived any objection they could have made as to the form of the decree, and the remedy declared by specifically requesting the court to make it in that form.

The judgment is in all things affirmed.

INTERSTATE AMUSEMENT COMPANY v. PAULI.

Opinion delivered April 21, 1913.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT.—Authority to employ a contractor to furnish all the individual players for an orchestra necessarily included the authority to employ any particular individual player.

Appeal from Pulaski Circuit Court, Second Division; *Guy Fulk,* Judge; affirmed.

Bradshaw, Rhoton & Helm, for appellant.

Robert L. Rogers and *Terry, Downie & Streepey,* for appellee.

KIRBY, J. This is a suit by appellee to recover from the appellant a balance of salary, $240.00, claimed to be due him as a musician under his contract with defendant for the season from October, 1911, to June 1, 1912. It was alleged that he was employed for the season at a salary of $20.00 per week; that on January 8, 1912, he was discharged without cause.

The answer denied that he was employed for the season at the wages claimed; admitted that he did play in the orchestra at the Majestic Theater in the city of Little Rock for a time; alleged that he was discharged because he was wholly incompetent and unfit to perform the services he was required to give; that he was paid in full to the time of his discharge.

The testimony shows that appellee was a boilermaker and worked in the railroad shops at Argenta; that one Mr. Epstein, claiming to be the agent of appellant company, came from Fort Worth, Texas, and engaged him for the season of 1911 and 1912 to play the piano in the orchestra at the Majestic Theater for $20.00 per week; that he began work on October 8, and continued until January 8, when he reported for duty and was told there was a man employed to take his place, and also, that his discharge came through Mr. Epstein. The manager of the orchestra told him that he had been notified by telegram from Mr. Epstein. Rosenthal was the leader of the orchestra at the time, and gave him notice of his discharge. It appears that there had been trouble and dissatisfaction with the orchestra at the Majestic Theater, and Epstein, who had known Pauli before, went to and talked with him about taking the place of the piano player, which Pauli stated he could not do unless the employment was for that season, as otherwise he could not afford to quit the employment in which he was already engaged. Epstein denied having made the contract with Pauli for the season of 1911 and 1912, but admitted that he did talk with the orchestra leader about his employment, and some of his letters were introduced in testimony relative thereto. The amusement company denied

the authority of Epstein to engage Pauli as the piano player. It appears from the testimony that Epstein was the musical director for the Interstate Amusement Company which furnished music for the different theaters in its circuit; that upon dissatisfaction of the musicians' union at Little Rock with certain players in the orchestra, he came to Little Rock to adjust the differences and arrange for the furnishing of music at the Majestic Theater; that while here, the contract was made with Pauli. There is enough testimony to show that Epstein was the musical director of the Interstate Amusement Company, with authority to employ orchestras for the different theaters controlled by his company upon the circuit, of which the Majestic was one, and, that it was his practice to make a contract with a particular person to furnish the orchestra and the music for each theater, such person being expected and allowed to procure individual performers for the orchestra. The testimony is further sufficient to support the finding that he made the contract with Pauli as claimed by him for the season of 1911 and 1912, and that he knew at the time of Pauli's accomplishment and skill as a piano player, and also of his deficiencies. Since Epstein was the agent of the amusement company with authority to provide the orchestra for the Majestic Theater, the fact that he was expected to employ some particular person as a contractor, who would employ the individual players in the orchestra and pay them, did not prevent his having the authority to employ an individual performer himself. Having the right to employ the contractor to furnish the individual performers and the music, is greater and necessarily included the lesser right to suggest to the contractor that he desired a particular performer in the orchestra, and to refuse to make a contract with such contractor if he declined to employ the individual suggested. The authority to employ the contractor to furnish all the individual players for the orchestra necessarily included the authority to employ any particular individual performer.

It is conceded in the briefs that appellee is entitled to recover the amounts claimed if he is entitled to recover at all.

Only a question of fact is presented in this case, and we do not deem it material to set out the testimony at further length, it being sufficient as already said to warrant the court's finding.

The judgment is affirmed.

RUSSELL v. BETTS.

JOHNSON v. BETTS.

BLACK v. BETTS.

Opinion delivered April 28, 1913.

STATUTE OF FRAUDS—SALE OF STOCK.—Where defendants agree orally with plaintiffs that in consideration plaintiffs would not sell their stock in a certain corporation to one S, that in the event the corporation became insolvent the defendants would pay to plaintiffs the value of their stock and interest from the date of the contract until the date the corporation became insolvent. *Held,* the agreement was in effect a conditional sale of plaintiff's stock to the defendants. and the value of the stock being over $30 was within section 3656 of Kirby's Digest, which is the statute of frauds.

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

STATEMENT BY THE COURT.

The plaintiff, Black, filed the complaint, alleging that on a certain day in the year 1911, plaintiff owned five shares of stock in the Hoke Metal Frame Screen Manufacturing Company, a corporation, and paid for said stock on July 20, 1910, the sum of $250.00; that defendants on said day owned stock in said corporation, and with certain of their friends, owned about 50 per cent of the stock of the said corporation. That one Smith and his friends owned about 50 per cent of the stock of the said corporation, and on said day said Smith desired to purchase the stock of plaintiff; and that defendants de-

sired to prevent the said Smith from purchasing plaintiff's stock; that on said day, said Smith proposed to purchase plaintiff's stock and offered to pay plaintiff a certain sum of money therefor; and that plaintiff was about to accept the said offer, and would have accepted said offer, but that defendants, in order to induce plaintiff not to accept said offer, and in order to further the best interests of the said corporation, in defendant's opinion, on or about said day, made and entered into an oral contract with plaintiff, whereby said defendants and each of them agreed that if the plaintiff would refuse to accept, and would not accept said offer of said Smith to purchase plaintiff's said stock, that defendants and each of them would pay plaintiff $250.00 with interest thereon from the blank day of 1911 until paid, "if the dividends on plaintiff's stock and plaintiff's equitable interest in the assets of said corporation, when the same became insolvent, if it did become insolvent, and did not equal the sum of $250.00 and interest thereon from the blank day of 1911 until said promise and agreement on the part of the defendants and each of them, plaintiff forebore the sale of said stock and refused to accept said offer from said W. M. Smith to purchase the stock of plaintiff. That the plaintiff has in all things kept and performed all things to be by him kept and performed in said contract; and that there have been no dividends paid on said stock; and that plaintiff's interest in the assets of said corporation is of no value. That said corporation is insolvent; that said Hoke Metal Screen Manufacturing Company has been sold; and that the proceeds of said sale, together with all other assets of the said corporation are not equal to its indebtedness. That the defendants well knew that said corporation became insolvent before the filing of this suit; that said defendants and each of them are liable to this plaintiff for the sum of $1,000.00. Wherefore, plaintiff prays judgment for that sum.

There were three separate complaints filed, one by each appellant, all substantially the same, except for different amounts. Appellees demurred to the complaints

for the following reasons: First, the complaints did not state facts sufficient to constitute a cause of action; second, the complaints state that the contract or agreement sued on, is an oral contract and not in writing, and the complaints alleged and show on their faces that said contract or agreement, if any, is an agreemnt or promise to answer for the debts, defaults, and miscarriages of the said Hoke Metal Screen Manufacturing Company, and appellees plead the statute of fraud on this account in bar if this suit. The court sustained the demurrer. The appellants declining to plead further, the court dismissed the complaint, to which ruling of the court, appellants duly excepted and prayed an appeal to this court.

Jobe & Montgomery and *McMillan & McMillan,* for appellants.

1. The complaint states a cause of action. 10 Cyc. 577d; 2 Cook on Corp. (6 ed.) 622c; Anson on Cont. 63; Parsons on Cont. 444; 27 Ark. 407; 9 Cyc. 312-315; 151 S. W. 249; 100 Ark. 515; 151 S. W. 1001; 18 L. R. A. (N. S.) 707-711; 31 L. R. A. 557; 94 Ark. 463.

2. The contract was not against public policy. 9 Cyc. 483f; 176 U. S. 498; 95 Ark. 449; 31 L. R. A. (N. S.) 1186-1196; 61 Am. St. Rep. 770-775.

3. The promise was not collateral, and hence not within the statute of fraud. 12 Ark. 174; 45 *Id.* 67-74-75; 64 *Id.* 462, 465; 76 *Id.* 292; 22 How. 28; 141 U. S. 479.

O. A. Graves, for appellee.

1. Complaint states no cause of action, because, (1) The agreement is a gambling or wager contract and void. (2) It is against public policy, and (3), it is void for want of consideration. Cook on Corporations 341; 64 S. E. 894; 61 *Id.* 487; Cook on Corp. 622.

2. It is within the statute of frauds. Kirby's Dig., § 3656.

WOOD, J., (after stating the facts). This court, in *Stifft* v. *Stiewell,* 91 Ark. 445, held that a contract for the sale of corporate stock for the amount of $30 or more, is within the statute of frauds. Section 3656, of Kirby's

Digest. The several complaints under consideration disclose a contract entered into between the several appellants and the appellees, whereby the latter, in consideration that the appellants would not sell their stock to Smith, agreed that in case the corporation became insolvent, they would pay appellants the amount of the value of their stock and interest thereon from the date of the contract until the date upon which the corporation became insolvent. This transaction was tantamount to the sale of the stock of the several appellants to the appellee upon condition. The appellees, upon certain contingencies, which appellants alleged existed, agreed to pay appellants the par value of their stock with interest. While the complaint does not allege that the stock was to be delivered upon the payment of the amounts specified, an intention upon the part of the appellants to deliver upon the payment for the stock would necessarily be implied. Under the contract when the condition arose, upon which the payment was to be made, the presumption would be that when the payment was made that the stock would be delivered to appellees, the purchasers thereof.

We are of the opinion that the complaints state, what in law amounts to a conditional sale of the stock, and as the stock was more than $30 in value, the transaction was within section 3656 of Kirby's Digest (Statute of Frauds), the same being an oral contract. The ruling of the court sustaining the demurrer to the complaint and its judgment dismissing the same, is therefore correct, and is affirmed.

KIRBY, J., dissenting.

APPENDIX

I.

CASES DISPOSED OF ON MOTION.

Tontitown Townsite Company *v.* James T. Wilburn; Washington Chancery Court; T. H. Humphreys, Chancellor; appeal dismissed February 17, 1913; *per curiam.*

May B. Parker, Administratrix of the Estate of H. A. Parker, Deceased, v. J. W. Byrne and Mrs. Ben Shorten; Monroe Chancery Court; J. W. Elliott, Chancellor; compromised and appeal dismissed on appellant's motion, February 17, 1913; *per curiam.*

Walter G. Hendrick and W. G. Glafcke *v.* State of Arkansas; *certiorari* to Dallas Circuit Court; H. W. Wells, Judge; judgment denying bail affirmed March 10, 1913; *per curiam.*

John B. Driver, Jr., *v.* W. F. Rozell; Mississippi Chancery Court, Chickasawba District; Charles D. Frierson, Chancellor; appeal dismissed on appellant's motion, March 31, 1913; *per curiam.*

J. S. Best *v.* The State of Arkansas, three cases; Jackson Circuit Court, R. E. Jeffery, Judge; appeals dismissed for failure to lodge transcripts in this court within sixty days from the date of the judgments of the lower court, April 14, 1913; *per curiam.*

Sam T. Gist *v.* The State of Arkansas, three cases; Jackson Circuit Court; R. E. Jeffery, Judge; appeals dismissed for failure to lodge transcripts in this court within sixty days from the date of the judgments of the lower court, April 14, 1913; *per curiam.*

W. P. Sanderson *v.* The State of Arkansas; two cases; Jackson Circuit Court; R. E. Jeffery, Judge; appeals dismissed for failure to lodge transcripts in this court within sixty days from the date of the judgments of the lower court, April 14, 1913; *per curiam.*

Arkansas Natural Gas Company *v.* L. C. Cook; Saline Circuit Court; W. H. Evans, Judge; appeal dismissed for noncompliance with rule 9, April 14, 1913; *per curiam.*

II

OPINIONS NOT REPORTED.

Routt *v.* State; appeal from Chicot Circuit Court; Henry W. Wells, Judge; reversed; opinion delivered March 31, 1913; *per* HART, J.

Knight *v.* State; appeal from Chicot Circuit Court; Henry W. Wells, Judge; reversed; opinion delivered March 31, 1913; *per* KIRBY, J.

III

JAMES WETHERALD BUTLER

Mr. Geo. B. Rose addressed the court as follows:

May It Please the Court:

I have been requested by the bar of the city of Batesville, where I was born, to present to this court its resolutions on the death of Judge James Wetherald Butler. Of Judge Butler's qualifications as a lawyer and a judge I can speak only from hearsay. I never had the honor to be associated with him or opposed to him in the trial of a case, nor the privilege of appearing in his court when he was on the bench. But we all know that for many years he was one of the leaders of the bar of Northern Arkansas, and that his career as judge of his circuit brought him praise and honor. If more were needed to prove his learning and ability, he has as special judge of this court left a record that should place both beyond question.

It is not so much of the lawyer and the judge that I wish to speak as of the man. I knew Judge Butler intimately from my childhood. The close friendship that grew up between my parents and Judge and Mrs. Butler at the time when they lived as neighbors in the little town of Batesville in the days of their youth resulted in his being at home in our house and in my being at home in his. It brought me into frequent association with him from the days of my earliest recollection; and this was a precious privilege.

It has been my good fortune to know a great many good men, not through any merit of mine, but mostly because they were friends of my father; and I do not hesitate to say that of all the men that I have ever known Judge Butler was the most perfect ideal of the Christian gentleman. He was the very flower of the spirit of Christian chivalry. Amongst the Knights of the Round Table, King Arthur would have placed him at his right hand. Most of you can remember him only when age had laid upon him its withering touch, marring in some degree the noble lineaments. But I have never seen a handsomer man than Judge Butler in his prime. Tall, erect and dignified, he was singularly graceful in every movement. He had the distin-

guished manners, the easy dignity of one descended from a long line of noble ancestors. His clear-cut features bore an expression of intelligence and of such beneficence that at the first glance one yielded to him an unquestioning confidence. You realized at once that you were in the presence of one of nature's noblemen. In his demeanor there was an exquisite urbanity that belonged to an age when men took the time to be polite and the like of which we are not apt to see again.

The soul that dwelt in this noble tenement was worthy of its abode. If there was ever a Christian knight, it was Judge Butler. Brave as a lion, he was gentle and tender as a woman. His charity was all-embracing. Though living on so high a plane himself, he was indulgent to the faults of others and merciful in his judgments. He was a sincere and earnest Christian, and his faith was without austerity. He loved his fellow-men; in fact, he loved all that had life, and was incapable of a harsh, a cruel or even an ungraceful act.

To say that Judge Butler was the embodiment of the spirit of Christian chivalry is to say that he was blameless in all the relations of life. As a citizen he was a leader in every movement for the moral and intellectual upbuilding of the community where he lived. At the bar he was an example of the loftiest ethical standards. He practiced on a high plane, scorning all forms of intrigue and chicane, and seeking ever to accomplish the ends of justice. He was not one of those lawyers who delight in their power to make the worse appear the better reason and to make wrong triumphant by the force of their personality. His pathway was strewn with no wrecks of justice. He appeared to his full advantage only in a meritorious cause. In such a case, however, his elevated character and convincing earnestness made him formidable indeed.

Judge Butler was one of the most companionable of men. Though so dignified in his demeanor, there was nothing austere in his deportment. He was delightful in the society of his friends, always exquisitely urbane, while maintaining the conversation upon a high level. The coarsest vulgarian dared not utter an impropriety in his presence, and yet no one felt the slightest constraint. He was devotedly loved by a large body of friends; and all worthy men who were brought in contact with him were irresistibly led to love him.

It was, however, in the bosom of his family that he was most delightful. In early youth he married a lady worthy of himself. When I first saw Mrs. Butler she was one of the most beautiful women that I ever knew—tall, graceful and with a sweet serenity of manner that brought peace and happiness wherever she went. Their home life was perfect. The sweetest concord reigned, and every one when he entered their hospitable doors felt lifted up into a purer and higher sphere.

The choice of a location for this home was typical of the man. It was built upon the top of the highest hill in the vicinity of Batesville, where the air was pure and where one had an extended view over hills and valleys to a far distant horizon. It was a prospect that brought calm and peace to the troubled heart and spoke to one of the infinite. Upon this eminence he lived, raised above the world, as his soul dwelt above its selfish strifes and petty ambitions.

Judge Butler was blessed with length of days, and he has passed to his reward revered and beloved by all. His long life was without a stain, and when death at length came, it was as a peaceful release. Truly we may believe that to him the Master has said: "Well, done, thou good and faithful servant; enter thou into the joy of thy Lord."

With this inadequate tribute to his worth, I present the resolutions, and ask that they be spread upon the records of this court.

IN MEMORIAM

RESOLUTIONS ADOPTED BY THE BAR OF THE CIRCUIT COURT OF INDEPENDENCE COUNTY, ARKANSAS, IN MEMORY OF JUDGE JAMES WETHERALD BUTLER.

James Wetherald Butler was born in Fairfax County, Virginia, April 1, 1829, and died in Batesville, Arkansas, March 17, 1913. His father moved to Nashville, Tennessee, about 1832, and he was reared and educated in that city, having graduated with the degree of A. B. from the Nashville University in 1847.

He then studied law under Hon. William F. Cooper, afterward chancellor and later a member of the Supreme Court of Tennessee. He was a fellow-student in law of the late Hon. Henry Hitchcock, a distinguished lawyer of St. Louis, Missouri, for many years.

In 1851 Mr. Butler located in Memphis, Tennessee, and began the practice of his profession, but in 1854 he moved to Batesville, and resided here until his death, except for a short time during the war, when he took his family to Texas.

He enlisted in the Confederate Army at the commencement of the war between the States, and was first lieutenant in the First Arkansas Mounted Rifles, commanded by Col. T. J. Churchill.

He was with his regiment in the battles of Oak Hill and Elkhorn and later accompanied it across the Mississippi River; but after the evacuation of Corinth, Mississippi, he was compelled to leave the service, on account of ill health, and returned to Batesville, afterward going to Texas with his family, where he remained until the close of the war, when he returned to Batesville, and resided here the rest of

his life in the practice of his profession when not serving as judge of the circuit court.

In 1873 he was appointed judge of the Third Judicial District of Arkansas by Gov. Elisha Baxter, to fill the vacancy made by his own election as Governor. This action was the more creditable to both Governor Baxter and Judge Butler, when it is remembered that they were members of different political parties. He served as judge until the election in 1874, when he declined to be a candidate for the position. In the meantime he was elected a delegate to the Constitutional Convention of 1874; was a member of the judiciary committee of that body and chairman of the committee on schedules and ordinances, and was one of the five men selected by the convention to make the address to the people of the State concerning the Constitution framed and submitted for their adoption.

When he first located in Batesville, Judge Butler was in delicate health and spent two or three years in out-of-door life, hunting and fishing; but in 1856 he was elected to the Legislature as a Democrat, with which party he always affiliated; but this was the only political office he ever held, except his service in the Constitutional Convention.

In 1887, upon the reorganization of the Third Judicial District, he was without opposition elected judge of the circuit court, was reelected in 1890, and declined to be a candidate at the end of that term, retiring to the great regret of the entire bar and the people of the district. He resumed the practice of law and continued it for several years, but more recently had retired entirely from the practice.

When he first began the practice of law in Batesville, he had to contend with the most brilliant bar in the State—Neely, Bevans, Rose, Fairchild, Byers, Patterson, DeSha, Gibbs, and later on Baxter; every one of whom, including himself, reached distinction. Neely, Bevans, Fairchild, Rose, Baxter, Byers and himself were elevated to the bench; Rose became chancellor and Baxter Governor. During his practice he was associated with several distinguished lawyers as partners—William A. Bevans, his brother-in-law, before the war, and afterward Jere C. Cravens, who later moved to Springfield, Missouri, and was a prominent practicing lawyer there until his death several years ago; later on it was Butler & Miller, his partner being William R. Miller, afterward Auditor of the State and Governor. He next associated himself with General Robert Neill, which partnership was dissolved by his election to the bench; after his retirement from the bench he practiced for several years with his oldest son, Hon. Paul Butler, until he gave up all active work.

He was tendered an appointment by Governor Fishback, as Chief Justice of the Supreme Court, to fill a vacancy, but declined it.

Judge Butler was married March 18, 1858, in Independence County, to Miss Kate E. Bevans, a daughter of Judge William C. Bevans, who died in Batesville, January 7, 1900. To this union were born six children—Susie (Mrs. W. B. Lawrence), Kate (Mrs. Julian C. Brown), Paul, who lives in Batesville, Eugenia (Mrs. Wallace Byler), now living in Los Angeles, California, James W. and Edwin Reed, who now live in Hempstead County, Arkansas, all of whom survive their parents, except Kate, who died several years ago.

As a lawyer, Judge Butler was learned, diligent and strictly honest; as an advocate, he was forceful, convincing and fearless. As a judge he was fair, prompt, clear and courteous, especially so to young lawyers, to whom he would listen with patience and attention, occasionally making a suggestion that aided and satisfied in the determination of the question under consideration.

Judge Butler was an essential gentleman; ever mindful of the rights of others, conscious of his own and those of his clients, whose interests never suffered in his hands.

With Judge Butler professional ethics was intuitive, and he would no more have violated one of its rules than he would have denied his God.

Of all his earliest professional associates, Judge U. M. Rose is the only survivor; and all his partners in the practice of law preceded him to the final bar where justice and mercy will be reconciled in righteous judgment, except his son, Paul, the last and youngest of them all.

Four score and four years is a long time to live, a long time to be loved, a long time to be trusted, but all these honors and blessings were meted out to Judge James W. Butler, in lavish and well-deserved measure; but he died and was buried like his fathers. May we who knew him in his daily and professional life emulate his virtues while we mourn his loss, for we may never see his like again. The sordid and craving spirit of a commercial age seems to blunt the sense of ethics, and honor is not always the subject of our story.

And now we, the members of the bar practicing in the circuit court of Independence County, with uncovered heads, recognizing the worth and merit of our departed brother in the law, who has been to us a bright exemplar and inspiration to lead us to the higher levels of our profession, desiring to place upon the records of the courts he so long and so greatly honored a testimonial of our regard, unite in this expression of our affection and esteem for our departed brother. Therefore,

Resolved, That a copy of this memorial be presented to the circuit and chancery courts of Independence County, and to the Northern Division of the Eastern District of the United States District Court for Arkansas, with the request that it be given a place in the records of said courts, on pages set apart for that purpose.

That a copy be furnished his family and to each of the county papers, with the request that it be published, and that a copy be sent to George B. Rose, Esq., with the request that he present it to the Supreme Court of Arkansas, and ask that it be made a record therein.

CHARLES COFFIN,
JOHN B. McCALEB,
ERNEST NEILL,
Committee.

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